COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2853 **Cir. Ct. No. 2007CV32**

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

HOWARD D. WALTON,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, CENTURY TEL, INC. AND AMERICAN MOTORISTS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Reversed and cause remanded with directions*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. Howard D. Walton appeals an order of the circuit court affirming a decision of the Labor and Industry Review Commission (LIRC),

which in turn affirmed a ruling by an administrative law judge (ALJ) pursuant to WIS. STAT. § 102.30(7) (2007-08).[1] The ALJ ruled that temporary total disability worker's compensation benefits awarded to Walton be paid directly to Hartford Life Benefit Management to reimburse Hartford for disability benefits it had previously paid to Walton under a nonindustrial insurance policy. Walton contends that the reimbursement is not appropriate because he discharged his obligation to Hartford in bankruptcy. LIRC argues that Hartford had a preexisting subrogation right that survived the bankruptcy and thus the order directing that reimbursement be made directly to Hartford was proper. The policy between Walton and Hartford was not made a part of the record, however, and we are unable to determine whether the policy creates a subrogation interest. Absent a showing of a valid subrogation interest, LIRC has no authority to direct a payment otherwise owed to Walton to be made to Hartford under § 102.30(7)(a). We therefore reverse and remand the matter for the purpose of redirecting the payments from Hartford to Walton.

[1] WISCONSIN. STAT. § 102.30(7) provides:

> (a) The department may order direct reimbursement out of the proceeds payable under this chapter for payments made under a nonindustrial insurance policy covering the same disability and expenses compensable under s. 102.42 when the claimant consents or when it is established that the payments under the nonindustrial insurance policy were improper. No attorney fee is due with respect to that reimbursement.
>
> (b) An insurer who issues a nonindustrial insurance policy described in par. (a) may not intervene as a party in any proceeding under this chapter for reimbursement under par. (a).

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 In January 2001, Walton was injured in a work related accident while employed by CenturyTel, Inc. Walton's claim for temporary total disability benefits was denied by CenturyTel and its worker's compensation insurer, American Motorists Insurance Company (collectively CenturyTel). Walton then applied for temporary disability benefits under a nonindustrial insurance policy issued by Hartford.[2] Hartford approved Walton's application and made disability payments to Walton totaling $60,269.10. Although the policy was not made part of the record, Walton concedes that as part of his agreement with Hartford, he was contractually required to pay back the disability benefits from any temporary disability benefit award he received in his worker's compensation case.

¶3 After all disability payments from Hartford had been made, Walton filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Walton listed Hartford as a creditor and Hartford's claim against Walton was discharged by order of the bankruptcy court.

¶4 After the bankruptcy court issued its order of discharge, Walton filed an application for worker's compensation benefits with the Department of Workforce Development against CenturyTel. Following a hearing on the matter, the ALJ ruled that Walton's injuries were compensable and determined that CenturyTel was liable for, among other benefits, temporary total disability benefits in the amount of $50,052. The ALJ further ruled, however, that pursuant to WIS.

[2] Hartford states, and Walton does not dispute, that the policy issued by Hartford was a nonindustrial insurance policy.

STAT. § 102.30(7)(a), CenturyTel was to pay that amount directly to Hartford as reimbursement for the disability payments previously paid by Hartford.

¶5 Walton petitioned LIRC for review of the ALJ's ruling with respect to Hartford's reimbursement. Walton contended that it was improper for the ALJ to order reimbursement to Hartford because Walton's obligation to Hartford had been discharged in bankruptcy. LIRC upheld the ALJ's ruling, adopting the ALJ's findings and order as its own. Walton sought further review from the circuit court, requesting that the court set aside the judgment and findings of LIRC. The circuit court affirmed LIRC's decision. Walton appeals.

STANDARD OF REVIEW

¶6 We review LIRC's decision, not the decision of the circuit court. *See* ***Wisconsin Dept. of Revenue v. Menasha Corp.***, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. The issue in this case, whether the bankruptcy discharge of Walton's obligation to Hartford prevented Hartford from receiving reimbursement from CenturyTel pursuant to WIS. STAT. § 102.30(7) for disability payments made by Hartford to Walton, involves the application of undisputed facts to a statute. This presents a question of law which we review de novo. *See* ***id.***, ¶44.

¶7 Although we are not bound by LIRC's legal conclusions, we may defer to them. ***Id.,*** ¶46. There are three possible levels of deference we can give an agency's interpretation of a statute: great weight, due weight, or no deference. ***Id.,*** ¶47. Walton argues that LIRC's interpretation of the statute should be given no deference because the issue is one of first impression and LIRC has no specialized knowledge in determining whether federal bankruptcy laws preempt state statutes. LIRC contends that we should give its interpretation great weight

deference because of LIRC's experience interpreting and applying the statute since its enactment. It also asserts that bankruptcy issues regularly intersect with worker's compensation claims and thus the issue is not one of first impression. We need not determine what level of deference might be appropriate because we conclude that the result would be the same regardless of the level of deference accorded LIRC's decision.

DISCUSSION

¶8 WISCONSIN STAT. § 102.30(7)(a) permits LIRC to intercept worker's compensation payments that would otherwise be paid directly to the claimant and to direct that those payments be paid to a nonindustrial insurer such as Hartford as reimbursement. To do so, however, either of the following two conditions must be met: (1) the claimant consents; or (2) it is established that the payments under the nonindustrial insurance policy were improper. Walton does not contend that it was wrongful for LIRC to order reimbursement to Hartford under § 102.30(7)(a) because neither one of the conditions have been met. Rather, he argues that reimbursement to Hartford was improper because his debt to Hartford was discharged in bankruptcy. Walton's argument proceeds as follows: the worker's compensation payments were owed to him alone; there was no separate contractual obligation on the part of CenturyTel or its insurer to repay Hartford in the event that Walton was unable to repay Hartford himself; and because the debt to Hartford was the sole obligation of Walton, it was discharged in bankruptcy.

¶9 In response, LIRC contends that it properly ordered reimbursement to Hartford under WIS. STAT. § 120.30(7)(a) because Hartford held a right of subrogation with respect to Walton's worker's compensation payments, which it claims was not defeated by Walton's bankruptcy. LIRC relies on ***Wiegel v. Sentry***

Indem. Co., 94 Wis. 2d 172, 180, 287 N.W.2d 796 (1980), which it claims holds that although a debt may be discharged in bankruptcy, it is not extinguished. Instead, according to LIRC, the discharge merely acts as a personal defense to the bankrupt person against further action on the debt and has no effect on preexisting subrogation interests.[3]

¶10 Subrogation is broadly defined as the substitution of one person in the place of another with reference to a legal right or claim in order to prevent the sort of double recovery that Walton seeks here. *See* ***Cunningham v. Metropolitan Life Ins. Co.***, 121 Wis. 2d 437, 444-45, 360 N.W.2d 33 (1985). Subrogation may exist by agreement of the parties, by statute, or by the judicial device of equity. ***Petta v. ABC Ins. Co.***, 2005 WI 18, ¶26 n.14, 278 Wis. 2d 251, 692 N.W.2d 639. The right to subrogation is not automatic, but rather, the party seeking to prove subrogation "has the burden of introducing evidence to that effect." ***Cunningham***, 121 Wis. 2d at 445-46. As we discuss below, a valid subrogation interest is a necessary prerequisite to LIRC's ability to order payments to a

[3] LIRC also appears to take the position that WIS. STAT. § 102.30(7)(a) creates an independent right of subrogation, although this argument is not developed. While the statute permits LIRC to intercept worker's compensation payments and use them to reimburse a nonindustrial insurer, the nonindustrial insurer would not be entitled to the reimbursement absent some preexisting subrogation right. *See, e.g.*, ***Wisconsin Ins. Sec. Fund v. LIRC***, 2005 WI App 242, ¶34, 288 Wis. 2d 206, 707 N.W.2d 293 ("Although WIS. STAT. § 102.30(7)(a), read in isolation, authorizes the reimbursement of a *subrogated* insurer ….") (Emphasis added.) Section 102.30(7)(a) does not, in itself, establish a subrogation right; it simply permits a payment to be made directly to a subrogated entity. We therefore reject this argument.

LIRC does not argue that Walton's debt to Hartford was not discharged in the bankruptcy proceeding. Rather, as noted above, it argues that in spite of the discharge, the debt was not extinguished.

nonindustrial insurer under WIS. STAT. § 102.30(7)(a). Thus, LIRC bears the burden of proof.[4]

¶11 In ***Cunningham,*** the supreme court discussed the applicability of subrogation in the context of insurance contracts. The court differentiated between contracts of indemnity and contracts of investment. *See* ***id.*** at 446. An indemnity contract generally reimburses the insured for actual expenses that have been incurred or paid. *See* ***id.*** at 447. *See also* ***Lambert v. Wrensch,*** 135 Wis. 2d 105, 117, 399 N.W.2d 369 (1987). In contrast, an investment contract pays a fixed sum to the insured upon the happening of a specified event. ***Lambert,*** 135 Wis. 2d at 117. The court in ***Cunningham*** noted that in the absence of an express subrogation clause, insurers are allowed to receive subrogation for contracts of indemnity, but not for contracts of investment. ***Cunningham***, 121 Wis. 2d at 446.

¶12 In determining whether an insurance contract is one of indemnity or investment, courts must review the insurance policy in question to determine the category in which the contract falls. ***Id.*** at 449. The court in ***Cunningham*** stated that "in the absence of an express subrogation clause, and without the benefit of the policy in the record," it was unwilling to find a subrogation right. ***Id.***

¶13 We will assume for the sake of argument that LIRC is correct that an insurer's subrogated interest for payments made to its insured survives the bankruptcy discharge of the insured's debt to the insurer under the reasoning in

[4] Pursuant to WIS. STAT. § 102.30(7)(b), nonindustrial insurers are precluded from participating in worker's compensation proceedings. *See also* ***Employers Health Ins. Co. v. Tesmer,*** 161 Wis. 2d 733, 736, 469 N.W.2d 203 (upholding this provision in the context of a constitutional challenge asserting that it is unconstitutional under WIS. CONST. art. I, § 9 as denying a "'certain remedy in the law for all injuries or wrongs'"). Thus, Hartford was not a party to the workers compensation proceeding.

Wiegel, and that the insurer may then recover its subrogated interest under WIS. STAT. 102.30(7)(a). The record before us, however, does not contain the policy of insurance between Walton and Hartford. Without the benefit of the policy, we cannot determine whether it contains an express subrogation clause. Nor can we determine whether the policy is one of indemnity or one of investment. Thus, we cannot ascertain whether Hartford had a right of subrogation for payments made to Walton under the policy.[5] In the absence of this proof, the order directing worker's compensation payments be made directly to Hartford under § 102.30(7)(a) is invalid. We therefore reverse and remand the matter for the purpose of redirecting the payments from Hartford to Walton.

CONCLUSION

¶14 For the reasons discussed above, the order of the circuit court is reversed and remanded.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[5] At issue in ***Cunningham*** was a Metropolitan Life Insurance Company policy which contained a "Group Hospitalization and Physicians' Services Benefits Rider" and a "Group Medical Expense Insurance-Extended Coverage" rider. ***Cunningham v. Metropolitan Life Ins. Co.***, 121 Wis. 2d 437, 440, 360 N.W.2d 33 (1985). Metropolitan argued that subrogation rights should be implied upon payment of benefits for medical and hospital expenses given the true indemnity nature of these types of contracts. ***Id***. at 449. However, the supreme court ruled that in the absence of an express subrogation clause and without the benefit of the policy in the record, it would decline to do so. LIRC does not argue that subrogation rights should be implied from the form of the payments in the present case. Even if it advanced such an argument, the rule in ***Cunningham*** requires explicit proof of a subrogated interest.