2001 DRAFTING REQUEST

Bill

Received: **12/06/2000**

Received By: **malaigm**

Wanted: **As time permits**

Identical to LRB:

For: **Bonnie Ladwig (608) 266-9171**

By/Representing: **Janine Hale**

This file may be shown to any legislator: **NO**

Drafter: **malaigm**

May Contact:

Addl. Drafters:

Subject: **Employ Priv - worker's comp**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Worker's compensation; injury due to intoxication or drugs

Instructions:

Redraft 99-4839/1

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	malaigm 12/06/2000	jdyer 12/07/2000		_____ _____			S&L
/1			jfrantze 12/08/2000	_____ _____	gretskl 12/08/2000	lrb_docadmin 09/05/2001	

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LRB-1337

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/?	malaigm	1 12/7 JLD	12/12/8	12/8			

FE Sent For:

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Malaise, Gordon

From: Hale, Janine
Sent: Tuesday, December 05, 2000 4:53 PM
To: Malaise, Gordon
Subject: Another drafting request

Gordon,

In addition to 1999 AB 72, Rep. Ladwig would also like to request a re-draft of 1999 LRB 4839. This draft was never introduced as a bill. It relates to worker's compensation; injury due to intoxication or drugs.

If you could send me a confirmation of this request, I would appreciate it. If you have any questions, please feel free to contact me.

Janine Hale

Janine Hale, Chief of Staff
Office of Representative Bonnie Ladwig
113 West, State Capitol
P.O. Box 8952
Madison, WI 53708
(608)266-9171
janine.hale@legis.state.wi.us

Malaise, Gordon

From: Kuesel, Jeffery
Sent: Tuesday, March 28, 2000 2:24 PM
To: Malaise, Gordon
Subject: FW: Ladwig request for draft of worker's compensation legislation

-----Original Message-----
From: Hale, Janine
Sent: Tuesday, March 28, 2000 2:12 PM
To: Kuesel, Jeffery
Subject: Ladwig request for draft of worker's compensation legislation

Jeff,

Since you are the managing attorney for General Govt., Business and Finance, I am sending this drafting request to you. Please feel free to refer it to the appropriate drafter.

Rep. Ladwig would like to draft legislation that would deny worker's compensation benefits to anyone who is injured on the job because they were intoxicated or under the influence of illegal drugs. This request is being spurred by the Oak Creek businessman who received benefits after losing his fingers to frostbite because he passed out in the cold after consuming too much alcohol (see attached article). Rep. Ladwig doesn't know if there are any legal ramifications for completely denying coverage or if it would be better to pursue this issue by raising the percentage reduction for intoxication.

It is not Rep. Ladwig's intention to introduce this legislation this session. She would just like to have a draft to work off of this summer and pursue the legislation in 2001.

If you have any questions or concerns, please feel free to contact me.

09CF5000.tif

Janine Hale

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Milwaukee Journal Sentinel March 15, 2000

Insurer must pay intoxicated man for lost fingers

Court of Appeals says Oak Creek businessman is entitled to worker's comp

By Jessica McBride
of the Journal Sentinel staff

An Oak Creek businessman whose hands froze when he passed out in subzero temperatures after downing at least four mixed drinks and ingesting diet pills should get tens of thousands of dollars in worker's compensation, the Wisconsin Court of Appeals ruled Tuesday.

The case of William E. Larsen concerns a state law on the books since the early 1970s that says employees injured on the job can't be denied worker's compensation benefits because they were intoxicated when injured. Under state law, benefits may be reduced by only 15% for intoxication.

Heritage Mutual Insurance Co. could end up paying Larsen, who lost all his fingers, almost $100,000 in benefits.

THE QUESTION

"Most people would say, 'How does that guy get paid?' "

THE ANSWER

It's a matter of law.

— Defense attorney Robert T. Ward

"Most people would say, 'How does that guy get paid?' " said Larsen's attorney, Robert T. Ward. But he said it's a matter of law.

"They (the insurance company) didn't establish that his intoxication caused any injury, and even if they had, it would have only resulted in a reduced benefit by 15 percent," Ward said. "There's certain circumstances where drinking is part of the job, like for salesmen, which is what he is. It's not unusual to have four or five drinks at a sitting while you're entertaining a customer."

In Larsen's case, there was no evidence he was entertaining a

...cont. next page

Milwaukee Journal Sentinel March 15, 2000

...cont. from prev. page

customer while he downed four to five mixed drinks at the Split Rock tavern in Tigerton, northwest of Green Bay, in January 1996.

After leaving the tavern, Larsen was attempting to enter a mobile home he and his wife owned in Tigerton — and used intermittently for business and personal reasons — when he "found himself passed out cold on a rapidly cooling mobile home floor," the appeals court decision said. Larsen contended he was in Tigerton to make a sales call nearby the following day.

It was reasonable to conclude, the appeals court found, that Larsen's injury was related to his work because his work had sent him to Tigerton, where temperatures were 25 degrees below zero. Larsen is co-owner of Larsen Laboratories Inc. in Oak Creek.

State law holds that worker's compensation claims require a finding that the job duties created a "zone of special danger" in which the injury occurred. Where traveling employees such as Larsen are concerned, the law presumes that the employee is essentially always on the job, unless the injury occurred when the employee "deviated" from the business trip for a personal reason.

The insurance company argued that Larsen should get no benefits at all because he "deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol before arriving at his mobile home." The administrative law judge agreed, ruling that the "zone of danger" that caused Larsen's injury was created by Larsen's own decision to drink alcohol — what the judge called a "personal deviation" from Larsen's business.

But the state Labor and Industry Review Commission, Milwaukee County Circuit Judge Michael Malmstadt and the appeals court found that Larsen's drinking did not qualify as a deviation. The commission ruled — and the courts agreed — that the zone of danger was created by the business trip that sent him into the frigid area.

The commission ruled that Larsen's benefits should receive the 15% reduction because his "intoxication was a substantial factor in causing" his frostbite injuries, and because "it is probable that he remained asleep for such an extended period due in part to his intoxication."

But Malmstadt ruled that Larsen should not face any reduction in benefits at all — and the appeals court agreed — because there was no evidence in the record that an intoxicated person is more likely to remain asleep.

"There is no evidence how the consumption of alcohol may affect sleeping patterns," the appeals court said. "Of further note is Larsen's habit of regularly indulging in four or five of the same type of drinks after work without ever having passed out."

The appeals court said the record does contain three medical reports "supporting the conclusion that he passed out because of ethanol abuse." The court said he consumed the alcohol in one hour and 45 minutes. But the court — which is limited to reviewing the lower court's application of the law — agreed it was reasonable to conclude that Larsen was visiting the mobile home for business purposes. It did note there was "also a suggestion in the record that, because of Larsen's less than tranquil married life, he drove to Tigerton because he was feuding with his wife."

Ward acknowledged that his client admitted ingesting diet pills and consuming four to five mixed drinks before he passed out. But he said Tuesday that definitive evidence of intoxication was never presented; the medical reports cited by the appeals court, he said, were not contemporaneous.

Ward also said it had never been firmly established what caused Larsen to pass out. He said Larsen had previous dizzy spells unrelated to drinking.

Officials at the insurance company and Richard Mueller, the company's attorney, declined to comment Tuesday, as did a man who answered the telephone at Larsen Laboratories.

A representative for Wisconsin Manufacturers & Commerce said Tuesday the group has unsuccessfully attempted to get the percentage reduction for intoxication raised.

"Fifteen percent seems fairly insignificant when a person willfully uses drugs or becomes intoxicated and injures themselves on the job," said James Buchen, vice president of the state's largest business advocate.

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

WILLIAM E LARSEN, Applicant

LARSEN LABORATORIES INC, Employer

HERITAGE MUTUAL INSURANCE CO, Insurer

WORKER'S COMPENSATION DECISION
Claim No. 96021617

The applicant submitted a petition for commission review alleging error in the administrative law judge's Findings and Order issued in this matter on August 18, 1997. Respondents submitted an answer to the petition and briefs were submitted by the parties. At issue are whether the applicant sustained an injury arising out of and in the course of his employment with the employer, and if so, nature and extent of disability, liability for medical expense, and a 30-day notice issue under Wis. Stat. § 102.12.

The commission has carefully reviewed the entire record in this matter, and after consultation with the administrative law judge regarding the credibility and demeanor of the witnesses, hereby reverses his Findings and Order. The commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The applicant, whose birthdate is July 16, 1941, is president and half owner of the employer, a small company which performs spectrographic analysis and physical testing of metals. The company is located in Oak Creek, Wisconsin, and the applicant and his wife, who is the other half owner of the company, reside in Cudahy. The applicant performed management and operational duties for the business, but his primary responsibilities were sales and computer programming. The company's customers are far flung so the applicant occasionally traveled, not only to see current customers but to solicit new ones.

In 1991, the applicant and his wife purchased forty acres of land near Tigerton, Wisconsin, and placed a mobile home on the land in 1992. Initially, the applicant used the land and mobile home solely for recreational purposes, as he is an avid hunter. However, in the fall of 1993, the applicant began using the mobile home as a company sales office, in addition to its recreational use. The applicant would use the trailer as a base from which to make sales calls, and also a quiet place to perform paperwork related to the business. The applicant also used the trailer as an occasional residence, when he and his wife were not getting along. He and his wife were divorced in 1983 and remarried in 1984.

On Wednesday, January 31, 1996, at approximately 12:30 p.m., the applicant left the company office in Oak Creek to drive to the trailer in Tigerton. He told his wife he planned to stay overnight there and then make a sales call on a prior customer, Aarrow Electric, located nearby in Shawano. He also

took some company paperwork with him, and planned to work on it in the trailer. It took him approximately three hours to drive to Tigerton. There he first bought some groceries, liquor, and feed corn to give to the deer, and then went to a tavern. He had four or five drinks of whiskey and diet coke, something he did after work four or five nights per week. He had also taken a couple of Dexatrim diet pills. He then drove directly to the trailer where he intended to fix a pizza and work on sales.

It was approximately 25 degrees below zero when the applicant reached the trailer. He was unable to open the trailer door, because the key he was using was a copy made from his wife's keys. He had lost his keys while bow hunting the previous December. He also found himself feeling dizzy and suffering from a slight headache. After unsuccessfully attempting to push and pry the door open, he broke a small, plastic window in the door and reached through it to turn the lock from the inside. The applicant does not recall what happened next, until he woke up at about 8:45 a.m. the following morning, lying on the floor next to the door. The door and storm door were open about one foot, and the applicant's fingers and toes were frostbitten.

The applicant's wife had been attempting to telephone him, and finally got him to answer the phone when he woke up. She knew he did not sound well when she talked to him, so she telephoned a neighbor, Wally Seefeldt, and asked him to go over and check on the applicant. Seefeldt and his wife found the applicant awake. They made coffee for him and talked to him in the kitchen of the trailer. At that time, the applicant told Seefeldt he had come up to Tigerton to go to Aarrow Electric. The Seefeldts took the applicant to the hospital, and ultimately all the applicant's fingers and most of each thumb were amputated due to the frostbite which caused gangrene.

The credible evidence leads to the inference that the applicant's purpose in going to Tigerton on January 31, 1996, was business related. The applicant had recently discussed his company's service prices with a representative of Aarrow Electric, as verified by the applicant's testimony and a copy of a letter from him to Aarrow Electric dated January 26, 1996. The applicant's company needed to obtain a technical certification before it could restart business with Aarrow Electric, but the applicant credibly testified that his company would not obtain such certification unless it had business from a customer which required it. Furthermore, the commission infers that it is unlikely that absent a business purpose, the applicant would have driven the significant distance to Tigerton at that time of year and in such severe weather. The applicant credibly testified that he had not been fighting with his wife and that he never hunted at that time of year. Had he been concerned about the condition of his trailer, Mr. Seefeldt was a phone call away, and testified that he had a key to the trailer. In fact, the applicant telephoned Mr. Seefeldt the morning of January 31, 1996, and asked him to plow out the driveway to the trailer, in anticipation of his arrival.

Accordingly, on January 31, 1996, the applicant was a traveling employe pursuant to Wis. Stat. § 102.03(1)(f). That statute provides that every traveling employe is covered for worker's compensation purposes at all times while on a trip, including all acts reasonably necessary for living or incidental thereto, except when engaged in a deviation for a private or a personal purpose. When injured, the applicant was simply attempting to enter his domicile for the night, an act reasonably necessary for living. Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger.

The fact that the applicant had a number of drinks prior to returning to the trailer does not defeat his

claim under Ch. 102. Regardless of any personal opinions one might have about the applicant's drinking habits, the fact is that he routinely drank as much as he did the evening of January 31, 1996, and when the accident and injury occurred the applicant was in the process of entering the trailer. Even were it to be found that the applicant had deviated from acts reasonably necessary for living by going to the tavern, a finding which the commission does not make, it would have to be found that the deviation had ceased by the time the applicant arrived at the trailer. As was stated in ***Lager v. ILHR Dept.***, 50 Wis. 2d 651, 185 N.W. 2d 300 (1971):

> "It is clear, as a matter of law, that, in the event a salesman commences travel in the course of his employment and subsequently deviates from that employment but later resumes his route which he would have to follow in the pursuance of his employer's business, the deviation has ceased and he is performing services incidental to and growing out of his employment."

Id. at 661.

While the applicant's drinking may or may not have contributed to his syncopal episode, even assuming that it did, intoxication alone does not defeat a worker's compensation claim but only decreases the benefits. ***Phillips v. ILHR Dept.***, 56 Wis. 2d 569, 579, 202 N.W.2d 249 (1972); ***Dibble v. ILHR Dept.***, 40 Wis. 2d 341, 350, 161 N.W.2d 913 (1968). The determinative fact in this traveling employe case is the fact that the applicant was performing acts reasonably necessary to living when his injury occurred.

The commission infers from the applicant's testimony concerning how much he drank at the tavern on January 31, 1996, that he was intoxicated. It additionally infers that this intoxication was a substantial factor in causing the applicant's frostbite injuries, because it is probable that he remained asleep for such an extended period due in part to his intoxication. Therefore, pursuant to Wis. Stat. § 102.58, all temporary disability and permanent disability awarded to the applicant will be reduced by 15 percent.

Although the respondents did not submit arguments to the commission concerning the 30-day notice issue under Wis. Stat. § 102.12, this issue was raised in the answer to the application. The commission finds that the circumstances of this injury were unusual enough that it is credible and reasonable that the applicant did not immediately understand that his injury was related to his employment. Regardless, there has been no showing that the employer was misled by the applicant's failure to give notice within 30 days of the injury.

The applicant's conceded average weekly wage is $576.92, which translates into a weekly temporary total disability rate of $384.62. The 15 percent reduction brings the temporary total disability rate to $326.93 per week. The medical opinions demonstrate temporary total disability from February 1, 1996 to the date the hearing was held on May 21, 1997, a period of exactly 68 weeks. Temporary total disability up to the date of hearing therefore amounts to $22,231.24, less $3,461.58 previously paid, for a net amount due of $18,769.66. A 20 percent attorney's fee will be subtracted from this award.

The applicant has also incurred reasonably required medical expenses as enumerated in Applicant's Exhibit E, requiring reimbursement of $44,809.33 to the nonindustrial insurance carrier, Family Health Plan, and $612.00 to Curative Rehabilitation Services.

Dr. Watchmaker's opinion leads to the credible inference that as of the hearing date, it was too early

to assess permanent disability, and that the order should be left interlocutory with respect to additional disability and medical care.

NOW, THEREFORE, this

INTERLOCUTORY ORDER

The administrative law judge's Findings and Order are reversed. Within 30 days from this date, the employer and its insurance carrier shall pay to the applicant compensation for temporary total disability in the amount of Fifteen thousand, fifteen dollars and seventy-three cents ($15,015.73); to applicant's attorney, Robert Ward, fees in the amount of Three thousand, seven hundred fifty-three dollars and ninety-three cents ($3,753.93); to Family Health Plan the sum of Forty-four thousand, eight hundred and nine dollars and thirty-three cents ($44,809.33); and to Curative Rehabilitation Services the sum of Six hundred, twelve dollars ($612.00).

Jurisdiction is reserved for such further findings and orders as may be warranted.

Dated and mailed: March 31, 1998
larsewi.wsd : 185 : 1 ND § 3.25 § 3.33

/s/ David B. Falstad, Chairman

/s/ Pamela I. Anderson, Commissioner

/s/ James A. Rutkowski, Commissioner

MEMORANDUM OPINION

The only issue of witness credibility entering into the commission's decision was the factual issue of what reason(s) the applicant had for traveling to his trailer in Tigerton on January 31, 1996. In consultation with the commission, the administrative law judge indicated that he was not entirely certain why the applicant took the trip, although he believed that it was probably taken both to check on the trailer and to call on Aarrow Electric.

The above findings detail the commission's reasons for concluding that the trip was a business trip. It should be noted that the administrative law judge found it significant that a nurse at the Shawano Medical Center on February 1, 1996, wrote in a clinic note: "Wife called. Pt. up in Shawano attending trailer." However, the applicant's wife denied that she told the nurse this, credibly indicating that she knew all along that the purpose of the applicant's trip was to visit Aarrow Electric, and that the nurse misunderstood what she told her.

cc: ATTORNEY ROBERT T WARD
SCHIRO & WARD

ATTORNEY SHAWN M EISCHORST
BORGELT POWELL PETERSON & FRAUEN SC

Appealed to Circuit Court. Affirmed in part (compensation allowed) and reversed in part (15% reduction reversed).

Circuit Court decision affirmed by Court of Appeals March 14, 2000, in a per curiam decision.

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COURT OF APPEALS

DECISION

DATED AND FILED

March 14, 2000

Cornelia G. Clark

Acting Clerk, Court of Appeals

of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* Wis. Stat. §808.10 and Rule 809.62.

No. 98-3577

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT I

Heritage Mutual Insurance Company and Larsen Laboratories, Inc.,

Plaintiffs-Appellants,

v.

William E. Larsen and Labor and

Industry Review Commission,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1. PER CURIAM.Heritage Mutual Insurance Company appeals from a final order of the circuit court, which confirmed the Labor and Industry Review Commission's (LIRC) determination that William E. Larsen sustained a compensable injury. Heritage also appeals the trial court's decision to reverse LIRC's determination that the award should be reduced by 15%.

¶2. Heritage claims that LIRC's decision was not reasonable given the evidence in the record. Because LIRC could reasonably conclude that Larsen sustained a compensable accidental injury in the course of his employment, we affirm.

I.BACKGROUND

¶3. This appeal concerns the application of Wis. Stat. §102.03(1)(f) (1997-98)[1] commonly referred to as the "traveling employee statute."[2] The basic facts in this appeal are not in dispute; the inferences drawn from the facts, however, are in dispute. We relate them in abbreviated form.

¶4. At the time that Larsen was injured, he and his wife jointly owned Larsen Laboratories, Inc. The company was engaged in the metal analysis business primarily for foundries. Among his other duties, Larsen was in charge of sales for the services provided by the company. Routinely, Larsen would contact customers by telephone and follow up, if necessary, with a personal visit to close a sale. This practice applied not only to current customers, but also to potential customers. On the date of the injury, January 31, 1996, Larsen and his wife owned a forty-acre tract of land near Tigerton, Wisconsin. They kept a mobile home on this lot, which was used for both recreational and business purposes.

¶5. On January 31st, Larsen left his company office in Oak Creek, Wisconsin, at approximately 12:30 p.m., with the intention of driving to the mobile home, staying overnight, and then, on the following day, calling upon a former customer, Aarow Electric, located in nearby Shawano, Wisconsin. Before Larsen left, he called his neighbor, Wally Seefeldt, and asked him to plough his driveway entrance. He took along some company paper work. The drive to Tigerton took approximately three hours. At approximately 3:30 p.m., Larsen arrived in Tigerton. He purchased some groceries at a Red Owl food store, purchased some shelled corn at the Tigerton Feed Mill to feed the wild life, and then stopped at the Split Rock tavern to relax. While there, Larsen consumed four or five mixed drinks, which was his normal daily practice. He arrived at the tavern at about 4:15 p.m. and left around 6:15 p.m. He then drove directly to the mobile home located three and one-half miles away. His intention was to prepare a pizza and then do some business paperwork. The temperature was approximately twenty-five degrees below zero.

¶6. On that same day, Larsen had started a diet, and had taken two Dexatrim pills: one in the morning and one at noon. Although Seefeldt had ploughed the mobile home's driveway, there remained about five inches of snow on the sidewalk and steps to the entrance of the mobile home. Initially, because of the accumulation of snow, Larsen had difficulty opening the outer storm door. He was unable to unlock the inner door with a new key he recently had made. In his efforts to open the door, he began to feel dizzy. His dizzy condition was such that he became concerned that he might fall down. Larsen hit the door with a shovel, but it would not open. Finally, he broke a plastic window which allowed

hit the door with a shovel, but it would not open. Finally, he broke a plastic window which allowed him to reach in and open the door from the inside and push it open. The last thing Larsen remembers was being half in and half out of the doorway entrance. The following morning he woke up about 8:45 a.m., and found himself on the floor just inside the inner door. Both doors were partially open. It was cold and both his hands and feet hurt. Soon he received a telephone call from his wife and, shortly thereafter, his neighbors, the Seefeldts, showed up at his door. After some discussion and reluctance, Larsen allowed the Seefeldts to take him to the Shawano Medical Center. As a result of this incident, all of his fingers and most of each thumb had to be amputated because of frostbite.

¶7. Larsen filed a worker's compensation claim for indemnity and expenses. An administrative law judge found that although Larsen was engaged in a business trip at the time of his injuries, he nevertheless had entered a zone of danger not created by the condition of employment, but rather a personal deviation, which did not entitle him to benefits. Larsen appealed to LIRC.

¶8. LIRC overruled the ALJ decision and found that the evidence led to the inference that Larsen's purpose in going to Tigerton on the date of the accident was business-related. It concluded that the zone of special danger; i.e., exposure to cold weather, was occasioned by reason of employment activity. LIRC further found that Larsen was intoxicated and that this condition was a substantial factor in causing his injuries. Pursuant to Wis. Stat. §102.58, it reduced Larsen's indemnity benefits by 15%.

¶9. Heritage petitioned for a review of LIRC's decision in circuit court. The circuit court affirmed LIRC's decision awarding Larsen benefits, but reversed its decision to reduce the benefits by 15%. Heritage now appeals the award of benefits; Larsen argues that LIRC's 15% reduction of his award was unwarranted.

II.ANALYSIS

¶10. In reviewing a determination of LIRC, this court's scope of review, both as to facts and the law, is the same as that of the circuit court. *See C.W. Transport, Inc. v. LIRC*, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986). The validity of the circuit court decision is not at issue, because the task of this court is merely to determine whether LIRC's decision was correct. *See Langhusv. LIRC*, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996).

¶11. Deciding whether or not an employee is acting within the course of his or her employment under the Worker's Compensation Act is a mixed question of fact and law for LIRC to decide. *See Ide v. LIRC*, 224 Wis. 2d 159, 164, 589 N.W.2d 363 (1999). The conduct of the employee that is placed in issue requires a finding of fact, and the application of the relevant statute to the conduct presents a question of law. *See id.* at 164-65.

¶12. When we are presented with a mixed question of fact and law in an administrative review, we employ the standard of review set forth in *Michels Pipeline Construction, Inc. v. LIRC*, 197 Wis. 2d 927, 541 N.W.2d 241 (Ct. App. 1995):

> LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence. The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. Any legal conclusion drawn by LIRC from its findings of fact, however, is a question of law subject to independent judicial review.

Id. at 931 (citation omitted).

¶13. For questions of law, we generally apply one of three levels of deference to the agency's conclusion: "great weight," "due weight," or no deference. For agency findings of fact, we apply the "substantial evidence" standard. *See Sea View Estates Beach Club, Inc. v DNR*, 223 Wis. 2d 138, 148, 588 N.W.2d. 667 (Ct. App. 1998). "Where great deference is appropriate, the agency's interpretation will be sustained if it is reasonable-even if an alternative reading of the statute is more reasonable." *Barron Elec. Coop. v. Public Serv. Comm'n*, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). We will also defer to an agency's interpretation "`if it is intertwined with value and policy determinations'" inherent in the agency's decision-making function. *See id.*

¶14. For findings of fact,

> The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the commission. We thus need not consider whether there was credible evidence that would have supported a contrary inference or conclusion.

Brickson v. DILHR, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

¶15. We conclude that it is proper to apply the great weight deference to LIRC's interpretation of Wis. Stat. §102.03(1)(f) in this case based upon the application of the four-factor test as enunciated in *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 572-73, 579 N.W.2d 668 (1998). That being the posture of our analysis, we shall affirm LIRC's interpretation of Wis. Stat. §102.03(1)(f) if it is reasonable; i.e., has a rational basis. *See id.* at 573.

¶16. Heritage proffers several bases for contending that LIRC erred. It first asserts that there is no support in the evidence for LIRC's finding that Larsen's purpose in going to Tigerton on January 31, 1996, was business-related. Relying on *Pressed Steel Tank Co. v. Industrial Comm'n*, 255 Wis. 333, 335, 38 N.W.2d 354 (1949), Heritage argues that this determination ought to be rejected as based upon assumed facts which were nonexistent. This assertion is based upon a year-old letter dated January 25, 1995, whereby Larsen requests the opportunity to bid on testing work for Aarow Electric of Shawano, Wisconsin. Heritage argues that this stale letter cannot be a reasonable basis to conclude that Larsen's trip was business-related. If that were the only evidence in the record relating to the drive to Tigerton, Heritage would win the day. But, it was not.

¶17. Aarow had been a customer of Larsen's and he wanted to re-acquire its business. It is uncontroverted that Larsen either called or visited Aarow every six months to a year in his effort to acquire Aarow as a customer. He needed to obtain a technical certification before he could restart business with Aarow; yet, the only way this could be achieved was to obtain an order from a customer that required certification. LIRC found this stratagem credible. In addition, LIRC, noting the severity of the weather, the length of the drive, that the neighbor Seefeldt had a key to the mobile home, that Larsen had, in fact, spoken to Seefeldt that morning to plough his driveway, and that he never hunted that time of year, inferred that the purpose of the trip was business-related.[3] We cannot conclude that LIRC's credibility-based findings and inferences drawn therefrom were unreasonable.

¶18. The second basis for Heritage's appeal is its disagreement with LIRC's conclusion that it failed to meet its burden to rebut the statutory presumption created in Wis. Stat. §102.03(1)(f). The statute creates a presumption that a traveling employee performs services incidental to his employment at all

creates a presumption that a traveling employee performs services incidental to his employment at all times on a business trip until he returns from the trip. *See CBS, Inc.*, 219 Wis. 2d at 578-79. To rebut the presumption, two requirements must be established: (1) a deviation by the employee from the business trip; and (2)such deviation must be for a personal purpose not reasonably necessary for living or incidental thereto. *See Hunter v. DILHR*, 64 Wis. 2d 97, 101-02, 218 N.W.2d 314 (1974). A determination of a deviation for private or personal purposes or of acts reasonably necessary for living or incidental thereto are questions of law. Nevertheless, these determinations call for a value judgment requiring a determination as to what extent we should substitute our evaluation for that of the administrative agency. *See Nottelson v. DILHR*, 94 Wis. 2d 106, 115-17, 287 N.W.2d 763 (1980). When the expertise of the administrative agency is significant to the determination of the legal question, the agency's decision, although not controlling, should be given weight and, in this case, great deference. *See CBS, Inc.*, 219 Wis. 2d at 572-73. Thus, we shall affirm LIRC's interpretation of Wis. Stat. §102.03(1)(f) if it is reasonable. *See CBS, Inc.*, 219 Wis. 2d at 573.

¶19. Heritage contends that LIRC's failure to find a deviation on Larsen's part is not "reasonable" because substantial evidence suggests that Larsen deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol before arriving at his mobile home. In succinct terms, Heritage argues that the evidence provides a clear rebuttal of the statutory presumption. We are not convinced.

¶20. The burden of proving a personal deviation by an employee on a trip is upon the party asserting the deviation. *See id.* at 579. Our supreme court has declared "that the effect to be given the presumption was primarily for [LIRC] to determine and that [an appellate court] would review [LIRC's] determination under the limited circumstances provided in the `any credible evidence' test." *Goranson v. DILHR*, 94 Wis. 2d 537, 552, 289 N.W.2d 270 (1980). Our task is only to decide whether LIRC properly concluded that the evidence relied upon by Heritage was insufficient to rebut the presumption.

¶21. LIRC found that, even if Larsen had deviated from acts reasonably necessary for living by going to the tavern, the deviation had ceased by the time he arrived at the mobile home. It opined that the determinative fact was that Larsen was performing acts reasonably necessary to living when his injury occurred. *See CBS, Inc.*, 219 Wis. 2d at 577. Larsen was trying to enter his domicile for the night when he was injured. LIRC's conclusion that Heritage did not meet its burden of overcoming the presumption is supported by credible evidence.

¶22. Next, Heritage asserts that our supreme court's decisions in *Sauerwein v. DILHR*, 82 Wis. 2d 294, 262 N.W.2d 126 (1978), *Hunter v. DILHR*, 64 Wis. 2d 97, 218 N.W.2d 314 (1974), *Dibble v. DILHR*, 40 Wis. 2d 341, 161 N.W.2d 913 (1968), *Tyrrell v. Industrial Comm'n*, 27 Wis. 2d 219, 133 N.W.2d 810 (1965), and *Simons v. Industrial Comm'n*, 262 Wis. 454, 55 N.W.2d 358 (1952), all require reversal as a matter of law. We disagree for a very fundamental reason. The determined facts in each of these decisions are so different from the facts of this case that we give no weight to their citation as authority to reverse.

¶23. Last, Heritage contends that LIRC erroneously applied the "positional risk analysis" when it concluded that Larsen's injury arose out of employment under Wis. Stat. §102.03(1). For the doctrine of "positional risk analysis" to apply:

> "...`all that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.' In other words, there is a causal connection between the employment and the injury

> where the employee is obligated by his employment to be present at the place where he encounters injury through the instrumentality of a third person or an outside force. Such cases include, among others, accidents arising from horseplay, weather conditions, and assaults."

American Motors Corp. v. Industrial Comm'n, 1 Wis. 2d 261, 273, 83 N.W.2d 714 (1957) (citations omitted).

¶24. In applying this doctrine, LIRC explained: "Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger."

¶25. In response, Heritage cites *Goranson*, where our supreme court upheld a denial of worker's compensation benefits where the dispute was whether the accident arose out of the driver's employment. *See id.*, 94 Wis. 2d at 555. Heritage relies upon the following language from *Goranson*: "An employee may wilfully do a wrongful act for purposes entirely foreign to his employment, and while so acting take himself without the scope of his employment.... Such a departure ... measured in terms of time and space, may be very slight." *Id.* (citations omitted).

¶26. In *Goranson*, the applicant, a charter bus driver, was injured after he drove a group of people to Green Bay. *See id.* at 541-42. In Green Bay, the driver checked into a hotel along with his passengers. *See id.* Later in the evening, he leaped from his third floor room onto the roof of another section of the hotel two floors below, sustaining a broken hip and other injuries. *See id.* There was evidence that he had been drinking throughout the evening with a woman and that he quarreled with her just before jumping. *See id.* at 556. Our supreme court declared, "The situation in which Mr. Goranson found himself was not one which was created by the risk of staying at the hotel." *Id.* at 557. By analogy, Heritage argues that the situation in which Larsen found himself-passed out cold on a rapidly cooling mobile home floor-was not created by the risk of going to Tigerton on a cold January day. A subsequent explication of *Goranson*, however, causes Heritage's analogy to limp.

¶27. In *Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 559 N.W.2d 588 (1997), the supreme court had occasion to refine *Goranson*. It stated:

> [T]he [*Goranson*] court determined that the accident did not arise out of the driver's employment, because the injuring force was purely personal to him.
>
> The facts of this case are distinguishable from those in *Goranson*. In *Goranson*, the bus driver's employment did not contribute to or facilitate the accident causing the injury he suffered jumping from the hotel window.

Id. at 108 (citation omitted).

¶28. Here, LIRC found that Larsen "[w]hen injured ... was simply attempting to enter his domicile for the night, an act reasonably necessary for living." Based on the record evidence, this was not an unreasonable finding and fulfills the requirement of Wis. Stat. §102.03(1)(f). Unlike Goranson, Larsen's plan to stay overnight in his mobile home in order to conduct business the following day, provided the occasion for the accident which caused the injury he suffered. Furthermore, there was no direct evidence that the "injuring force was purely personal to him." Larsen did not suffer any injury until after he sought shelter for himself for the evening, an activity, that under the circumstances, was

incidental to employment. Due to the nature of the evidence in the record and the lack of evidence to the contrary, it was not unreasonable for LIRC to infer that the business circumstances of Larsen's trip to Tigerton on January 31, 1996, caused him to be in the zone of special danger, whereby he was exposed to sub-zero temperatures.

¶29. The last issue is whether there is credible evidence in the record to support LIRC's finding that Larsen's intoxication was a substantial factor in causing his frostbite injuries. The employer bears the burden of proof to establish the fact of intoxication and that the injury was caused in part by intoxication to sustain a 15% reduction in compensation benefits under Wis. Stat. §102.58. *See Haller Beverage Corp. v. DIHLR*, 49 Wis. 2d 233, 237, 181 N.W.2d 418 (1970).

¶30. Larsen drank four or five mixed drinks within one hour and forty-five minutes, just before he drove to his mobile home. Because it was customary for him to engage in such a habit, Larsen claimed he was not intoxicated. Contrary to Larsen's assertion, the record contains three medical reports supporting the conclusion that he passed out because of ethanol abuse. We conclude there is support in the record for LIRC's finding that Larsen was intoxicated. The question of the causal link between intoxication and the injury, however, is quite another issue.

¶31. LIRC inferred that Larsen's "intoxication was a substantial factor in causing" his frostbite injuries, "because it is probable that he remained asleep for such an extended period due in part to his intoxication." The inferred determination of the existence of a substantial factor is a fact-finding process. Just as we can assume that the trial court determined a fact in a manner that supports the trial court's ultimate fact determination, *see Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960), so can we engage in the same process in reviewing the determinations of LIRC. But, we can only make that assumption when the evidence exists in the record to support the "assumed fact." If the record does not support the "assumed fact" then the finding of the "assumed fact" is clearly erroneous and cannot be sustained.

¶32. The trial court explicated:

> [T]he record does not contain any evidence that a person is more likely to remain asleep if he or she is intoxicated, the Commission just believed it to be probable. Furthermore, the record does not contain any evidence that if Larsen would not have remained asleep for such a long time he would not have received frostbite. At the time Larsen "passed out," the outside temperature was twenty-five degrees below zero. The Commission did not make a finding that Larsen's drinking contributed to his passing out.

There is no evidence how the consumption of alcohol may affect sleeping patterns. Of further note is Larsen's habit of regularly indulging in four or five of the same type of drinks after work without ever having passed out. LIRC did not discount this testimony. We adopt the trial court's analysis and decision, including the trial court's decision to overturn the reduction made by LIRC.

By the Court.-Order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)5.

1 All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

2 Wis. Stat. §102.03(1)(f) provides:

2 Wisconsin Stat. §102.03(1)(f) provides:

> Every employe whose employment requires the employe to travel shall be deemed to be performing service growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment.

3 There is also a suggestion in the record that, because of Larsen's less than tranquil married life, he drove to Tigerton because he was feuding with his wife. LIRC accorded this suggestion little weight.

-1337/1

1999 – 2000 LEGISLATURE

LRB-~~4839~~/1
GMM:~~wlj~~:km

jld

~~1999~~ BILL

AN ACT ***to amend*** 102.58; and ***to create*** 102.03 (1) (dm) of the statutes; **relating to:** adding as a condition for worker's compensation liability a condition that the ~~employe's~~ injury not result from the intoxication of the ~~employe~~ by alcohol beverages or use of a controlled substance or a controlled substance analog.

Analysis by the Legislative Reference Bureau

Under current law, an employer is liable for worker's compensation only when an ~~employe~~ of the employer sustains an injury while performing services growing out of and incidental to ~~his or her~~ employment, the accident or disease causing the ~~employe's~~ injury arises out of ~~the employe's~~ employment and the injury is not intentionally self–inflicted. Current law provides, however, that if the injury results from the intoxication of the ~~employe~~ by alcohol beverages or use of a controlled substance or a controlled substance analog, the worker's compensation payable to the ~~employe~~ is reduced by 15%, except that the total reduction may not exceed $15,000.

This bill eliminates the 15% or $15,000 reduction in worker's compensation payable to an ~~employe~~ whose injury results from the intoxication of the ~~employe~~ by alcohol beverages or use of a controlled substance or a controlled substance analog. Instead the bill adds as a condition for *any* liability of an employer for worker's compensation a condition that the ~~employe's~~ injury not result from the intoxication of the ~~employe~~ by alcohol beverages or use of a controlled substance or a controlled substance analog.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 102.03 (1) (dm) of the statutes is created to read:

102.03 **(1)** (dm) Where the injury does not result from the intoxication of the ~~employe~~ by alcohol beverages, as defined in s. 125.02 (1), or use of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m).

SECTION 2. 102.58 of the statutes is amended to read:

102.58 Decreased compensation. If injury is caused by the failure of the employe to use safety devices ~~which~~ are provided in accordance with any statute or lawful order of the department and are adequately maintained, and the use of which is reasonably enforced by the employer, or if injury results from the employe's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employe and of which the employe has notice, ~~or if injury results from the intoxication of the employe by alcohol beverages, as defined in s. 125.02 (1), or use of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m),~~ the compensation and death benefit provided in this chapter shall be reduced 15% but the total reduction may not exceed $15,000.

SECTION 3. Initial applicability.

(1) INJURY RESULTING FROM INTOXICATION. This act first applies to an injury, as defined in section 102.01 (2) (c) of the statutes, resulting from the intoxication of an

employee

employe, as defined in section 102.07 of the statutes, sustained on the effective date of this subsection.

(END)

by alcohol beverages, as defined in section 125.02(1) of the statutes, or use of a controlled substance, as defined in section 961.01(4) of the statutes, or a controlled substance analog, as defined in section 961.01(4m) of the statutes)

State of Wisconsin

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December 8, 2000

MEMORANDUM

To: Representative Ladwig

From: Gordon M. Malaise, Senior Legislative Attorney

Re: LRB-1337 Worker's compensation; injury due to intoxication or drugs

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

X JACKET FOR ASSEMBLY _____ JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-9738 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.