

STATE OF WISCONSIN

PERSONNEL COMMISSION

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LLOYD R. ROSE, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

CORRECTIONS, *

Respondent. *

Case No. 93-0180-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss the appeal as untimely. The parties have filed written arguments.

The appeal arises from a decision denying the appellant's request for paid leave pursuant to §230.36, Stats. On August 5, 1993, appellant, who is employed as a Security Officer 2 at the respondent's Oakhill Correctional Institution, filed a request for §230.36 leave. The request included the following description of the claimed injury and surrounding circumstances:

I was assigned as 2 shift Sgt HSU, WCI [Waupun Correctional Institution] from mid 1987 thru Dec 1989. I had daily contact with inmate patients housed @ HSU. Info received from Nurse Nancy White, that during 1989 there were at least 2 inmates with fungal infections of the lung housed @ HSU, WCI. To the best of my knowledge we had no respiratory [sic] restrictions in place for any inmate, and the facility does not have web flow isolation capability.

Fungal infection with a tumor was found in my [left] upper lung on or about Jan 25, 1993 which resulted in 3 wks SL [sick leave] diagnostic. Later on Mar 11 1993, [left] upper lung removed. Tumor was found to have turned cancerous. Returned to work June 11, 1993 after 3 months combination SL & income continuation.

On September 1, 1993, a representative for respondent denied appellant's claim with the following rationale: "Not only is this claim not timely but there is no medical documentation that substantiates this claim." (emphasis in original) Appellant filed his appeal with the Commission on September 21, 1993.

Employees eligible for hazardous employment benefits under §230.36, Stats., are entitled to be fully paid by their employing agency during their absence from work due to a covered injury, as if they were still in work status, until they can either return to work or until their employment is terminated. The statute defines "injury" in §230.36(2) as "physical harm... caused by accident or disease." In §230.36(3)(c)6., injuries suffered by employees at state penal institutions are covered "when disease is contracted as a result of exposure to such disease arising out of the care of inmates or patients."

Respondent premises its motion to dismiss on §ER 28.04(1), Wis. Adm. Code, which provides:

Application for benefits under s. 230.36, Stats., shall be made by the employe or the employe's representative to the appointing authority within 14 calendar days from the day of injury, on forms prescribed by the secretary. In extenuating circumstances, at the discretion of the secretary, the time limit for application for benefits may be waived. When medical verification is required for final approval of the claim, failure by a physician to provide verification within the 14 days shall not be the basis for denial. The application shall contain sufficient and factual information to indicate the nature and extent of the injury or illness, the circumstances surrounding its occurrence and the qualifying duties on which the application is based.

Appellant contends that even though he was ill in January and had surgery in March, it wasn't until the week of July 26 through 30, 1993, through comments made by Nurse White, that he first gained knowledge of the alleged connection between his prior work and the illness.

The 14 day time limit set forth in §ER 28.04(1) is in the nature of a statute of limitations rather than a jurisdictional requirement such as the time limit established in §230.44(3), Stats., for filing an appeal. In Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 559, 335 N.W. 2d 578 (1983), the supreme court adopted the discovery rule for tort actions, with the following justification:

In any event the problems caused by the lapse of time must be balanced against the policy in favor of allowing diligent claimants to bring meritorious claims. It is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. Although theoretically a claim is capable of enforcement as soon as the injury occurs, as a practical matter a claim cannot be enforced until the claimant discovers the injury and the accompanying right of action. In

some cases the claim will be time barred before the harm is or could be discovered, making it impossible for the injured party to seek redress. Under these circumstances the statute of limitations works to punish victims who are blameless for the delay and to punish victims who are blameless for the delay and to benefit wrongdoers by barring meritorious claims. In short, we conclude that the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.

In the later case of Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W. 2d 140, (1986), the court went on to clarify that a cause of action does not accrue "until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct or product."

Here, appellant is alleging that he became infected prior to December of 1989, that this infection and resultant tumor were first diagnosed in January of 1993, but that the connection between the condition and his employment was not apparent until July of 1993. Under the discovery rule, the appellant had 14 days from when he discovered that the injury was probably caused by his employment with respondent in which to file a claim. This approach is consistent with the language in the rule which permits waiver of the 14 day period "in extenuating circumstances." It is also consistent with the Commission's approach under the Fair Employment Act, as enunciated in Sprenger v. U.W. (Green Bay), 85-0089-PC-ER, 1/24/86, where the Commission held that the time limit for filing a charge of occupational safety and health retaliation and for filing a charge of discrimination under the Fair Employment Act did not begin to run "until the facts that would support a charge of discrimination or retaliation were apparent to the complainant or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the complainant." The Commission will interpret the language in §ER 28.04(1) in a manner which is consistent with both the discovery rule adopted by the supreme court in Hansen and Borello, and Commission precedent involving other statutory provisions.

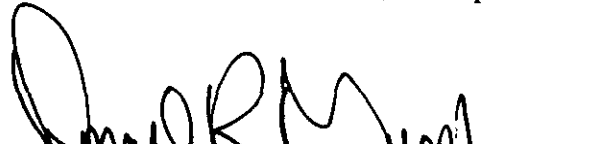
ORDER

Respondent's motion to dismiss is denied.

Dated: November 30, 1993 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner