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**DISTRICT I/IV**

February 25, 2019

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2018AP416

Margaret Bach v. LIRC (L.C. # 2017CV6902)

Before Sherman, Blanchard and Fitzpatrick, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Margaret Bach appeals a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) to deny Bach's claim for worker's compensation benefits.

After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We summarily affirm.

Bach applied for worker's compensation benefits for an injury she sustained on October 5, 2011. The injury occurred while Bach was assisting her disabled son, Aaron, with entering his grandparents' home, where he was to spend the night. At the time of the injury, Bach was paid from a combination of federal, state, and county funds to provide 24-hour care for Aaron. Aaron also had a court-appointed corporate guardian. Pursuant to a court order entered in October 2010, Aaron was required to be placed in a community-based residential facility (CBRF), but remain at Bach's residence until the guardian could locate a facility.

Prior to August 2011, Bach was paid \$360 per day, or \$15.00 per hour, to care for Aaron. Bach received notification in August 2011 that, effective August 25, 2011, her pay would be reduced to \$100 per day. Bach testified before the Division of Hearings and Appeals that she was told by an employee of Aaron's corporate guardian that her daily pay was reduced because Aaron lived at her house. According to Bach, the employee stated that if Aaron did not sleep at Bach's house, Bach would still be entitled to the pay rate of \$15.00 per hour for Aaron's care. Bach decided, after receiving this information, to have Aaron spend his nights at his grandparents' house. On the morning of October 5, 2011, Bach sent an email to Aaron's guardian stating that "[r]ather than let our understaffed home situation get to the point of living out of our car, I have moved Aaron out of his home today." On that same day, Bach injured her elbow while helping Aaron walk to the basement entrance of his grandparents' home. Bach

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

applied for worker's compensation benefits, and her application was denied after a hearing before the Division of Hearings and Appeals, on the basis that Bach's injury was "not growing out of and incidental to her employment." Bach appealed to LIRC, and LIRC affirmed the Division's decision. Bach then petitioned the circuit court for judicial review. The circuit court upheld LIRC's determination.

Bach now appeals, arguing that she was acting within the scope of her employment at the time of her injury and is entitled to worker's compensation benefits. On appeal, this court reviews the decision of LIRC and not that of the circuit court. *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. Deciding whether an employee is acting within the course of his or her employment for worker's compensation purposes is a mixed question of law and fact. *Town of Russell Volunteer Fire Dep't v. LIRC*, 223 Wis. 2d 723, 729, 589 N.W.2d 445 (Ct. App. 1998). The conduct of the employee presents questions of fact. *Id.*, at 729-30. LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). Any legal conclusion drawn by LIRC from its findings of fact is a question of law. *Id.*

Whether Bach is entitled to worker's compensation benefits hinges on whether, at the time of injury, Bach was "performing service growing out of and incidental to" her employment. WIS. STAT. § 102.03(1)(c)1. "Generally, service is considered incidental to employment when 'its performance inured to the benefit of the employer.'" *Begel v. LIRC*, 2001 WI App 134, ¶10, 246 Wis. 2d 345, 631 N.W.2d 220 (quoted source omitted). An employee may not recover for an injury that occurred while doing work entirely different from what was assigned, against

orders, and for the employee's own benefit. *Kosteczko v. Industrial Comm'n*, 265 Wis. 29, 30–31, 60 N.W.2d 355 (1953).

In this case, LIRC found that Bach made the change in Aaron's sleeping arrangements solely for her own benefit, and not for the benefit of her employer, whether her employer was considered to be Aaron or his guardian. LIRC also found that Bach's intention in moving Aaron was to keep receiving the higher pay rate for herself and her expenses. Accordingly, LIRC concluded that Bach was engaged in a deviation from employment when she was injured and that, pursuant to WIS. STAT. § 102.03(1), the injury was not compensable.

The record contains credible and substantial evidence to support LIRC's findings of fact. It is undisputed that, at the time of her injury on October 5, 2011, Bach did not have guardianship over Aaron. Bach testified that she did not seek permission to move Aaron to his grandparents' house, and did not notify his guardian about the move until the morning of October 5, 2011. It is also undisputed that, at the time Bach was injured, there was a circuit court order in effect that stated, "placement shall continue in the home of Margaret Bach until an appropriate CBRF that is willing to accept [Aaron Bach] is found." At the worker's compensation hearing before the Division of Hearings and Appeals, Bach acknowledged that she was aware of the court order. Bach also testified that she made the decision to have Aaron sleep nights at his grandparents' house so that she could still be paid the \$15.00 per hour that she previously had received for Aaron's care.

LIRC's findings of fact that Bach acted for her own benefit, and not for the benefit of her employer, are conclusive on appeal. See WIS. STAT. § 102.23(6). Applying those findings to the applicable statute, WIS. STAT. § 102.03(1)(c)1., we conclude that Bach was not "performing

service growing out of and incidental to” her employment when she was injured on October 5, 2011, and, therefore, is not entitled to worker’s compensation benefits.

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeal*