STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS JOHNSON,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 89-0080-PC-ER

RULING ON MOTION TO DISMISS

NATURE OF THE CASE

This matter is before the Commission to consider the question of whether its subject matter jurisdiction over this complainant of handicap discrimination under the Fair Employment Act (FEA) is superseded by the exclusivity provision of the Worker's Compensation Act (WCA), pursuant to §102.03(2), Stats. For purposes of deciding this issue, the parties have stipulated to the Commission considering paragraphs 1, 2, 4, 5, and 12-18 in the investigative summary of the Initial Determination dated June 5, 1992, and the Commission will consider them as the factual basis for ruling on this motion. A copy of these paragraphs is attached hereto as an appendix and incorporated by reference.

In summary, the factual background of this matter is as follows: Complainant has been employed at Central Wisconsin Center (CWC) as a Food Service Laborer since 1986. In February and August of 1988, he sustained two work related injuries, as a result of which he was off work for short periods of time. In February 1989, he applied on a transfer basis for certain Laundry Worker 3 vacancies at CWC. As a result of a decision by respondent in April 1989, he was not selected. The job reference provided by his supervisor referred to complainant having been "off on worker's compensation a few times" and states that his health and safety record was "not too good." Complainant asserts that the only basis for these negative comments by his supervisor were his work related injuries, that respondent perceived him as handicapped in connection with these injuries, and that this resulted in his transfer request not being granted.

The WCA exclusivity provision, Section 102.03(2), Stats., provides, inter alia: "[w]here such conditions [for the employer's liability] exist the right to compensation under this chapter shall be the exclusive remedy against the employer." In Coleman v. American Universal Insurance Co., 86 Wis. 2d 615, 621-22, 273 N.W. 2d 220 (1979), the Court held:

> The compensation remedy is exclusive, however, only if the injury falls within the coverage of the act. A distinction is made between a covered injury and compensable damages. If an injury is covered by the act, an action for damages is barred, even though the particular element of damages is not compensable under the act.
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> [I]f the injury is one covered by the Worker's Compensation Act, the compensation remedy is exclusive. If it is not so covered, the fact that a worker's compensation remedy exists for a separate injury [emphasis added] is irrelevant.
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> (citations omitted)

In Franke v. Durkee, 141 Wis. 2d 172, 413 N.W. 2d 667 (Ct. App. 1987), the Court held:

> Section 102.03(2), Stats., which provides that the terms of the Act constitute an employe's exclusive remedy against his or her employer for work-related injuries, has been held to bar any action by the employee against the employer for such injuries.

141 Wis. 2d at 1976. (emphasis added) The Court concluded that §102.03(2) precluded a malpractice claim against a "company doctor" employed by the employer who allegedly negligently failed to diagnose a tumor during the course of a general physical examination the employer had offered to its employes. The Court rejected the argument that the WCA did not apply to the doctor's alleged act of negligence because the injuries did not arise out of the employe's employment. The Court relied on the "positional risk" doctrine: "The conditions of his employment -- his access to company medical facilities -- created the 'zone of special danger' giving rise to his injury, and it was thus compensable under the Act. As a result, the terms of the Act provide the exclusive remedy for the injury...." 141 Wis. 2d at 178. (emphasis added) Thus, in order to determine whether §102.03(2) bars this charge of handicap discrimination, it is necessary to decide whether the injury claimed in this case is an injury compensable under the WCA. See also Zabkowicz v. West

Bend, 789 F. 2d 540, 40 FEP Cases 1171, 1174 (7th Cir. 1986) ("If it [employe's alleged emotional distress] is an injury compensable under the WCA ... then the plaintiff's tort claims are barred by the exclusivity provision.").

The "injury" alleged in this complaint is the denial of a transfer. This occurred in April of 1989, which was about seven months subsequent to complainant's return to work after his last work related injury. The complainant alleges that he was denied the transfer because respondent perceived him as handicapped. The only relationship between the subject matter of this complaint and the work related injuries which occurred in 1989 is that complainant alleges that respondent's perception of these work related injuries was causal with respect to respondent's perception of him as handicapped, and consequently it could be contended that the injuries were causal with respect to the transfer denial.

In the Commission's opinion, these circumstances do not result in the preclusion of this complaint by operation of §102.03(2), Stats. The WCA covers primarily (for purposes of this discussion) the actual injuries resulting from the work related accident or disease, and the employer's wrongful refusal "to rehire an employee who is injured in the course of employment," §102.35(3). This case does not involve the latter subsection, because clearly this case does not involve a refusal to rehire. Rather, it involves a denial of transfer that occurred several months following complainant's return to work after his last work related injury. Therefore, the only issue is whether the denial of transfer is an "injury" compensable under the WCA, and in turn whether pursuant to §102.03(2) the WCA is the exclusive remedy.

The primary conditions for WCA liability are set forth in §102.03, Stats., as follows:

> (1) Liability under this chapter shall exist against an employer only where the following conditions occur:
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> (a) Where the employe sustains an injury.
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> (b) Where, at the time of the injury, both the employer and the employe are subject to the provisions of this chapter.
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> (c) Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment.
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> * * *
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> (d) Where the injury is not intentionally self-inflicted.

(e) Where the accident or disease causing injury arises out of his employment.

Section 102.01(2)(c), Stats., defines "injury" as, inter alia, "mental or physical harm to an employee caused by accident or disease." Laying to one side the question of whether the denial of a transfer can be considered as a "mental or physical harm" to complainant[1] it seems that the only way the transfer denial can be considered to have been "caused by [the work related] accident or disease," id. (emphasis added), is in the sense, outlined above, that complainant's work related injuries were an extended "but for" cause of that denial. That is, looking at the chain of events from the perspective of complainant's allegations, if the injuries had not occurred, complainant would not have missed work in connection with those injuries, his supervisor would not have perceived his attendance as problematical, would not have perceived complainant as handicapped, would not have given complainant a poor reference as a result of that perception, and respondent would not have denied complainant the transfer on the basis of that reference. The question, then, is whether, for purposes of coverage by the WCA, and the concomitant operation of its exclusivity provision (§102.03(2), Stats.), this "but for" chain of causation is an appropriate basis for a conclusion that the denial of the transfer in April 1989 was an injury caused by complainant's work related accidents in February and August 1988. In the Commission's opinion, the Supreme Court's analysis in Coleman v. American Universal Insurance Co., 86 Wis. 2d 615, 624-35, 273 N.W. 2d 220 (1979) dictates the answer that this chain of "but for" causation is too extended and tenuous to result in a conclusion of pre-emption

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[1] If this case involved a claim for "mental or physical harm" as a result of this transfer denial, arguably that claim would be subject to WCA exclusivity, see Zabkowicz v. West Bend, 789 F. 2d 540, 40 FEP Cases 117 (7th Cir. 1986). That is, the employe arguably could recover under the WCA for those injuries regardless of whether the employer acted wrongfully in any respect in denying the transfer, so long as the employe could satisfy the criteria developed under the WCA for coverage of these kinds of injuries, see, e.g., School Dist. No. 1, Village of Brown Deer v. DILHR, 62 Wis. 2d 370, 377-78, 215 N.W. 2d 373 (1974) ("mental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience."). However, the subject matter of such a claim would be the mental or physical injuries resulting from the transfer. The subject matter of a WCA claim with respect to the facts of the instant case would be the transfer itself as the "injury," rather than any "mental or physical harm" per se, except to the extent (discussed below) that the transfer could be conceptualized as an extension of the earlier (1988) injuries.

through the operation of WCA exclusivity. Coleman includes the following discussion:

> Larson ... also rejects as spurious any attempt to claim that a second injury sustained as a consequence of the intentional acts of the insurer is merely an extension or aggravation of the work-related injury. Larson points out that the latter argument relies on an extended "but for" analysis that leads to preposterous results. Larson explains:
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> "It is true that but for the original injury the investigation would never have been undertaken and the second injury would not have occurred. But must we go on to say that the carrier acquires complete tort immunity ever after for anything its agents do to carry out their investigation? Suppose the agent had decided to burglarize the claimant's house to get needed evidence. Suppose claimant died of fright on seeing the burglar. Is the compensation act the exclusive remedy, merely because the activity involved, which was the collecting of evidence, was in the mainstream of the agent's duties?
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> "Again, suppose a claimant has a compensable broken toe, and is being tailed by a photographer. Claimant sees him in the bushes, a scuffle ensues, and claimant receives a skull fracture as a result of a blow from the camera. Is this skull fracture nothing but an aggravation of the broken toe?"

86 Wis. 2d at 624-25 (citations omitted). In the instant case, any attempt to connect the original injuries to the subsequent transfer denial also "relies on an extended 'but for' analysis that leads to preposterous results." id. To allow such a connection would lead to the conclusion that once an employe suffers an injury as a result of a work related accident that is covered by the WCA, the FEA's prohibition against handicap discrimination would be nullified with respect to that employe in connection with any handicap that might result from the WCA covered injury. For example, assume a person employed by DHSS as a clerical assistant loses an arm as a result of a workplace accident. After the ensuing convalesence, the employe resumes work without incident, but five years later applies for a promotion to a supervisory position, and requests as an accommodation that a specially equipped vehicle be made available for travel required in connection with the supervisory position. The agency denies the request. Under the kind of "but for" analysis discussed above, the denial of the accommodation would not have occurred but for the WCA covered injury that happened five years earlier. However, as Coleman demonstrates, that kind of causation is too remote to be considered the legal causation of the accommodation denial, which is a subsequent, independent act of the employer, and a handicap discrimination claim against the employer based on the denial of accommodation should not be precluded by WCA exclusivity.

It perhaps should be noted that the legislature's amendment of the WCA in reaction to the Coleman decision did not vitiate the Supreme Court's holding on which the Commission relies. Coleman involved a claim for alleged "bad faith conduct ... for refusing to honor Coleman's [insurance] claims and for the intentional infliction of emotion distress," 86 Wis. 2d at 618, in connection with a work-related injury. The Court held that: "this action is based not on the original work-related injury but on a second separate injury resulting from the intentional acts of the insurer and its agents while investigating and paying the claim." 86 Wis. 2d at 623. In Jadofsky v. Iowa Kemper Ins. Co., 120 Wis. 2d 494, 355 N.W. 2d 550 (Ct. App. 1984), the Court discussed the legislative reaction to Coleman as follows:

> In Coleman, our Supreme Court adopted the view that the bad faith denial of benefits was a separate and distinct injury from the original injury.
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> Following Coleman, however, the legislature adopted sec. 102.18(1)(bp), Stats., which provided an exclusive remedy of the lesser of 200% of total compensation or $15,000 for employer or insurer bad faith. Previously, no similar provision existed in the worker's compensation statutes.
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> * * *
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> Section 102.18(1)(bp), Stats., now provides the exclusive remedy for bad faith claims, but the holding in Coleman that bad faith constitutes a separate injury remains in force.

120 Wis. 2d at 497-98 (citations omitted). That is, the amendment providing for a new exclusive WCA remedy for insurer bad faith created a statutory barrier to an independent cause of action for insurer bad faith. However, the legislature did not change the law in a way that affects the reasoning underlying the Coleman holding: "any attempt to claim that a second injury sustained as a consequence of the intentional acts of the insurer is merely an extension or aggravation of the work-related injury ... relies on an extended 'but-for' analysis that leads to preposterous results." 86 Wis. 2d at 624.

The decision reached here is not inconsistent with the decision in Schactner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988). The employe in that case stopped working for the employer in 1984 due to a work-related injury. In 1986, the employe applied for, and was denied, rehiring with that employer. The employe filed a FEA complaint alleging that she had been denied reemployment because of a perceived handicap. The Court pointed out

that the WCA provided the exclusive remedy for this transaction, since §102.35(3), Stats., specifically provides a penalty for failure to rehire an employe injured in the course of employment, and that: "[W]hen the legislature creates a right, the statutory remedy for violation of that right is exclusive." (citation omitted)[2]

In addition to being supported by the above-cited cases, the conclusion that this FEA charge of discrimination is not precluded by operation of §102.03(2), Stats., also is consistent with a decision of the Labor and Industry Review Commission (LIRC) which administers the FEA with respect to non-state employers. In Scherer v. Perry Corp., Nos. 8601126, 8601369 (1/18/90), LIRC held:

> The actions by the employer which the [complainant] complains about are the making of unfavorable work assignments, the denial of a promotion, and a transfer to a less responsible position. These injuries are not covered by §102.35(3), stats., and a claim of a violation of that statute would therefore not lie on the facts alleged.

In conclusion, because the denial of complainant's transfer request was an independent decision by respondent, with too remote a connection to his work related injuries for there to be legal causation between them for purposes of WCA exclusivity, this claim of handicap discrimination is not

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[2] While the Court relied on the point that the WCA at §102.35(3) provided a remedy for refusal to rehire, it also noted that certain language in that subsection that refers to "exclusive liability" has to do with the liability of the employer versus the insurer, and is not material to the issue of WCA exclusivity:

> DILHR also contends that certain exclusivity language of sec. 102.35(3), Stats., controls in this case. This subsection provides in part:
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> > Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has *exclusive liability to pay* to the employe the wages lost during the period of such refusal, not exceeding one year's wages. [Emphasis added.]
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> We disagree with DILHR. We do not see this subsection as dealing with the exclusivity of the employer's *liability* under the act. Rather, the purpose of the subsection is to visit the *penalty* for an unreasonable refusal to hire solely on the employer.

144 Wis. 2d at 9-10, n. 4 (emphasis in original).

precluded by the operation of §102.03(2), Stats., and the motion to dismiss must be denied.

ORDER

Respondent's motion to dismiss on the ground of WCA exclusivity is denied.

Dated: April 30, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:tmt
Attachment

APPENDIX

1. At the time relevant to this complaint and at the present time, complainant is employed as a Food Service Laborer at respondent's Central Wisconsin Center for the Developmentally Disabled (CWC).

2. In February 1989, complainant applied for a Laundry Worker 3 position in CWC's laundry and interviewed in early April. Later in April, complainant received a letter informing him that he had not been selected. There were three Laundry Worker 3 positions being filled in this hiring process.

4. In its reply to this complaint, respondent stated the substance of paragraphs 4 through 8. On February 14, 1989, the CWC Administrative Bulletin identified a transfer/demotion opportunity for a Laundry Worker 3 position. Complainant requested to be considered on a transfer basis. Nine candidates were certified and interviewed on March 28 and 29, 1989. Three additional candidates were eligible for consideration as transfers and were interviewed on April 7.

5. The candidates were ranked after the interviews according to their responses to questions during the interviews. The top three candidates in rank order were Kevin Jones, Roberta Myren and Richard Fandrich. Complainant tied for fourth place with another candidate, Linda Pierce. While Fandrich ranked third, and complainant and Pierce tied for fourth place, Webber, who ranked fifth, was selected because of her excellent reference. Respondent states that "information obtained through references in the areas of attendance, quality and quantity of work, and ability to get along with supervisors and coworkers were considered most important. After references were received, Jones, Myren and Webber were offered the positions."

12. According to complainant, he has been employed at CWC from October 13, 1986, to the present. On February 17, 1988, he sustained a work-related injury for which he lost minimal work time. He was again injured on the job in August 1988 and remained off work from August 13, 1988 to August 31, 1988. Subsequently, the decision was made to deny him the Laundry Worker 3 position. At the time he was working his regular hours with no restrictions and had over 200 hours of sick leave accumulated.

13. Respondent submitted as evidence in this case job reference forms the candidates were required to have filled out by their current employers around the time of the interviews. The form asks the candidates' supervisors for information regarding the candidates' dates of employment; position held; reason for leaving; would he/she be rehired; attendance and tardiness; cooperation with supervisors and coworkers; quality and quantity of work; communication skills; potential for advancement; health and safety record during employment; the general emotional stability of the employee; and additional comments.

14. Complainant's job reference form was signed by a supervisor, Arlene Moura. By the heading, "Attendance and Tardiness," Moura wrote, "Off on workman's compensation a few times." By the question, "Did this person have a good health and safety record while in your employ?", Moura wrote, "Not too good." The questions, "Would you rehire?" and "Did this person show potential for advancement?" and the area for "Additional Comments," were not answered by Moura on the form. With respect to the other questions asked on the form Moura wrote, "Satisfactory."

15. Webber's reference indicates that by the heading "Attendance and Tardiness," her supervisor wrote, "Excellent attendance - no tardiness." By the question, "Did this person have a good health and safety record while in your employ?", it was written, "yes." With respect to the other questions asked on the form it was written, "excellent, very good or good." The questions, "Would you rehire?" and "Did this person show potential for advancement?" were both answered with "Yes." Under "Additional Comments", it was written, "Karen has been part of this restaurant since before I arrived. She was very supportive during the transition and very stable in the last year. I hope any position she takes outside of the restaurant is only for her betterment."

16. Richard Fandrich ranked third after the interviews, after Jones and Myren. His reference form shows no comments by any of the questions. Under "Additional Comments", it was written, "Richard always did an excellent job with Service Master on any of our cleaning. He was honest & dependable."

17. Linda Pierce tied with complainant for fourth place after the interviews, but she was not selected. Pierce's reference indicates that by the heading "Attendance and Tardiness", her supervisor wrote, "Good." By the question, "Did this person have a good health and safety record while in your employ?", it was written, "Yes." The question, "Would you rehire?" was answered, "Yes." The question, "Did this person show potential for advancement?", was answered, "Not much room for advancement at this line of work." With respect to the other questions asked on the form it was written, "Good or Fair." Under "Additional Comments", it was written, "Linda was a dependable employee."

18. The other successful candidates, Kevin Jones and Roberta Myren, received favorable comments to all the questions on their reference forms.