

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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DECISION ON
FEES AND
FINAL ORDER

This matter is before the Commission on the appellant's request for attorney fees and costs under the §227.485, Stats. In an interim decision and order dated November 29, 1993, the Commission reversed the respondent's decision denying §230.36 benefits to the appellant for injuries suffered in April of 1992.¹

The respondent contends that the appellant is not entitled to fees and costs because the respondent was substantially justified in its underlying decision.

Pursuant to §227.485(3), Stats:

In any contested case in which an individual... is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The term "substantially justified" is defined in §227.485(2)(f), as "having a reasonable basis in law and fact." In Sheely v. DHSS, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989), the court adopted the analysis set forth in Phil Smidt & Son, Inc. v. NLRB, 810 F.2d 638, 642 (7th Cir., 1987):

¹In its November 29th Order, the Commission provided the parties an opportunity to attempt to reach an agreement as to the amount of hazardous duty benefits due the appellant as a consequence of the interim decision. The parties have indicated that they reached agreement on the question of benefits.

To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

The Court went on, in Sheely, to give the following examples:

Losing a case does not raise the presumption that the agency was not substantially justified. Nor is advancing a "novel but credible extension or interpretation of the law" grounds for finding a position lacking substantial justification. (citations omitted)

The parties submitted the merits of their dispute to the Commission on a stipulation of fact. Therefore, there can be no dispute that respondent demonstrated "a reasonable basis in truth for the facts alleged." Respondent based its underlying decision on the conclusion that because the injury arose as a consequence of non-volitional conduct by a sedated resident, the appellant had not been injured "as the result of an *act*" by a resident within the meaning of §230.36, Stats. It was undisputed that the resident had accidentally lost his balance and did not intend to fall on the appellant. The respondent contended that the legislative intent was not to protect employees from "mere accidents."

In reaching its decision, the Commission relied on other language found in §230.36 and Krug v. Commonwealth Dept. of Public Welfare, 9 Pa. Cmwlth.563, 308 A.2d 168 (1973), which construed a similar reference to "act" under a comparable Pennsylvania statute.

The Commission cannot say that there was a "reasonable basis in law for the theory propounded" in terms of respondent's narrow reading of the word "act" in §230.36(3)(c)3., Stats. The definition of the term "injury" to specifically include harm caused "by accident or disease" and the reference elsewhere in §230.36 to contracting disease as a consequence of exposure to the disease during care of inmates and patients makes it clear that volitional conduct on the part of the resident or patient is not required in order for an employe to be entitled to hazardous duty pay for injuries received during employment. The mere fact that the Pennsylvania Department of Public Welfare had also narrowly construed "act" in Krug, does not mean that the DHSS's similar construction a decade later was reasonable, where the court in Krug had rejected the Pennsylvania agency's approach.

The appellant's attorney fee request is for 6.5 hours at \$85.00 per hour. The criteria for determining the amount of costs set forth in §814.245(5), Stats., are incorporated by reference in §227.485(5), Stats. Pursuant to §814.245(5)2.:

Attorney or agent fees may not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.


Here, the appellant has offered no justification for a fee in excess of \$75.00 per hour, so his request is modified to 6.5 hours at \$75.00 per hour, or \$487.50.


The appellant also requests reimbursement for postage and for copies of medical records. Those disbursements which are set forth in §814.04(2), Stats., are incorporated by reference in §814.245(5), Stats. While §814.04(2) allows for postage, it does not specifically cover the cost of medical records.


ORDER

Appellant's petition for fees and costs under §227.485 is granted in the amount of \$503.65, representing \$487.50 in attorney fees and \$26.15 for postage and UPS costs. The Commission's November 29, 1993, interim order is finalized as the Commission's final disposition of this matter.

Dated: March 29, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

KMS:kms
K:D:Fees (EAJA)-Shew

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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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)