

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DONALD L. SHEW,

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 92-0506-PC

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INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission as an appeal from a decision denying the appellant's request for hazardous employment benefits pursuant to §230.36, Stats., for an injury sustained in April of 1992. The parties reached a stipulation of facts, and the following findings are drawn from that stipulation.

FINDINGS OF FACT

1. Respondent, Department of Health and Social Services, Division of Care and Treatment Facilities, administers the Northern Wisconsin Center for the Developmentally Disabled, one of three such centers in the state.
2. Appellant worked at NWC and was classified as a Resident Care Supervisor prior to, during, and after his injury sustained on April 15, 1992. His duties included provision of client care.
3. On April 15, 1992, at approximately 9:00 a.m., the appellant and NWC staff members Steve Short, Resident Care Supervisor and Ronald Strom, Nursing Supervisor, attempted to transfer resident C.L. from a wheel chair to a vehicle, in order to transport resident C.L. to a scheduled dentist appointment.
4. On April 15, 1992, at approximately 7:30 a.m., resident C.L. was sedated in preparation for a medical procedure other than dental.
5. During the attempt to transfer him, resident C.L. accidentally lost his balance while in an upright position and began to fall.
6. In an attempt to keep resident C.L. from injury, the appellant, repositioned his hold on resident C.L. and tried to hold him or break his fall,

thereby injuring his left knee. Neither Steve Short or Ronald Strom were injured as they had no contact with resident C.L. as he was falling.

7. Resident C.L. is ambulatory only with a wheelchair.

8. On April 15, 1992, resident C.L. weighted approximately 155 pounds and was approximately 6 feet tall.

9. The appellant has a duty to provide daily living needs of clients through management of human and material resources, providing a safe, enjoyable and healthful living environment for all residents at the Northern Wisconsin Center for the Developmentally Disabled.

10. The appellant did not report to work between April 16, 1992, through June 15, 1992, due to the injury he sustained on April 15, 1992 while breaking the fall of resident C.L.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(d), Stats.

2. The appellant was engaged in the "performance of duties" when he was injured on April 15, 1992.

3. The appellant is entitled to hazardous employment benefits as a consequence of his injury on April 15, 1992.

#### OPINION

The relevant portions of §230.36, Stats., relating to pay to employes who suffer injuries while engaged in hazardous duties, are as follows:

(1) If... any other employe whose duties include... supervision and care of patients at a state mental institution, and University of Wisconsin hospital and clinics 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....

(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:

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(c) A guard, institution aide, or other employe at the university of Wisconsin hospital and clinics or at state penal and mental institutions..., at all times while:

1. In the process of quelling a riot or disturbance or other act of violence;

2. In the process of restraining patients, inmates, probationers or parolees and apprehending runaways or escapees, including probationers and parolees;

3. When injury is occasioned as the result of an act by a patient, inmate, probationer or parolee;

4. In the process of making an arrest or investigating any violation or suspected violation of law pursuant to police powers authorized by s. 46.058(2) or 301.29(2) and rules adopted pursuant thereto;

5. Going to or returning from a fire, engaging in the suppression of a fire, evacuating patients or inmates because of a fire or engaging in fire drills; or

6. When disease is contracted as a result of exposure to such disease arising out of the care of inmates or patients.

The respondent contends that resident C.L. did not engage in an "act" within the meaning of §230.36(3)(c)3 because he accidentally lost his balance and did not intend to fall. Respondent relies on a dictionary definition of "act" as something done involving intent and volition. According to respondent, the "legislative intent was not to protect specified employees from mere accidents."

The Commission rejects this narrow reading of §230.36. The statute specifically defines "injury" in terms of "physical harm to an employe caused by *accident* or disease." By referencing "accident" in this definition, the legislature was indicating a clear statutory intent to cover unintentional injuries.

The use of the noun "act" in §230.36(3)(c)3 is not inconsistent with the general legislative goal made clear in the definition of "injury." The specific definitions of "act" recited by the respondent in its brief do refer to volitional conduct. However, other dictionary definitions do not specify intentional conduct. For example, in Webster's New Collegiate Dictionary (1977), act has seven definitions, the first of which has two parts and reads: "1 a : a thing done : DEED b : something done voluntarily." The first part of this first definition makes no reference to voluntary conduct. An interpretation of "act" as including unintentional as well as volitional conduct is also supported by case law interpreting a comparable Pennsylvania statute. In Krug v. Commonwealth Dept. of Public Welfare, Pa. Cmwlth., 308 A. 2d 168, the appellant, an employe at a state school for the developmentally disabled,

sought benefits under a provision awarding full salary to any employee of a state mental hospital "injured during the course of his employment by an act of any inmate or any person confined in such institution." The appellant had been injured when a patient had thrown herself at Ms. Krug's lower legs. The employer contended that the appellant was not entitled to benefits because the patient's action was merely a compulsive act normally associated with her behavioral pattern and had not been deliberate. The court held that the appellant was entitled to benefits:

[W] hold that the narrow interpretation of the term "act", by which actual intent to harm must be established, was not intended by the legislature. Whether a patient formulated an intent to harm or even possessed such a capability, is not the deciding factor in determining eligibility for... benefits. If the injury incurred by the employee resulted from an 'act' of a patient, irrespective of actual intent to deliberately harm, the employe is covered by [the statute].

As a policy matter, adopting the respondent's proposed interpretation of the statutory provision would also require a difficult factual analysis for each request under §230.36(3)(c)3., as to whether the patient, inmate, probationer or parolee intended the conduct resulting in the injury.

For all of the above reasons, the appellant is entitled to §230.36 benefits for his April 15, 1992, injury.

The stipulation of facts in this matter also included information relating to the appellant's hourly pay rate, the Worker's Compensation benefits received by the appellant and the effect of his absence on his sick leave balance. The parties will be provided a period of time after this interim decision is issued in which to attempt to reach an agreement as to the level of benefits due the appellant as a consequence of this decision.

#### ORDER

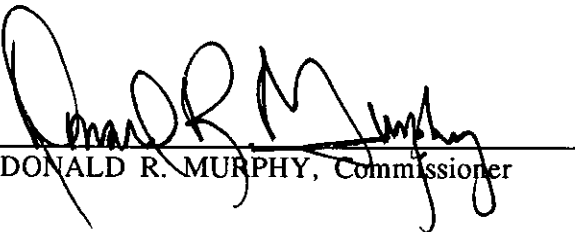
The respondent's decision denying §230.36 benefits to the appellant for injuries he suffered on April 15, 1992, is reversed. The parties are provided 30 days after this interim decision is issued in which to attempt to reach an agreement as to the amount of hazardous duty benefits due the appellant as a consequence of this decision. If an agreement cannot be reached, the appellant should so advise the Commission in writing by the end of the 30 day pe-

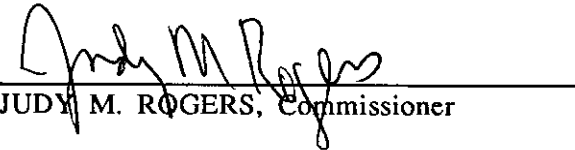
riod. During the same period, the Commission will provide the appellant an opportunity to file any request for fees or costs under the Equal Access to Justice Act, §227.485.

Dated: November 29, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
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DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner