STATE OF WISCONSIN PERSONNEL COMMISSION

LEONARD PALMERI,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 90-0007-PC

INTERIM DECISION AND ORDER

This is an appeal pursuant to §§230.36(4) and 230.45(1)(d), stats., of the denial of hazardous employment injury benefits. This matter is before the Commission on respondent's motion to dismiss for failure to state a claim. Both parties have filed briefs.

For purposes of resolving this motion, the Commission will assume as true the facts alleged by appellant. The appeal includes the following:

> I am a Correctional Officer and on 10/8/85 I was injured while confronting an inmate. I received 230.36 benefits for this injury and have been under a doctor's care and receiving treatment regularly since then for this injury.
>
> On 9/2/89 while working at home, I reinjured myself. The physician's certification clearly indicates that the recent injury is an aggravation of the already existing condition.

In his brief in opposition to this motion to dismiss, appellant further alleges:

> [M]y injury has never been cleared up. I have been under a doctor's care as a result of this injury since it occurred . . . on three separate occasions I have been granted these benefits, after the initial injury and a return to work.

The relevant language from §230.36, stats., is as follows:

> (1) Whenever a . . . guard . . . suffers injury while in the performance of his or her duties, as defined in subs. (2) and (3)

> . . . the employe shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury with no deduction from sick leave credits, compensatory time for overtime accumulations or vacation. Such full pay shall continue, while the employe is unable to return to work as the result of the injury, or until the termination of his or her employment . . . .
>
> (2) "Injury" as used in this section is physical harm to an employe caused by accident or disease.
>
> (3) As used in this section, "performance of duties" means duties performed in line of duty by:
>
> * * *
>
> (c) A guard, institution aide, or other employe . . . at state penal and mental institutions . . . at all times while:
>
> 3. When injury is occasioned as the result of an act by a patient, inmate, probationer or parolee.

There appears to be no question that appellant is an eligible employe under §230.36(1), and that on October 8, 1985, he suffered an injury while in the performance of his duties as defined in §230.36(3)(2). Rather, respondent argues as follows in its brief:

> It is obvious and undisputed that the injury appellant suffered while working at his home in September, 1989, did not occur during the performance of any of the foregoing "hazardous duties." Appellant is, therefore, not entitled to s. 230.36 benefits relating to that injury.
>
> Appellant alleges that the September, 1989 injury "aggravated" a condition caused by an earlier "hazardous duty" injury. The legislature could have chosen to include coverage for a nonwork injury that "aggravated" a hazardous duty injury. The fact is, however, that the statute does not include language that would permit coverage in this situation. Nor does the statute give any sort of definition, guidelines or standard of medical certainty by which to determine whether and how a work injury "aggravated" a hazardous duty injury. In the absence of such statutory language, appellant's appeal must be rejected on its face.

In the Commission's view, respondent's position is not persuasive because it misconceives the thrust of appellant's benefit claim. Rather than looking at the claim as related solely to the injury received on September 2, 1989, which viewed in isolation from the earlier injury was not a covered

injury, the focus should be on the concededly covered October 8, 1985, injury as it relates to the 1989 injury. In this regard, it is helpful to advert to the worker's compensation law which is similar in many respects to §230.36.

The elements of a claim under §230.36, stats., are as follows:

1) The employe must be in a covered status.

2) The employe must suffer injury — i.e., physical harm caused by accident or disease.

3) The injury must be suffered in the performance of the employe's duties as set forth (as relevant here) in §230.36(3)(c) 3. — i.e., while engaged in hazardous duties.

4) The employe must be unable to return to work as a result of the injury.

The basic elements of a claim under the worker's compensation law §102.03(1), stats., are as follows:

1) The requisite employment relationship must exist.

2) The employe must sustain an injury — i.e., mental or physical harm caused by accident or disease.

3) At the time of the injury, the employe must be performing services arising out of and incidental to his or her employment.

4) The injury must arise out of the employment.

The language of §230.36 that is primarily material to this motion to dismiss is: "suffers injury while in the performance of his or her duties," §230.36(1) stats. The parallel language from the Worker's Compensation Act is: "at the time of the injury, the employe is performing service growing out of and incidental to his or her employment." §102.03(1)(c)1., stats.

In Shelby Mut. Ins. Co. v. DILHR, 109 Wis. 2d 655, 327 N. W. 2d 178 (1982), a worker's compensation claimant suffered repeated on-the-job injuries to his lower back over a number of years. The last such injury occurred in November 1976. His last day of work was December 17, 1976, after which he commenced a vacation. While on vacation he reinjured his back and never returned to work. The Court upheld the findings of the Labor and Industry Review Commission (LIRC) that the claimant had suffered a covered injury and that the date of injury had been his last day of work, December 17, 1976. Apparently the key evidence in the case was the testimony of medical expects that: "the heavy labor and series of trauma caused Mosser's back problems. The experts did not identify any one trauma as the source of the present problems, or apportion the source among the many traumas." 109 Wis. 2d at 659-660.

This case illustrates that under appropriate circumstances an employe can be covered under the worker's compensation law when he suffers an off-duty injury that is sufficiently related to an injury or disease suffered by the employe while on duty. This result is sensible under both the hazardous employment and the worker's compensation laws. If an employe suffers a covered injury, he or she should be covered notwithstanding that the full results of that injury are not manifested until there is a subsequent precipitating injury that may occur while the employe is not in the course of employment. Back condition cases such as Shelby probably are good examples of this genre. An employe can suffer severe work-related back problems that cause a predisposition to be exacerbated by relatively minor things that would have no effect on a healthy back — in Shelby the precipitating injury was

caused by the employe sneezing while carrying a ten or fifteen pound box at home.

Returning to the motion before the Commission, appellant's appeal should not be dismissed merely because his claim for §230.36 benefits was precipitated by an injury that occurred while he was in non-work status. Appellant has alleged a connection between this injury and the 1985 injury that concededly was covered. This claim apparently will have to be resolved by an evidentiary hearing.

Respondent also contends that the provision in §230.36(1) that "full pay shall continue, while the employe is unable to return to work as the result of the injury" means that after an employe returns to work initially, he or she is no longer eligible for §230.36 benefits with respect to that injury. This result does not follow from anything in the language of the statute, and it is inconsistent with the purpose of the statute. For example, suppose an employe suffers what appears to be a minor muscle injury and returns to work after a day of rest, only to find out subsequently there is a stress fracture that makes the employe unable to work for several months. It would be inconsistent with the purpose of the law to deny the employe §230.36 benefits for the second period of inability to work, merely because the employe had been able to work for one day before then.

ORDER

Respondent's motion to dismiss for failure to state a claim is denied.

Dated: October 4, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner