COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1649

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DAVID S. IDE,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, MACFARLANE PHEASANT FARM, INC., AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Reversed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. David Ide appeals a circuit court order affirming the decision of the Labor and Industry Review Commission (LIRC) to deny him worker's compensation benefits after he injured his back changing a tire on his employer's van. Ide first claims that the record fails to support several of

LIRC's factual findings regarding whether he had punched out for the day and was using the van for a personal errand when he got the flat tire. Alternatively, he contends that LIRC unreasonably concluded that he was not performing a service incidental to his employment by changing a tire on his employer's van, because he was motivated by a desire to use the van to go grocery shopping prior to its being used again for the employer's business. Because we conclude that changing a tire on a company vehicle, under the facts of this case, constitutes service incidental to employment under controlling appellate precedent, we reverse the circuit court's order and LIRC's decision.

BACKGROUND

In January of 1989, as part of an agricultural internship, Ide began working at the McFarlane Pheasant Farms crating and boxing birds. He did not have a car, and usually got rides to work with co-workers, although the farm's owner, William McFarlane, permitted him to borrow the company van to get to and from work, on occasion. On February 15, 1989, Ide asked, and was granted, permission to borrow his employer's van to go grocery shopping after work. Ide's timecard showed a hand-written notation, rather than a time-clock punch, indicating that he had finished work at 5:30 p.m. that day. Similar hand-written notations had been made on his timecards on twenty-two other occasions in the prior five or six weeks that he had worked at the farm. Ide claimed not to have checked out at all that day, and neither his employer nor his supervisor knew who had made the notation. In any event, at approximately 6:00 p.m., while Ide was still on the employer's property, the van got a flat tire, and Ide injured his back while changing it.

Ide filed for worker's compensation benefits. The parties entered into a limited compromise agreement in which the respondents denied that the injury was work-related, but paid $17,000 to settle the dispute. However, the agreement did not cover any claims of disability which might accrue after February 11, 1992. Ide subsequently brought a claim seeking increased permanent partial disability benefits, temporary total disability, and reimbursement for medical bills and expenses which he alleged were attributable to the original injury.

At an administrative hearing held on the matter, Ide claimed that he was returning from delivering water buckets to the breeder barn when he ran over a nail. However, one of Ide's former supervisors testified that when he observed Ide changing the tire, Ide appeared to have stopped working for the day. He said that Ide told him he was changing the tire so he could go grocery shopping. The administrative law judge determined that the injury was compensable, and granted a partial award. LIRC reversed, finding, as a matter of fact, that Ide was on a personal errand at the time of his injury; and therefore concluding, as a matter of law, that the injury was not incidental to his employment. Ide challenges both LIRC's factual findings and its legal conclusion on appeal.

DISCUSSION

Standard of Review.

Under ch. 102, STATS., this court reviews the administrative agency's decision rather than that of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). LIRC's factual findings must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same

findings. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983); § 227.57(6), STATS. A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. *See* ***Advance Die Casting Co. v. LIRC***, 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 227.57(6). Rather, it must examine the record for credible and substantial evidence which supports the agency's determination.

A court is not bound by an agency's conclusions of law in the same manner as by its factual findings. ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). However, it may nonetheless defer to its determination. An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review, depending on the circumstances.[1] ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). Under the great weight standard, "a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." ***Id.*** at 287, 548 N.W.2d at 62. The parties agree that great weight deference is generally appropriate for worker's compensation decisions. *See* ***Nigbor v. DILHR***, 120 Wis.2d 375, 383, 355 N.W.2d 532, 537 (1984). "However, it is well established that the general deference given to an agency's application of a particular statute does not apply when the agency's determination conflicts with prior case law established by our supreme court." ***Doering v. LIRC***,

[1] We will accord great weight deference only when all four of the following requirements are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996), *citing* ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995).

187 Wis.2d 472, 477, 523 N.W.2d 142, 144 (Ct. App. 1994). Therefore, we review *de novo* whether LIRC properly applied prior case law when we decide whether LIRC's legal conclusion was reasonable. ***Id***.

Factual Findings.

Ide challenges five of LIRC's findings: (1) that he had punched out from work at the time of the injury; (2) that he had completed his work for the day at the time of the injury; (3) that he was leaving the employer's property when the flat tire occurred; (4) that he had started on a personal errand before he was injured; and (5) that he did not regularly use the vehicle in question as part of his employment.

With regard to the timecard issue, it is true that Ide, his supervisor and his employer all denied knowledge of who had made the "17 50" notation, and thus, there was no direct testimony that Ide signed out at 5:30. However, we cannot say that the lack of such testimony would preclude LIRC from finding that the handwritten notation was accurate, either because Ide had never challenged the time for which he had been paid, which was based on the timecard, or because Ide's testimony was not credible. Furthermore, we note that the critical fact in regard to LIRC's decision is not *who* signed Ide out that day, but rather *when* Ide actually finished working. Therefore, we determine that resolution of the timecard issue was not material to the commission's order and we do not address it further.

As to whether Ide had in fact completed his work for the day at the time of his injury, Ide points to his own testimony that he had not finished working when he got the flat tire, and that he was going to stay late to help his supervisor, Richard Stevens, clean up the garage after he watered the birds at the breeder barn. However, Ide's testimony on this point was directly contradicted by Stevens's

testimony that he had not asked Ide to stay late, and that Ide appeared to have completed his work for the day when Stevens saw him changing the tire. Therefore, there was credible and substantial evidence to support the commission's finding.

Similarly, while there was no direct testimony that Ide was leaving his employer's property when the flat tire occurred, that could be reasonably inferred from the fact that Ide was driving the van after completing his last task for the day, and also from the fact that he had been given permission to use the van after work. The finding that Ide had started on a personal task before he was injured was also directly supported by Ide's comment to Stevens that he had to change the tire in order to go grocery shopping. Therefore, there is credible and substantial evidence in the record to support LIRC.

However, we agree with Ide that there was no credible and substantial evidence in the record to support LIRC's finding that he did not use the van in question as part of his employment. Both Ide and McFarlane testified that Ide did use one of the farm vehicles, including this one, on nearly a daily basis. There is nothing in the record that is contradictory. Therefore, we conclude this finding cannot stand.

Eligibility for Worker's Compensation.

The Worker's Compensation Act is designed "to give prompt relief to injured employees who are entitled to compensation" and it must be liberally construed to achieve that end, including "all service that can be reasonably said to come within it." ***Nigbor***, 120 Wis.2d at 382, 355 N.W.2d at 536; ***Fels v. Industrial Comm'n***, 269 Wis. 294, 297, 69 N.W.2d 225, 226-27 (1955). Nonetheless, in order to be eligible for benefits under the Worker's Compensation

Act, certain conditions must be met. Section 102.03(1), STATS., provides in relevant[2] part:

> Liability under this chapter shall exist against an employer only where the following conditions concur:
>
> …
>
> (c) 1. Where at the time of injury, the employe is performing service growing out of and incidental to his or her employment.
>
> 2. Any employe going to and from his or her employment in the ordinary and usual way, while on the premises of the employer … is performing service growing out of and incidental to employment.

The supreme court has repeatedly noted that "the phrase 'growing out of and incidental to his employment' as used in sec. 102.03(1)(c)1, STATS., is broader than the common-law 'scope of employment'" and "includes activity that is reasonably required by the terms and conditions" of the employment. ***Employers Mut. Liab. Ins. Co. v. DILHR***, 52 Wis.2d 515, 521, 190 N.W.2d 907, 911 (1971). As a logical corollary to this rule, any activity which falls within the more narrow common law scope of employment also satisfies the incident-to-employment test.

When analyzing whether an employee was performing a service incidental to his or her employment, "the focus is on the nature of the employee's course of conduct." ***Nigbor***, 120 Wis.2d at 384, 355 N.W.2d at 537. Generally, service is incidental to employment when "its performance inured to the benefit of the employer." ***Kimberly-Clark Co. v. Industrial Comm'n***, 187 Wis. 53, 55, 203

[2] Other conditions of liability, such as the requirement that the accident which caused the injury must have arisen out of the claimant's employment, have not been challenged on appeal. *See* § 102.03(1)(e), STATS.

N.W. 737 (1925) (awarding benefits to worker injured while making himself a tool box to hold personally-owned tools he used during the course of his employment). For instance, "the testing and repairing of machinery used in promoting the business of an employer is a service that is within the scope of the employment …." ***Fels***, 269 Wis. at 298, 69 N.W.2d at 226 (citations omitted). And it has been held that:

> one's employment by implication authorizes him to do, in addition to the things for which he is specifically employed, such further work in advancement of his employer's interests as is reasonably necessary at the time and place and which he has not been forbidden to do.

Anderson v. Industrial Comm'n, 250 Wis. 330, 334, 27 N.W.2d 499, 502 (1947). This is so, even if the employee has a personal purpose for his activities, concurrent with a valid business purpose, so that the benefit derived from his services is shared between the employer and the employee. *See* ***Bergner v. Industrial Comm'n***, 37 Wis.2d 578, 590, 155 N.W.2d 602, 608 (1968) (in the context of a business trip); ***Fels***, 269 Wis. at 298, 69 N.W.2d at 226 (employee injured while repairing his own truck which he used in transacting the employer's business).

In addition, under the going-to-and-from-work provision of § 102.03(1)(c)2., STATS., an employee's actions from which an injury is sustained typically are covered by worker's compensation if they occur after he or she reaches the employer's premises. *See* ***Doering***, 187 Wis.2d at 479, 523 N.W.2d at 145. The test under subparagraph (1)(c)2. is whether the mode and route by which the employee traveled were the ordinary and usual way to/from work. ***Cmelak v. Industrial Comm'n***, 27 Wis.2d 552, 556, 135 N.W.2d 304, 306 (1965). Of course, "there may be more than one ordinary and usual way to get from point A

to point B." ***Oscar Mayer Foods Corp. v. LIRC***, 145 Wis.2d 864, 871, 429 N.W.2d 89, 92 (Ct. App. 1988). The point to keep in mind is that "the legislature carefully chose its words … [so as not] to extend coverage for any conduct that was unusual or extraordinary in terms of going to or from the employer's premises." ***Id***. at 870, 429 N.W.2d at 92 (citation omitted).

1. Going from Employment.

Ide challenges LIRC's determination that his injury was not incidental to work, because he claims that his actions fit within the going-to-and-from-work provision of § 102.03(1)(c)2., STATS. He relies primarily on ***Cmelak***, where a woman who was injured when she assisted other employees attempting to separate two cars that had locked bumpers in an employee parking lot was awarded benefits for a back injury. The court reasoned that the employee had been going to work in her ordinary and usual manner (by car) when the parking lot mishap which led to her injury occurred. Respondents in turn refer this court to ***Dardanell v. DILHR***, 37 Wis.2d 249, 253, 155 N.W.2d 43, 45 (1967), where an employee who slipped in an employee parking lot while opening the trunk of her car after work was held to have deviated from her ordinary and usual way from work when her injury occurred. A more recent case, ***Oscar Mayer Foods***, also held that a claimant had deviated from her ordinary and usual way to work when, after driving to work in her normal manner, she tripped while attempting to climb over cable barriers in the parking lot, rather than walking around them. ***Oscar Mayer Foods***, 145 Wis.2d at 871-72, 429 N.W.2d at 92-93.

Here, it is undisputed that Ide was on his employer's premises when his injury occurred. There is also no contention that the *route* which Ide was following when he ran over the nail was not the ordinary and usual route which

Ide would have taken to go home. Rather, the dispute centers on whether Ide's use of the company van, rather than a co-worker's vehicle or his own bicycle, constituted the ordinary and usual *mode* by which Ide traveled from work.

Ide did not travel to and from work in the same manner each and every day. There was testimony that he biked and hitched rides with co-workers, and that McFarlane allowed him to borrow the company van "when he asked." Now, while it is true that a person may have more than one ordinary and usual way to get to and from work, LIRC found that biking and hitching rides with co-workers were Ide's two usual means of getting to and from work. There is credible and substantial evidence in the record to support that finding. Therefore, we will not disturb it

The question then becomes whether borrowing his employer's vehicle was equivalent to hitching rides with others, in regard to the mode of going from work. The answer depends on how broadly or narrowly the issue is framed, *i.e.*, whether mode is defined as broadly as traveling by car or as narrowly as using a particular vehicle. We need not resolve which of these interpretations is more reasonable, however, because our standard of review is limited to determining whether the interpretation which LIRC chose was a reasonable one. We conclude that it was reasonable for LIRC to conclude that driving a vehicle (whether company-owned or not) was a qualitatively different mode of coming and going from work than riding as a passenger in a co-worker's vehicle. Therefore, we must uphold LIRC's conclusion that Ide was not traveling from work in the ordinary and usual way when he was injured.

2. Service Incidental to Employment.

LIRC concluded, without any citation to authority, that Ide was not performing any service growing out of or incidental to his employment because he had completed his daily duties and was on his way to the grocery store when he stopped to change the flat tire. However, careful consideration reveals that LIRC's decision fails to apply the standards established by appellate courts; and therefore, it is contrary to controlling precedent and unreasonable.

To begin with, LIRC improperly failed to focus on Ide's conduct at the time of his injury, as required by ***Nigbor***, 120 Wis.2d at 384, 355 N.W.2d at 537. Specifically, Ide was not injured while *using* the van, but rather while attempting to *fix* it. Therefore, our focus must be on the activity of changing the tire. In order to analyze whether changing the tire was incidental to Ide's employment, we are required to determine whether his employment placed him in the position where he was confronted with the task which led to the injury (*see* ***Village of Butler v. Industrial Comm'n***, 265 Wis. 380, 386, 61 N.W.2d 490, 493 (1953)) and whether his actions reasonably benefited the employer. ***Doering***, 187 Wis.2d at 487, 523 N.W.2d at 148.

Under that two-part test, the fact that Ide was headed to the grocery store when he ran over the nail is not dispositive, because Ide was injured as he attempted to change the van's tire. Because he used the van as part of his employment and had been given permission for after hours use, his employment placed him in the position of encountering the task which caused his injury.

Similarly, the fact that Ide had punched out, or been signed out for the day, does not preclude a determination that changing the tire was incidental to his employment. In ***Employers Mut. Liab.***, for example, a claimant who had been

laid off, recovered benefits for an injury he incurred on his employer's property while performing maintenance work on his own truck. Although he certainly was not being paid for his time while he was laid off, the court reasoned that it was beneficial to the employer to have the claimant's truck in good repair and running order at all times so that he would be able to respond quickly if work became available. ***Employers Mut. Liab.***, 52 Wis.2d at 522, 190 N.W.2d at 91. Likewise, in ***Fels***, a dump truck owner had finished hauling his last load of gravel for the day when he was injured making repairs to his own truck. Again, the court held that the repairs grew out of and were incidental to the claimant's employment because keeping the truck in good repair benefited the employer. ***Fels***, 269 Wis.2d at 299, 69 N.W.2d at 227.

The Respondents point out that the claimants in both ***Employers Mut. Liab.*** and ***Fels*** bore responsibility for the maintenance of their vehicles, whereas here, the pheasant farm employed a maintenance man who could have fixed the van. However, this argument skips over the fact that the van being repaired here was actually owned by the company, whereas the ***Employers Mut. Liab.*** and ***Fels*** claimants owned the trucks they were repairing. Thus, it was necessary to those decisions to establish why maintenance of personally owned trucks was a condition of employment. Here, on the other hand, the benefit to the employer of maintaining its own vehicle is obvious. In this regard, we note that there has never been any requirement in worker's compensation cases that an employee bear individual responsibility for maintaining company-owned equipment in order to be eligible for worker's compensation benefits. For instance, in ***Anderson***, a claimant who was employed to remove clay and sod from a conveyer belt on a rock crusher was held to be performing service growing out of and incidental to his employment when he took it upon himself to grease the

gears of the crusher without the knowledge of his employer. ***Anderson***, 250 Wis. at 333, 27 N.W.2d at 501.

Here, McFarlane and Stevens agreed that someone had to change the flat tire on the van before it could be used in the employer's business the next day. Although Ide did not bear responsibility for the maintenance of the van, the conditions of his employment reasonably placed him in the position of changing the tire, since he routinely used the vehicle to bring feed and water to the birds. Furthermore, the benefit to the employer of having an operational vehicle the following day existed regardless of whether Ide also would have benefited personally from being able to use the truck that evening. Therefore, consideration of the criteria established by the appellate courts of Wisconsin requires us to conclude that Ide's injury grew out of and was incidental to his employment.

CONCLUSION

There was credible and substantial evidence in the record sufficient to support LIRC's factual determinations that Ide had completed his work for the day and was leaving the farm to go grocery shopping when the tire of the company van went flat. However, the commission exceeded its authority when it found that Ide did not use a vehicle in his employment and also when it concluded, contrary to appellate precedent, that Ide was not performing a service incidental to his employment by changing the van's tire. His employment placed him in the position where changing a tire might occur and, since the tire would have had to be changed before Ide or his co-workers could have used the van for work the following day, the act which caused his injury occurred while he was providing a benefit to his employer. Therefore, we conclude Ide's injury occurred while he was performing services growing out of and incident to his employment.

By the Court.—Order reversed.

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