STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL VAN ZUTPHEN,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 90-0141-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss filed March 9, 1992. Both parties have filed briefs.

This is a charge of handicap discrimination filed on August 23, 1990. It alleges in essence that DOT improperly refused to hire complainant because of a problem with his knee. It appears from the briefs on the motion to be undisputed that complainant had worked periodically for DOT as an engineering aid on a limited term basis. In 1985, he apparently injured his knee while at work, and subsequently reinjured his knee at work during 1989. He was not rehired in 1990 or subsequently.

Respondent's motion to dismiss is grounded on the exclusivity provision of the Worker's Compensation law, §102.03(2), Stats. Initially, this appears to be a case of refusal to rehire because of a job-related injury covered by the Worker's Compensation law, in which case the Worker's Compensation law would provide an exclusive remedy. Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988). However in opposition to the motion, complainant asserts that the reason he was not rehired was because of an injury to his knee which occurred in 1965, long before his employment with DOT. Complainant submitted a copy of a May 23, 1990, report of an independent medical examination in connection with his Worker's Compensation matter which concluded that: "his present symptoms were secondary to old problems in the knee ... I do not feel that his current symptoms and findings were precipitated, aggravated or accelerated by the injury of 8-8-89." Complainant also submitted a letter from DOT referring to this report and offering to settle his Worker's Compensation claim based on 5% permanent disability.

In its reply brief, DOT contends that it "received permanent disability ratings attributable to the injury of 30% and 15% from the complainant's physicians." Respondent argues as follows:

> The Complainant tries to argue that because the Respondent has disputed his claim concerning the extent of permanent disability from his on the job injuries, that the Respondent concedes that he does not have a remedy under the Workers Compensation Act and that the Workers Compensation Act is therefore not the Complainant's exclusive remedy. The existence of a dispute as to the extent of benefits is irrelevant. The Respondent has already conceded that the injuries suffered in 1985 and 1989 were on the job injuries covered by the Workers Compensation Act by paying for medical treatment and for loss of time from work. The Complainant has conceded that the injuries fall within the coverage of the act by applying for and accepting benefits under Workers Compensation.

Complainant is alleging that DOT refused to rehire him because of a knee condition which is 100% attributable to injuries he incurred prior to commencing employment. Assuming the truth of these allegations, which the Commission must on a motion to dismiss, the work-related injuries he suffered in 1985 and 1989 do not enter into respondent's refusal to rehire The pre-existing condition and the work-related injuries to the same joint are conceptually separable. See Elmer v. UW, 88-0184-PC-ER (8/24/849):

> As a result of these provisions [§§102.03(2), 102.35(3), Stats.], where an employer refuses to rehire an employe who has suffered a compensable injury, the employe's exclusive remedy for the failure to rehire is under the Worker's Compensation law Cornejo v. Polycon Indus., Inc., 109 Wis. 2d 649, 327 N.W.2d 183 (Ct. App. 1982); Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988). Implicit in the law is the principle that exclusivity comes into play only when the refusal to rehire has a causal relationship to the work-related injury. See Franke v. Durkee, 141 Wis. 2d 172, 176, 413 N.W. 2d 667 (Ct. App. 1987): "Section 102.03(2), Stats., which provides that the terms of the act constitute an employee'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 ...." (emphasis supplied, citations omitted)

In Elmer, the record on the motion to dismiss included a medical report which concluded that the employe had pre-existing spondylolisthesis and that "[a]ny residual problem that the patient continues to have with his back is probably related to the presence of his spinal defect and not to his acute injury." The

Commission concluded that if it were established that the employer acted at least in part on the basis of a condition not covered by the Worker's Compensation law, then §102.03(2), Stats., would not require dismissal of the complaint. Because the complainant in the instant case also is alleging he was refused reemployment because of a pre-existing medical condition not covered by the Worker's Compensation law, the same result is mandated in this case.

ORDER

This motion is denied without prejudice to renewal on the basis of additional factual developments.

Dated: May 1, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:gdt/1