COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2332 **Cir. Ct. No. 2011CV5479**

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

JACOB WESTERHOF,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, EMPLOYERS ASSURANCE CORP. AND DEWITT, ROSS & STEVENS LAW FIRM,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Jacob Westerhof appeals an order affirming a Labor and Industry Review Commission decision denying his claim for worker's compensation benefits. Westerhof argues the Commission erred by concluding

that he was not performing services growing out of and incidental to his employment at the time of his injury. We reject Westerhof's arguments, and affirm the order.

BACKGROUND

¶2 On September 15, 2006, Westerhof was in a motorcycle accident that rendered him a quadriplegic. At the time of the accident, Westerhof was an attorney and a shareholder in the law firm of DeWitt, Ross & Stevens. According to Westerhof, his compensation was based on two components—"actual work performed" and "clients brought into the firm regardless of who perform[ed] the legal work." Westerhof testified that, in an effort to market himself, he joined a poker group comprised of small business owners, including real estate appraiser Steve Franken.

¶3 The group, at times, referred clients to each other, although Westerhof did not record time spent playing poker as marketing time for compensation purposes. The law firm did, however, reimburse Westerhof for any snacks or drinks he brought to the weekly poker event and also reimbursed him for expenses arising from Las Vegas trips Westerhof took with poker group members.

¶4 In 2005, Franken and his wife were sued in small claims court following a dispute over damage to a cabin they owned near Wisconsin Rapids. In November 2005, Westerhof visited the Frankens to view the cabin and the damage giving rise to the suit. Westerhof filed an answer and counterclaim on the Frankens' behalf, and subsequently attempted to void an insurance release they signed. No fee agreement was memorialized and Westerhof did not submit a bill for payment of his services to the Frankens, although an account of Westerhof's billable hours included 12.3 hours spent on the Frankens' case.

¶5 At a weekly poker game in September 2006, Westerhof asked to join Franken and his wife at a Harley-Davidson rally they planned to attend in Tomahawk during the upcoming weekend. Westerhof was not involved in any of the trip planning and relied on Franken for transportation to the event—Westerhof drove the Frankens' truck from Madison to Plover, while Franken rode his motorcycle. Westerhof then rode the motorcycle from Plover, with the Frankens following in their truck. Westerhof sustained his injuries after losing control of the motorcycle near Wausau.

¶6 Although the Frankens testified that the original plan was to stop by their Wisconsin Rapids cabin on the way to the rally to take pictures for an upcoming hearing in their small claims action, Westerhof did not personally recall such a plan. At any rate, the plan changed when their departure from Madison was delayed. Westerhof nevertheless stated that he considered the excursion to be a business trip.

¶7 Westerhof sought worker's compensation benefits, claiming that his injury arose out of his employment because, at the time, he was "rainmaking" or "networking" on behalf of the firm. The administrative law judge (ALJ) denied Westerhof's claim, and the Commission affirmed that decision, adopting the ALJ's findings and order as its own. On certiorari review, the circuit court affirmed the Commission's decision, and this appeal follows.

DISCUSSION

¶8 On appeal, this court reviews the Commission's findings of fact and conclusions of law, not those of the circuit court. *See* ***United Parcel Serv., Inc. v. Lust***, 208 Wis. 2d 306, 321, 560 N.W.2d 301 (Ct. App. 1997). The Commission's findings of fact are conclusive on appeal as long as they are supported by credible

and substantial evidence. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995); *see also* WIS. STAT. § 102.23(6) (2011-12).[1] Our role on appeal is to search the record for evidence supporting the Commission's factual determinations, not to search for evidence against them. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶9 We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to the agency's legal determinations. An agency's legal determinations may be accorded great weight deference, due weight deference, or de novo review, depending on the circumstances. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). We need not discuss or resolve what level of deference is due here because the level of deference does not affect the outcome. We would affirm the Commission's decision even applying the level of review most favorable to Westerhof, de novo review.

¶10 On appeal, Westerhof does not dispute the Commission's findings of fact but, rather, claims the Commission's decision is erroneous as a matter of law. At issue is whether Westerhof was, at the time of the injury, "performing service growing out of and incidental to his ... employment." *See* WIS. STAT. § 102.03(1)(c)1. and 102.03(1)(f). Westerhof contends that the evidence established that he had been directed to market the firm's services and his primary motivation for taking the trip to Tomahawk was to entertain his client for the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

purpose of business development. Westerhof consequently asserts that the facts of his case fall squarely within the ambit of ***Continental Casualty Co. v. Industrial Commission***, 26 Wis. 2d 470, 132 N.W.2d 584 (1965), and ***Bechen v. American Guaranty & Liability Insurance Co.***, 298 F. Supp. 2d 806 (W.D. Wis. 2003). We disagree.

¶11 In ***Continental Casualty***, our supreme court upheld an award of worker's compensation benefits to the widow of an employee who died in an automobile accident while returning from a three-day pheasant hunting trip with his brother, his employer's sales manager, and a distributor. ***Continental Casualty***, 26 Wis. 2d at 471-73. The court agreed with the commission's conclusion that the employee was performing a service growing out of and incidental to his employment at the time of the accident, and further found that it was reasonable for the commission to infer that hunting was incidental to the trip's business purposes. ***Id.*** at 473-74. Those purposes included calling on distributors, familiarizing the deceased employee with day-to-day operations of the company, and discussing the possible purchase by the sales manager of a one-half interest in the business. ***Id.*** In addition, the court relied on the fact that the company president knew of the pheasant hunting trip. ***Id.*** at 474. The court acknowledged cases from various jurisdictions that held "when an employer authorizes or directs an employee to entertain customers as a part of sales promotion, the employee is considered in the course of employment when injured during a hunting or fishing trip with the customers." ***Id.*** The court took the view that "the [pheasant] hunting was in the nature of entertaining customers—when play is work and work is play." ***Id.***

¶12 In ***Bechen***, an employee who was expected to entertain existing and potential clients for business development was injured during a hunting and

fishing trip he organized for customers. ***Bechen***, 298 F. Supp. 2d at 808-09. In determining that the employee's injuries were covered under the Worker's Compensation Act, the ***Bechen*** court emphasized that the employee had "standing approval" from his employer to take such trips, and that he had taken clients on the same hunting trip the previous year and had been reimbursed by his employer upon his return. ***Id.*** at 811. The court noted that, although the employee had personal reasons for taking the trip, a purpose of the trip was to build customer rapport and loyalty. ***Id.*** Having concluded that the purpose of the employee's trip was "predominantly for the business purpose of entertaining clients" and that it was authorized by the employer, the ***Bechen*** court concluded that the trip was incidental to the employee's employment. ***Id.*** at 812.

¶13 The cited cases are distinguishable from Westerhof's case. Unlike the hunting trip in ***Continental Casualty***, the motorcycle trip here was not "incidental" to any asserted business purpose. In fact, Westerhof concedes in his reply brief that the dual purpose doctrine is immaterial to the issues in this case.[2] Further, and unlike the recreational trip in ***Bechen***, the motorcycle trip was not an event initiated by Westerhof to entertain a client. Rather, Westerhof was merely a guest on a personal trip initiated and planned by Franken.

¶14 Westerhof nevertheless contends that, regardless who planned the trip, he chose to entertain Franken by accompanying Franken on a trip involving Westerhof's client's own interests. The business generated by Westerhof from the

[2] The dual purpose doctrine recognizes that "an employee may be found to have acted within the scope of his or her employment as long as the employee was at least partially actuated by a purpose to serve the employer." ***Olson v. Connerly***, 156 Wis. 2d 488, 499, 457 N.W.2d 479 (1990).

weekly poker games, however, was minimal, and the ALJ found that the facts did not support Westerhof's claim that the "poker group" was his marketing mechanism to attract clients to the firm. We agree with the Commission's determination that, even if the poker games could be considered client entertainment, it does not follow that every trip or activity Westerhof and Franken undertook together was client entertainment or business-related networking. Based on our review of the record, we conclude that there was credible and substantial evidence to support the Commission's conclusion that the motorcycle trip was "simply a social outing among friends who occasionally did business together." Thus, the Commission properly determined that Westerhof was not performing service growing out of and incidental to his employment at the time of his injury.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.