STATE OF WISCONSIN PERSONNEL COMMISSION

BRUCE I. POWERS,

Appellant/
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

Case Nos. 92-0746-PC
92-0183-PC-ER

RULING
ON
MOTION
TO DISMISS
AND
FINAL ORDER

This matter is before the Commission on respondent's motion to dismiss on the ground of the exclusivity provision of the Worker's Compensation Act (WCA), §102.03(2), Stats. Both parties have filed briefs. The underlying facts relating to WCA exclusivity do not appear to be in dispute and are set forth as follows.

Case No. 92-0183-PC-ER involves a charge of handicap discrimination under the Fair Employment Act (WFEA) (Subchapter (II, Chapter 111, Stats.). The complaint alleges respondent discharged complainant because of his handicap. In a subsequent document, complainant characterized his handicapping condition as involving degenerative disc disease, especially in the right shoulder, lumbar laminectomies, chronic fibromyalgia, chronic headache syndrome, cervical disc herniations, osteoarthritis, and depression resulting from chronic pain. Respondent's stated reason for discharge, set forth in a letter to complainant dated June 19, 1992, is as follows:

> This is to inform you that it is our intention to terminate your employment as an Auditor - Senior as of July 3, 1992 due to continuing medical problems that preclude you from performing the job requirements of your position.
>
> According to the information you have provided, you are not able to perform your duties as an Auditor - Senior. Unless our conclusion is incorrect or, you are able to provide written information from your physician which indicates that you are able to perform your duties with no restrictions, your last day of employment as an Auditor - Senior will be July 3, 1992.

> If no information is provided by July 3, 1992, your termination will be effective on this date.

Case No. 92-0746-PC involves an appeal pursuant to §230.44(1)(c), Stats., of the same discharge. The appeal alleges that the discharge was in violation of the civil service code.

Complainant filed an application for WCA benefits dated September 4, 1991, which described the injuries suffered from an alleged workplace attack as "neck discs broken (cervical spine disc and joint disease). Fibromyalgia, headache syndrome, depression." Complainant's WCA claim was compromised by a $15,000.00 payment approved in a December 15, 1992, compromise order.

It is undisputed by complainant that his WCA claim involved basically the same medical condition as formed both the ostensible basis for his termination, and the asserted handicapping condition. It is undisputed that complainant commenced a medical leave on March 5, 1991, and never returned to work prior to his termination effective July 3, 1992.

Section 102.03(2), Stats., provides that: "[W]here such conditions [for the employer's liability under the WCA] exist the right to compensation under this chapter shall be the exclusive remedy against the employer." Subsections 102.35(2) and (3), Stats., impose liability on an employer: "who, without reasonable cause, refuses to rehire an employe who is injured in the course of employment...." The result of these provisions is that when an employer refuses to rehire an employe who is absent from work in connection with a WCA injury, the employe's exclusive remedy for the failure to rehire lies under the WCA, and the employe cannot also pursue a WFEA claim. Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W. 2d 906 (Ct. App. 1988); Norris v. DILHR, 155 Wis. 2d 337, 455 N.W. 2d 665 (Ct. App. 1990). Many of complainant's arguments in opposition to the motion to dismiss rest on the policies behind the civil service law and the WFEA. However, these kinds of arguments were explicitly or implicitly rejected by the Court in Schachtner and Norris.

Complainant also attempts to distinguish Schachtner and Norris on the ground that those cases involved a separation from employment followed by a refusal to rehire, as opposed to an outright discharge as occurred here. However, this distinction does not result in a different conclusion. In determining WCA exclusivity, the critical inquiry is whether the injury for which relief is sought is covered by the WCA. Coleman v. American Universal Insurance Co., 86 Wis. 2d 615, 622, 273 N.W. 2d 220 (1979). There are a number

of cases interpreting §102.35, Stats., holding that the discharge of an employe who suffers a WCA injury is equivalent to a failure to rehire for purposes of §102.35 coverage. See e.g., Delco Metal Products v. LIRC, 142 Wis. 2d 595, 605, 419 N.W. 2d 292 (Ct. App. 1987) ("the termination is the functional equivalent of a refusal to rehire. L & H Wrecking, 114 Wis. 2d at 510, 339 N.W. 2d at 347."); Link Industries v. LIRC, 141 Wis. 2d 551, 554-56, 415 N.W. 2d 574 (Ct. App. 1987) (Court rejected employer's argument that §102.35(3) was inapplicable because employe had been terminated after once having gone to the doctor rather than having come to work, and had neither been unemployed nor disabled); Meinholz v. DOT, 90-0147-PC-ER (1/11/91); Alvey v. Briggs & Stratton (LIRC, 11/27/91).

Complainant also contends that the legislative origins of the WCA exclusivity provision substantially predate the legislative origins of this Commission's statutory jurisdiction, "[a]t the very least there has been a de facto amendment to or an implicit overruling of said 'exclusivity' provisions. They have been implicitly repealed." Complainant cites no authority for this proposition, the Commission is aware of none, and it is at odds with the reported cases in this area which have reinforced the continuing vitality of the WCA exclusivity provision as regards other statutory provisions.

The Commission also notes that this case is distinguishable from Johnson v. DHSS, 89-0080-PC-ER (4/30/93), where it held that WCA exclusivity did not preempt its jurisdiction over an FEA complaint alleging that the employe had been denied a transfer as a result of handicap discrimination that was related to two short periods of missed work in connection with work-related injuries that had occurred several months before the transfer denial. In reaching its decision, the Commission relied heavily on the view that the only way a connection could be made between the work-related injuries and the denial of the transfer would be as the result of an untenable "but for" chain of causation:

> [I]t seems that the only way the transfer denial can be considered to have been "caused by [the work related] accident or disease," [§102.01(2)(c), Stats.] (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 problematic, 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 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:
>
> "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?
>
> "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 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.

Johnson, pp. 4-5. In the instant case, there is neither a transaction other than a refusal to rehire (or discharge), nor an extended chain of "but for" causation. Complainant was absent from work for an extended period of time in connection with a medical condition which was the subject of a WCA claim, and respondent's termination of his employment was based on the determination that because of that medical condition, complainant was unable to work. Since under §102.35, Stats., "the termination is the functional equivalent of a refusal to rehire," Delco Metal Products v. LIRC, 142 Wis. 2d 595,

605, 419 N.W. 2d 292 (Ct. App. 1987) (citation omitted), the termination is covered by the WCA and that remedy is the exclusive remedy pursuant to §102.03(2), Stats., see Coleman, 86 Wis. 2d at 622.

Finally, complainant also argues that respondent waived its right to raise the question of WCA exclusivity because it did not raise the issue until sometime after the prehearing conference, at which the parties stipulated to the issues for hearing. While it would have been preferable to have raised this issue at an earlier point, "[i]t is axiomatic that issues of subject matter jurisdiction can be raised at any time and cannot be waived. See §PC 1.08, Wis. Adm. Code; In Interest of A.E.H., 152 Wis. 2d 182, 191, 448 N.W. 2d 662 (Ct. App. 1989); Morgan v. Knoll, Wis. Pers. Bd. 75-204 (5/25/76)." ACE v. DHSS, 92-0238-PC (3/29/93), pp. 3-4.

In Heideman v. American Family Ins. Group, 163 Wis 2d 847, 859-60, 473 N.W. 2d 14 (Ct. App. 1991), the Court held that WCA exclusivity did not run to the circuit court's subject matter jurisdiction over a tort claim. The Court's opinion includes the following:

> The circuit court's ability to entertain the claim when it did is not a function of its subject matter jurisdiction, but its competency to proceed on the matter. No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever. Mueller v. Brunn, 105 Wis. 2d 171, 176, 313 N.W. 2d 790, 792 (1982). There is a difference between the situation where a court lacks power to treat a certain subject matter at all and the situation where a court may treat the subject generally but there has been a failure to comply with the conditions precedent necessary to acquire jurisdiction. Galloway v. State, 32 Wis. 2d 414, 419, 145 N.W. 2d 761, 763 (1966). "[O]nly in the former situation is it correct to say that there is a lack of subject-matter jurisdiction." Id. The legislature has the authority to set standards for exhaustion of administrative remedies or for primary jurisdiction prior to the proper invocation of the court system's subject matter jurisdiction, but the failure to follow these standards results not in a lack of jurisdiction but in a lack of competency to proceed to judgment. See Mueller, 105 Wis 2d at 176-77, 313 N.W. 2d at 792-93.

Mueller v. Brunn, 105 Wis. 2d 171, 176, 313 N.W. 2d 790 (1982), relies on the principle that: "subject matter jurisdiction is vested by the constitution in the courts of the State of Wisconsin. No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." This basis of jurisdiction may be contradistinguished with the jurisdictional basis of an administrative agency. Unlike a court of general jurisdiction, the subject matter jurisdiction of an administrative agency like this Commission is strictly

limited by statute, see, e.g., Board of Regents v. Wisconsin Personnel Comm., 103 Wis. 2d 545, 552, 309 N.W. 2d 366 (Ct. App. 1981) ("Administrative agencies are tribunals of limited jurisdiction dependent upon a statutory grant of authority." (citations omitted)). If the Commission's authority to entertain a proceeding with respect to a certain kind of transaction is superseded or usurped by operation of another statute, the operation of the latter statute runs to the Commission's subject matter jurisdiction. The issue of the effect of WCA exclusivity in connection with the FEA complaints has always been cast in terms of subject matter jurisdiction. See, e.g., Meinholz v. DOT, 90-0147-PC-ER (1/11/91); Olson v. UW-System (Stout), 87-0176-PC-ER (5/1/91); Alvey v. Briggs & Stratton (LIRC, 11/27/91).

This approach is consistent with how the Commission has dealt with other statutes which have a superseding operation. For example, §111.93(3), Stats., provides, inter alia:

> [I]f a collective bargaining agreement exists ... the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes ... related to wages, fringe benefits, hours and conditions of employment."

The Commission has consistently held that where this provision applies, it has no subject matter jurisdiction over the proceeding in question. See, e.g., Matulle v. UW-System (Oshkosh), 81-433-PC (1/27/82); affirmed, Matulle v. State Personnel Commission, Winnebago Co. Circuit Court, 82CV207 (11/19/82) ("the procedure for enforcement set forth in the [collective bargaining] agreement, under §111.93(3), supersedes the statutory provision for review by defendant under §230.44(1)(c). The Court concludes that the Commission was without jurisdiction, whatever rights may be asserted under the grievance procedure.")

Also, in Schachtner v. DILHR, 144 Wis. 2d 1, 3, 422 N.W. 2d 906 (Ct. App. 1988), while the Court did not explicitly address the issue of whether WCA exclusivity deprived DILHR of subject matter jurisdiction, the Court affirmed an initial DILHR decision dismissing the complaint "on the ground that her complaint did not come under the jurisdiction of WFEA."

Similarly, in the instant case, WCA exclusivity operates to supersede this Commission's authority to hear this matter under either §230.44(1)(c) or §230.45(1)(b), Stats., and the Commission has no subject matter jurisdiction over these cases.

Finally, the Commission notes that the operation of WCA exclusivity in the manner involved here does not deprive an employe of his or her right to challenge, under §230.44(1)(c), Stats., a discharge ostensibly grounded on an injury covered by the WCA, if the employe alleges that the employer's ostensible reliance on the WCA covered injury was in reality a pretext to attempt to get rid of the employe for other reasons and deprive the employe of his or her appeal right. If the employer actually were so motivated, then the discharge would not in fact have involved the WCA injry, and the employe would not be restricted to the exclusive remedy of the WCA. In the instant case, appellant has not made such an allegation, either in his pleadings or his brief in opposition to the motion to dismiss, and in fact alleges in his complaint of discrimination that respondent discharged him because of his handicap.

ORDER

On the basis of the conclusion that this Commission's subject matter jurisdiction over these cases has been superseded by the WCA exclusivity provision, §102.03(2), Stats., respondent's motion to dismiss is granted and theses cases are dismissed.

Dated: June 25, 1993

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel

Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.