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**DISTRICT II**

January 9, 2013

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

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2012AP1858-FT

County of Washington v. LIRC (L.C. # 2012CV197)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

The County of Washington and Cannon Cochran Management (collectively, “the County”) appeal from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) awarding worker’s compensation benefits to Daniel R. Brawn for a nontraumatic mental injury. Pursuant to a presubmission conference and this court’s order of September 11, 2012, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2009-10).<sup>1</sup> Upon review of those memoranda and the record, we affirm the order of the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version.

On May 8, 2008, Brawn was employed as a deputy sheriff for Washington County. He was assigned to investigate an individual later identified as Marc Rosario, who was acting irrationally. Brawn believed that Rosario was demonstrating some type of mental illness that did not appear to be drug or alcohol induced. Accordingly, he and another deputy transported Rosario to St. Joseph's Hospital in Washington County.

At the hospital, another deputy, Adam Winkler, discovered a wallet in Rosario's possession containing several items, including a small foil packet. Winkler asked Brawn what he thought the packet was, and Brawn answered that it appeared to be some kind of a bandage. Neither deputy confiscated the wallet or the packet inside it. Rosario later regained possession of both before leaving the hospital.

At the conclusion of the hospital examination, Rosario was cleared to be transported to Winnebago Mental Health Center. Deputy Jeffrey Schwitz assisted Brawn with Rosario's transport. While driving to the mental health institute, Rosario obtained possession of the foil packet in his wallet, which concealed a miniature scalpel. Rosario used the miniature scalpel to administer wounds to his neck. When Schwitz saw blood on Rosario's face and neck, he drove to the Winnebago County Sheriff's Department. Schwitz and Brawn attempted to administer first aid to Rosario. Paramedics then arrived and took over Rosario's care. Despite these efforts, Rosario died from his self-inflicted wounds.

After the incident of May 8, 2008, Brawn continued his employment with the Washington County Sheriff's Department. However, he sought psychological treatment for what he had observed and was diagnosed with posttraumatic stress disorder. Eventually, Brawn left work and filed an application for workers compensation benefits.

Following a hearing on the matter, an administrative law judge awarded workers compensation benefits to Brawn for a nontraumatic mental injury. LIRC affirmed the decision, concluding that the May 8, 2008 incident was an event “unexpected and unforeseen” and “so out of the ordinary from the countless emotional strains and differences” that deputy sheriffs encounter daily without serious mental injury. The circuit court affirmed the decision of LIRC, and this appeal follows.

On appeal, we review LIRC’s decision and not the decision of the circuit court. *Pick ‘n Save Roundy’s v. LIRC*, 2010 WI App 130, ¶8, 329 Wis. 2d 674, 791 N.W.2d 216. We will uphold LIRC’s findings of fact so long as they are supported by credible evidence in the record. *See id.*

When reviewing an agency’s conclusions of law, “we apply a sliding scale of deference that is contingent upon the level of [LIRC’s] experience, technical competence, and specialized knowledge.” *Epic Staff Mgmt., Inc. v. LIRC*, 2003 WI App 143, ¶15, 266 Wis. 2d 369, 667 N.W.2d 765 (quotation omitted). Although the parties differ as to the appropriate level of deference in this case, we conclude that great weight deference is warranted due to LIRC’s experience in making value judgments when determining whether a claimant has suffered a compensable mental or emotional injury pursuant to WIS. STAT. § 102.01(2)(c). *See Bretl v. LIRC*, 204 Wis. 2d 93, 105, 553 N.W.2d 550 (Ct. App. 1996).

The County first contends that LIRC erroneously relied on a finding of fact not supported by credible evidence. Specifically, it cites a sentence from LIRC’s decision that states that Brawn “returned to Mr. Rosario his wallet containing the surgical knife with which he killed himself, which both [Brawn] and his expert acknowledged was a mistake.” According to the

County, this finding is not supported by the record. It therefore asks that LIRC's decision be set aside.

We decline to set aside LIRC's decision on the basis of the alleged erroneous finding of fact. Although Brawn may not have directly returned the wallet to Rosario, he did testify that he "let Rosario's wallet go back in his pants pocket." He further acknowledged that by not taking the personal effects of a person in custody, he violated department policy.<sup>2</sup> Thus, regardless of whether Brawn directly returned the wallet to Rosario or simply let the wallet go back in Rosario's pants pockets, Brawn was responsible for Rosario possessing the miniature scalpel used to kill himself. As a result, LIRC could properly use the word "mistake" to describe Brawn's participation in the events leading to Rosario's death.

The County next contends that Brawn did not experience an event that was so unexpected and unforeseen that it constituted unusual stress of greater dimensions than the day-to-day emotional strain and tension experienced by similarly situated employees. It submits that this case is analogous to *Bretl*, 204 Wis. 2d 93, where this court upheld LIRC's determination that a police officer did not sustain a compensable mental injury caused by his shooting of an armed suspect. *Id.* at 106-07. It further submits that the grisliness of the scene was not unusual for someone in Brawn's position. Finally, it submits that an individual's feeling of guilt should not be a factor in determining whether there is a compensable mental injury.

The standard adopted by the Wisconsin Supreme Court for awarding workers compensation benefits in nontraumatic mental disability claims can be found in *School Dist. No.*

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<sup>2</sup> Brawn was later disciplined for the events involving Rosario.

*I v. DILHR*, 62 Wis. 2d 370, 215 N.W.2d 373 (1974). In that decision, the court held that to be compensable

mental injury nontraumatically caused 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 [WIS. STAT. ch. 102] be found.

*Id.* at 377-78.

Here, LIRC applied this standard and determined that Brawn had sustained a compensable mental injury. In doing so, it readily distinguished *Bretl*, noting that the police officer in that case was a member of the SWAT team and, thus, shooting a suspect in the line of duty was not outside the norm. It also explained how Brawn’s involvement with Rosario’s suicide was extremely grisly and out of the ordinary, which was supported by the testimony of Lloyd Uelmen, the former West Bend chief of police. Finally, it took into account Brawn’s feeling of responsibility, which is a proper factor to consider. See *International Harvester v. LIRC*, 116 Wis. 2d 298, 303, 341 N.W.2d 721 (Ct. App. 1983).

Reviewing LIRC’s decision, we are satisfied that it contains a reasonable application of this case’s facts to the *School District No. 1* test for nontraumatic mental injury. Accordingly, we affirm.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*