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DISTRICT II

November 24, 2021

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
Electronic Notice

Paul R. Riegel
Electronic Notice

Melody Lorge
Clerk of Circuit Court
Sheboygan County
Electronic Notice

Jody J. Schmelzer
Electronic Notice

Steven C. Kilpatrick
Electronic Notice

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

2020AP1916

Dickow Cyzak Tile Co., Inc. v. LIRC (L.C. #2019CV664)

Before Gundrum P.J., Neubauer and Grogan, 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).

The Labor and Industry Review Commission (LIRC) and Work Injury Supplemental Benefit Fund (Fund) appeal from an order of the circuit court reversing LIRC's decision ordering Dickow Tile Cyzak Co., Inc. (Dickow) to pay the Fund death benefits pursuant to WIS. STAT. § 102.49(5)(a)-(b) (2019-20).¹ LIRC and the Fund contend that, based on the plain language of these statutory provisions, the Fund is entitled to the death benefits because a Dickow employee

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

who had no dependents died as a result of a work-related injury. Dickow and its insurer, Acuity Insurance Company (Acuity), contend that WIS. STAT. § 102.58² precludes such payments because the employee was under the influence of alcohol and drugs, in violation of Dickow’s policies, at the time of the accident that resulted in his injury and death. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree with LIRC and the Fund, reverse the circuit court’s order, and affirm LIRC’s decision.

This case requires us to interpret and apply statutes, based upon an undisputed set of facts, which are matters of law we review de novo. *State v. Carter*, 2010 WI 77, ¶12, 327 Wis. 2d 1, 785 N.W.2d 516.

Chapter 102 of the Wisconsin Statutes deals with “Worker’s Compensation,” and WIS. STAT. § 102.49 in that chapter addresses “Additional death benefit for children, state fund.” Section 102.49(5) specifically deals with payments to the state fund:

(a) In each case of injury resulting in death, the employer or insurer shall pay into the state treasury the sum of \$20,000.

(b) In addition to the payment required under par. (a), in each case of injury resulting in death leaving no person dependent for support, the employer or insurer shall pay into the state treasury the amount of the death benefit otherwise payable, minus any payment made under [WIS. STAT. §] 102.48(1), in 5 equal installments with the first installment due as of the date of death.

² The Wisconsin Legislature revised both WIS. STAT. §§ 102.49 and 102.58 earlier this year. *See* 2021 Wis. Act 29, §§ 16-20. WISCONSIN STAT. § 102.03(4) provides that, with certain exceptions that do not apply here, “[t]he right to compensation and the amount of the compensation shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury.” Thus, we analyze §§ 102.49 and 102.58 as they were on the date of the injury, May 19, 2017.

....

(e) The adjustments in liability provided in [WIS. STAT. §§] 102.57, 102.58, and 102.60 *do not apply* to payments made under this section.

(Emphasis added.)

WISCONSIN STAT. § 102.58 provides in relevant part:

If injury is caused by the failure of the employee to use safety devices that are provided in accordance with any statute, rule, or order of the department of safety and professional services and that are adequately maintained, and the use of which is reasonably enforced by the employer, or if injury results from the employee's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employee and of which the employee has notice, the compensation and death benefit provided in this chapter shall be reduced by 15 percent but the total reduction may not exceed \$15,000. *If an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefits shall be payable to the injured employee or a dependent of the injured employee.*

(Emphasis added.)

Peter T. Marsalek was employed by Dickow. While on duty and operating a vehicle owned by Dickow, he was under the influence of alcohol and drugs, caused an accident, and died as a result. Marsalek's operation of the vehicle while under the influence was in violation of Dickow's drug and alcohol policy. He had no dependents.

WISCONSIN STAT. § 102.49(5)(a) provides that "in each case" where an employee's injury results in death, "the employer or insurer shall pay into the state treasury the sum of \$20,000." Paragraph (b) provides that in addition to this payment, "in each case" where an injury results in death and no person is left dependent for support, "the employer or insurer shall pay into the state treasury the amount of the death benefit otherwise payable." Sec. 102.49(5)(b). Because Marsalek was an employee whose injury resulted in his death and he had no dependents at the

time, these provisions entitle the Fund to the death benefits it seeks from Dickow and Acuity based upon Marsalek's death.

The Fund applied to collect the death benefit payments for Marsalek. Dickow and Acuity denied the application, claiming, as they also do on appeal, that WIS. STAT. § 102.58 precludes the payments because it reads in part—as Dickow and Acuity write it on appeal—“[i]f an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefit shall be payable.”

Egregiously, Dickow and Acuity leave out of their appellate briefing—repeatedly—the remainder of the relevant sentence of WIS. STAT. § 102.58. The full sentence reads: “If an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefit shall be payable *to the injured employee or a dependent of the injured employee.*” Sec. 102.58 (emphasis added). This emphasized language, which we can only conclude Dickow and Acuity omitted intentionally, shows that, as relevant to this case, the plain language of this sentence was intended to and does only operate to preclude death benefits to “a dependent” of the injured employee. The Fund, quite obviously, is not a dependent of Marsalek and thus this provision of § 102.58 does not operate to preclude the death benefits to which the Fund is legally entitled under WIS. STAT. § 102.49(5)(a)-(b).

As if that is not clear enough—and it is—WIS. STAT. § 102.49(e) leaves no question the Fund is entitled to the death benefit payments as it specifically provides that “[t]he adjustments in liability provided in [WIS. STAT. §§] 102.57, 102.58, and 102.60 *do not apply* to payments

made under this section.” (Emphasis added.) Thus, subsec. (e) removes any possible doubt that § 102.58 does not preclude payments to the Fund under § 102.49(5)(a)-(b).

IT IS ORDERED that the order of the circuit court is summarily reversed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals