

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 14, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 00-0801**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STEPHEN J. HIGHMAN,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR & INDUSTRY REVIEW COMMISSION, DUNN COUNTY  
SHERIFF'S DEPARTMENT AND DEPARTMENT OF EMPLOYEE  
TRUST FUNDS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Dunn County:  
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Stephen J. Highman appeals from a judgment affirming a Labor and Industry Review Commission (LIRC) decision dismissing

his claim for duty disability benefits under WIS. STAT. § 40.65(4).<sup>1</sup> At issue is whether Highman's non-traumatic mental injury resulted from stress of a greater dimension than that ordinarily experienced by police officers.<sup>2</sup> Because LIRC reasonably concluded that Highman's injury was not compensable, we affirm the judgment.

¶2 Highman was a deputy at the Dunn County Sheriff's Department for approximately seven years until October 22, 1992, when he took himself off duty for psychological reasons. Highman remained on medical leave for over a year and was ultimately terminated.<sup>3</sup> He filed a claim for duty disability benefits under WIS. STAT. § 40.65(4), which allows a person employed in a protective occupation to receive disability benefits if the employee sustains injuries while performing his or her duty, if the disability is likely to be permanent, and if the disability causes the employee to retire from his or her job.<sup>4</sup>

¶3 Highman's claim was denied after several hearings before an administrative law judge (ALJ), and he appealed to LIRC. LIRC affirmed the

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<sup>1</sup> There have been no significant changes to WIS. STAT. § 40.65(4) since Highman's claim was filed. All references to the Wisconsin Statutes are to the 1997-98 version.

<sup>2</sup> The parties and previous decisions in this case interchange the job titles sheriff's deputy, police officer and law enforcement officer, implicitly suggesting that the jobs are sufficiently similar that it is appropriate to consider the job stress experienced by police officers, sheriff's deputies and other law enforcement officers to determine whether Highman is entitled to benefits. For consistency, we will use the term police officer.

<sup>3</sup> In his brief, Highman states that he was terminated because he had not filed a request for continuation of his medical leave, "which he did not know he had to do." The circumstances of his termination are not relevant to this appeal and do not affect our decision.

<sup>4</sup> Pursuant to WIS. STAT. § 40.65(4), benefits are also payable in some cases where the employee remains employed, but those situations are not relevant here.

ALJ's findings and order denying benefits. The circuit court affirmed LIRC's decision and this appeal ensued.

¶4 The parties do not dispute that Highman suffered a mental injury and that the cause of the injury was arguably due entirely to workplace stress. The sole issue presented is whether Highman's injury "resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience." See *School Dist. #1 v. DILHR*, 62 Wis. 2d 370, 377-78, 215 N.W.2d 373 (1974). This standard for evaluating non-traumatic mental injuries was established in *School Dist. #1*, a workers' compensation case, and subsequently has been applied to duty disability cases. See *Village of Random Lake v. LIRC*, 141 Wis. 2d 559, 565-66, 415 N.W.2d 577 (Ct. App. 1987). Pursuant to the standard established in *School Dist. #1*, Highman cannot recover duty disability benefits unless he experienced stress of a greater dimension than that ordinarily experienced by police officers.<sup>5</sup>

#### STANDARD OF REVIEW

¶5 On appeal, we review LIRC's, not the circuit court's, decision. See *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). Whether the stress Highman suffered as a police officer was extraordinary is a mixed question of fact and law. See *Bretl v. LIRC*, 204 Wis. 2d 93, 100, 553 N.W.2d 550 (Ct. App. 1996). The determination of the parties' conduct is an issue of fact, and LIRC's factual findings must be upheld if there is

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<sup>5</sup> It is undisputed that we should compare the stresses Highman suffered with those experienced by police officers, as opposed to stresses those in other occupations might experience. This is consistent with our prior decisions. See *Bretl v. LIRC*, 204 Wis. 2d 93, 106, 553 N.W.2d 550 (Ct. App. 1996) (LIRC is required to determine whether the duties of the job subject the claimant to greater stress than those who are similarly situated.).

any credible and substantial evidence in the record upon which a reasonable person could rely to make the same findings. *See* WIS. STAT. § 102.23(6); *Bretl*, 204 Wis. 2d at 100.

¶6 LIRC's interpretation and application of the non-traumatic mental injury standard established in *School Dist. #1* presents a question of law. *See Bretl*, 204 Wis. 2d at 100. When reviewing legal conclusions drawn by LIRC, we apply a sliding scale of deference that is contingent upon the level of LIRC's expertise, technical competence and specialized knowledge. *See id.* at 104. The great weight standard is the highest degree of deference granted an administrative agency's conclusion of law or statutory interpretation; it is used when the agency's experience, technical competence and specialized knowledge assist the agency in its interpretation and application of the statute. *See Ide v. LIRC*, 224 Wis. 2d 159, 166, 589 N.W.2d 363 (1999). In Highman's initial brief, he questions the degree of expertise LIRC has about a police officer's day-to-day life, but appears to agree with the respondents that the great weight standard of review is appropriate in this case. In his reply brief, Highman states that this court owes no deference to LIRC's unreasonable conclusion of law. The two statements are compatible; even if we choose to apply the great weight standard of review, we will refuse to uphold LIRC's conclusions of law if they are unreasonable.

¶7 Other cases interpreting and applying the *School Dist. #1* standard have applied the great weight standard of review. *See Bretl*, 204 Wis. 2d at 105; *Probst v. LIRC*, 153 Wis. 2d 185, 190-92, 450 N.W.2d 478 (Ct. App. 1989). We see no reason to apply a different standard, particularly in light of Highman's apparent concession that the great weight standard should apply. Accordingly, we will apply the great weight deference standard, which requires us to uphold LIRC's interpretation and application of a statute unless it is unreasonable. *See*

*Secor v. LIRC*, 2000 WI App 11 ¶15, 232 Wis. 2d 519, 606 N.W.2d 175. An unreasonable interpretation of a statute is one that directly contravenes the words of the statute, is clearly contrary to legislative intent or is otherwise without rational basis. *See id.*

## DISCUSSION

### A. Factual Determinations

¶8 Although the facts are somewhat lengthy, we recite them in some detail in order for the reader to understand the basis for Highman's claim. LIRC found that several incidents led to Highman's mental injury. First, on January 27, 1991, Highman was involved in an altercation with an alleged domestic batterer, during which Highman used deadly force to subdue the man. Specifically, Highman hit the man four times on the head with a stainless steel flashlight, causing a head injury that required forty-three stitches.<sup>6</sup> After the incident, Highman contacted Sheriff Robert Zebro to report that he had used deadly force.

¶9 In the days that followed, an undersheriff investigated the incident and concluded that Highman may have unnecessarily used deadly force. He reported his findings to the sheriff and the corporation counsel. The undersheriff also recommended that an independent investigator be appointed to conduct an impartial review of the matter, but none was ever appointed. Highman met with Zebro on January 30 and was notified that he was being suspended with pay<sup>7</sup> for possibly using deadly force unnecessarily and that the department would continue

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<sup>6</sup> The injured man recovered and in fact was taken to jail immediately after seeing the doctor at the hospital.

<sup>7</sup> In April 1991 his suspension with pay was changed to suspension without pay.

its investigation. Highman was also asked to give a statement at a meeting scheduled for February 6, but he deferred to his report, offering no further elaboration.

¶10 Thereafter, the sheriff's office referred the matter to the district attorney's office for possible prosecution. In July, a special prosecutor charged Highman with a felony, but the charge was ultimately dismissed.

¶11 During the course of the criminal litigation, Highman also pursued arbitration concerning his suspension. An arbitrator's decision issued in February 1992 exonerated Highman and directed that he be reinstated with back pay. Highman returned to work on March 14, 1992.

¶12 During the eleven months that Highman was suspended from work, he thought his career was over. He had difficulty sleeping and eating. He had no money and sold many of his possessions to exist. He was worried about returning to work. He did not believe that his fellow officers would help him, back him up, and cover him in tense situations. Although when Highman returned to work Zebro assured him that he would be starting with a clean slate, Highman continued to be apprehensive.

¶13 On June 20, 1992, Highman was confronted with another situation involving an alleged batterer. Highman was dispatched to a farm to address a domestic dispute after an elderly woman claimed that her son physically abused her. Highman interviewed the woman at the scene, and she told Highman that her son was in the field. Highman radioed for backup and proceeded to the field. Although Highman later testified that he was afraid to act on his training and afraid to engage the suspect for fear of being disciplined or prosecuted, he nevertheless confronted the suspect. A physical altercation ensued, during which

Highman was kicked and scratched repeatedly. He eventually subdued the suspect and, with the help of a fellow officer, placed him in the squad car. Highman recommended to the district attorney that the suspect be charged with assault of a police officer, resisting arrest, disorderly conduct and felony battery to a person over the age of sixty-five.

¶14 Shortly after the June 20 incident, Highman met with his attorney and explained what happened. He told the attorney that he failed to perform his duties in this instance because he should have made use of “take-down” maneuvers and his police training when dealing with the suspect. The attorney recommended that Highman see a psychiatrist.

¶15 Highman met with a psychiatrist on July 16. The psychiatrist noted that Highman was having difficulty since his return to work and that he felt antagonism from his fellow officers and was afraid to do his law enforcement job. Highman expressed vivid memories of the 1991 incident that led to his suspension. The psychiatrist diagnosed Highman with post-traumatic stress disorder (PTSD). After an appointment on July 29, the psychiatrist noted that Highman had not deteriorated any further and that at times Highman experienced “traces of his old self[-]confidence.” The psychiatrist did not recommend that Highman remove himself from the work place and did not place any restrictions on Highman’s ability to work.

¶16 A final incident on October 22 led to Highman’s retirement from his job. Highman met with the assistant district attorney who was handling the prosecution of the June 20 incident. The assistant district attorney informed Highman that he was not going to charge the suspect with a felony. This news greatly upset Highman. He later testified that it was at this point that he

“snapped.” Shortly thereafter, he notified the sheriff that he was relieving himself of duty until further notice because he was no longer “psychologically able” to perform his job duties. He then contacted his psychiatrist by telephone. Medical records established that this was Highman’s first contact with the psychiatrist since the July 29 office visit.

¶17 Highman met with his psychiatrist on October 30. The psychiatrist noted that until the incident with the assistant district attorney, Highman had been doing fairly well. The psychiatrist advised Highman to remain off work and ordered further psychological testing. Thereafter, Highman continued to suffer sleep disturbances and experienced “brief, vivid memories” of work incidents. Highman began taking Prozac in December 1992, which seemed to improve his outlook and attitude. However, he continued to experience “post-traumatic stress symptoms.” The psychiatrist continued to treat Highman and transferred his case to another psychiatrist in June 1994.

¶18 The second psychiatrist confirmed the PTSD diagnosis, citing the two violent episodes in January 1991 and June 1992 and Highman’s ongoing symptoms that included intrusive recollections, hypervigilance, hyperarousal and avoidant numbing symptoms. The psychiatrist expressed the opinion that Highman’s inability to work as a police officer was permanent and that the disability that prevented him from working was the direct result of his employment as a deputy sheriff.

¶19 On appeal, Highman does not argue that the record lacks any credible and substantial evidence to support any particular finding. Rather, his statement of the facts and his argument highlight facts that LIRC did not find.



Specifically, Highman argues that what happened to him was the result of Zebro's declared intent to terminate Highman. Highman argues:

Sheriff Zebro ... and the County Officials had determined to get rid of [Highman] based on the [January 1991] incident. The way in which the events unfolded, the extended lapse of time, the offers and threats for [Highman] to resign, the issuance of felony battery charges before the labor arbitration decision all result from the decision to get rid of [Highman]. This course of conduct motivated by the intent of getting rid of [Highman] created a stress of a greater dimension than the everyday stress of being a police officer.

¶20 The flaw in Highman's argument is that it ignores LIRC's rejection of his theory that there was a conspiracy to terminate him. LIRC concluded that it was not established that co-workers or supervisory personnel conspired to undermine Highman or his work. He never complained about any problems he was having once he returned to work. Further, LIRC found that the decision to pursue prosecution of the case rested with the district attorney and rejected the suggestion that charging Highman with felony battery was the employer's doing. LIRC also rejected the assertion that there was a conspiracy or plan to "get rid of" Highman. LIRC observed:

[Highman] argues that the things that happened, and failed to happen, subsequent to the [January 1991] incident only make sense when they are understood as being done by Sheriff Zebro and Dunn County in furtherance of the express intent to use the [January 1991] incident as a means to get rid of the applicant. ... However, pointing out deficiencies in the investigation does not establish a conspiracy.

¶21 Thus, although Highman does not urge this court to overturn the factual findings, he bases his argument on facts not found by LIRC. This approach is not consistent with our standard of review and we therefore reject it.

Whether Highman experienced extraordinary stress must be examined in light of LIRC's findings.

## B. Legal Conclusions

¶22 LIRC concluded that the stress leading to Highman's injury did not meet the standard established in *School Dist. #1*, which held that to be compensable, non-traumatic mental injuries

must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under [the Workers' Compensation Act] be found.

*Id.* at 377-78. LIRC concluded that two altercations, an investigation occurring because of an admitted use of deadly force and a prosecutor's decision to charge a suspect with a misdemeanor rather than a felony, do not constitute extraordinary stress and strain in the job of a small town police officer. LIRC also concluded that while criminal charges against an officer are not common, they do happen and are not extraordinary.

¶23 On appeal, Highman presents two primary arguments. First, he argues that Zebro's intent to terminate Highman made the incident extraordinarily stressful. He states:

Prompt, proper and fair investigation and resolution of the issues raised by Steve Highman's use of deadly force in subduing [the January 1991 suspect] would not subject him to extraordinary stresses for a police officer.

Instead what happened to [Highman] was very different. What happened to him was not the result of well meaning

bumbling of small town officials, but instead resulted from Sheriff Zebro's declared intent to terminate [Highman] from the Department based on an investigation which merely raised the possibility that his use of force was excessive.

If someone's out to get you, it's a stress of a greater dimension than the day-to-day stresses of the job of being a police officer.

¶24 As noted earlier, LIRC rejected Highman's assertion that there was a conspiracy to terminate him. Nonetheless, Highman argues that he is not asking this court to make any findings of fact contrary to those LIRC made: "Sheriff Zebro immediately made up his mind to get rid of [Highman]. This is not a conspiracy theory. This is Sheriff Zebro's declared intention." LIRC refused to make that finding of fact:

There is no credible evidence that [Highman] was unfairly criticized or reprimanded or disciplined by Sheriff Zebro between his return in March [1992] and the incident in June, or June to October 1992 when he spoke with the [District Attorney]. This is not to say the applicant didn't believe there was antagonism, but it was not established.

Our independent review of the record convinces us that the factual findings must be upheld because there is credible and substantial evidence in the record upon which a reasonable person could rely to make the same findings. *See* WIS. STAT. § 102.23(6); *Bretl*, 204 Wis. 2d at 100. Thus, because there was no finding that Zebro intended to terminate Highman, we must reject Highman's entire argument that this alleged intention subjected him to extraordinary stress.

¶25 Highman's second argument is that the filing of criminal charges against a police officer for an alleged offense while performing his or her duties is an unusual and highly stressful event for an officer. LIRC rejected this argument, concluding that while criminal charges against an officer are not common, they do

happen and are not extraordinary. LIRC's conclusion will be sustained on appeal unless it is unreasonable. See *Secor*, 2000 WI App at ¶15.

¶26 There was testimony from two experts on whether the filing of criminal charges against a police officer for an alleged offense while performing his duty is an unusual and highly stressful event. Highman offered the testimony of Dennis Forjan, and the employer and insurance carrier offered the testimony of Edward Nowicki. LIRC found persuasive Nowicki's testimony that the issuance of criminal charges against an officer, while not common, does happen and is not extraordinary. It is the function of LIRC, and not the reviewing court, to determine the credibility of the witnesses and to weigh the evidence. See *Applied Plastics, Inc. v. LIRC*, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). It was reasonable for LIRC to conclude that filing criminal charges against a police officer for an alleged offense while performing his duty is not an extraordinary event, especially when LIRC had the benefit of testimony of an expert on that issue.

¶27 In summary, we have no quarrel with LIRC's legal conclusion that under the facts of this case Highman's non-traumatic mental injury did not meet the standards of *School Dist. #1*. LIRC's interpretation and application of the *School Dist. #1* standard is reasonable and must therefore be upheld on appeal.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

