IN THE COURT OF APPEALS OF IOWA

No. 2-473 / 12-0176
Filed October 3, 2012

THE ESTATE OF LAWRENCE S. BREHM JR., WENDY BREHM, Administrator,
Plaintiff-Appellant,

vs.

DUBUQUE COMMUNITY SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

The estate appeals from the district court order finding its claims fall exclusively under the provisions of the Workers' Compensation Act. **AFFIRMED.**

Fred L. Dorr of Wasker, Dorr, Wimmer & Marcouiller, P.C., West Des Moines, for appellant.

D. Brian Scieszinski of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Tabor and Mullins, JJ.

TABOR, J.

After Lawrence Brehm Jr. died in a job-related accident, his estate began receiving workers' compensation benefits. Those benefits compensate his estate for only one of the two full-time jobs he held. The estate filed a petition for declaratory judgment, seeking a ruling that would allow it to sue his employer for the damages not covered under the Workers' Compensation Act. The district court granted summary judgment in favor of Brehm's employer.

On appeal, the estate contends because Iowa Code chapter 85 (2011) does not compensate for additional jobs a worker may have been performing at the time of the injury, the workers' compensation remedy is inadequate. It argues the case should be removed from the jurisdiction of the workers' compensation commissioner to allow the pursuit of tort claims against Brehm's employer.

Although the chapter 85 benefits do not fully compensate the estate for Brehm's death, the damages sought by the estate arose from Brehm's work-related injury and the Workers' Compensation Act provides compensation for such injury. We therefore conclude the workers' compensation remedy is "adequate" as that term is used in Iowa case law. Accordingly, we affirm the district court's order.

I. Background Facts and Proceedings

Lawrence Brehm Jr. was an employee of Dubuque Community School District and also worked as an electrician for Bechen Electric, Inc. He had been

working full-time at both places of employment for several years and earned a total of approximately $60,000 per year.

In the early morning hours of February 8, 2011, Brehm was working for the school district at its administration building. He was struck and run over by a school-owned vehicle operated by a school district employee. Brehm died at the scene.

At the time of the incident it was dark outside. Light meter readings of the maintenance building, where the collision occurred, read between 0-1 Lux. The American National Standard for Industrial Lighting states building exterior entrances should have at least 50 Lux of illumination. The Iowa Division of Labor Services, Occupational Safety and Health Bureau cited the school district for a serious violation of Iowa Code section 88.4 ("The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees . . . ."). The agency assessed a fine of $4500 against the school district.

Brehm was survived by his wife, Wendy, and their three minor children. His estate was opened and Wendy was appointed the administrator of the estate.

EMC Insurance Group, Inc. (EMC), the workers' compensation carrier for the school district, began paying benefits to Wendy in the amount of $560.33 per week or $29,137.16 annually.

On August 26, 2011, the estate filed a petition for declaratory judgment. It argued the workers' compensation statute does not provide adequate redress for Brehm's death. The estate sought a judicial declaration that it was not barred

from suing the school district for damages not covered under the workers' compensation statute. Both the estate and the school district filed motions for summary judgment.

Following a hearing, the district court granted summary judgment in favor of the school district. It found the workers' compensation commissioner has exclusive jurisdiction over the estate's claims that stem from the work-related injury.

II. Standard of Review

We review an order granting summary judgment for correction of errors at law. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). Review is limited to whether a genuine issue of material fact exists, and whether the district court correctly applied the law. *Id.* We review the record in the light most favorable to the nonmoving party. *Schneider v. State*, 789 N.W.2d 138, 144 (Iowa 2010). We also afford the nonmoving party every legitimate inference that can be reasonably deduced from the evidence. *Hills Bank & Trust*, 772 N.W.2d at 771. If reasonable minds can differ on how the issue should be resolved, a fact question is generated. *Id.*

III. Analysis

Subject matter jurisdiction is the court's authority to hear and determine cases of a particular class to which the proceedings in question belong—not merely the particular case then occupying the court's attention. *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 874-75 (Iowa 2007). It cannot be waived or vested by the consent of the parties. *Cincinnati Ins. Co. v.*

Kirk, 801 N.W.2d 856, 859 (Iowa Ct. App. 2011). The Iowa district courts have "exclusive, general, and original jurisdiction of all actions . . . except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body." *Id.* (citing Iowa Code § 602.6101).

Workers' compensation is an example of an exception where the legislature has conferred original jurisdiction upon an administrative body. *Id.* Iowa workers' compensation laws are to be the "exclusive and only rights and remedies" for an employee who has suffered a work-related injury. Iowa Code § 85.20. If an employee's injury arises "out of and in the course of employment," the employer "is relieved from other liability for recovery of damages or other compensation for such personal injury." *Id.* § 85.3. But where no adequate remedy is provided by the Workers' Compensation Act, our courts have found an injured worker's claims fall outside of the exclusivity provision. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 137 (Iowa 1996).

There is no question Brehm's injury arose out of and in the course of his employment with the school district. As such, he is entitled to compensation under the workers' compensation rate set forth in Iowa Code section 85.36. This section provides that the basis for compensation shall be the gross salary, wages, or earnings of an employee "to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's

employer for the work or employment for which the employee was employed."[1] Iowa Code § 85.36.

In *King v. City of Mt. Pleasant*, 474 N.W.2d 564 (Iowa 1991), our supreme court addressed the situation of employees who were injured while performing a job that did not reflect their total earnings. Mt. Pleasant Mayor Edward King was killed during a shooting at a city council meeting and council members Ronald Dupree and Joann Sankee were injured. *King*, 474 N.W.2d at 565. There was no dispute the injuries arose out of and in the course of their employment with the city. *Id.* King earned an annual salary of $4800 as mayor, and earned $38,868 through his private employment, plus $2000 per year in bank director's fees. *Id.* Dupree earned $660 annually from the city and $2516.67 per month in private employment. *Id.* Sankey likewise received a $660 annual salary from the city, but earned $1141.60 bi-weekly working for the department of corrections. *Id.*

King's widow, Dupree, and Sankey each filed a claim for workers' compensation benefits and argued their benefits should be calculated based on their respective total incomes under then-section 85.36(10) ("If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months

[1] Two subsections allow consideration of an employee's earning from *all* employment during the previous twelve months. *See* Iowa Code § 85.36(9), (12). Neither apply to Brehm. Nor does section 85.36(11), which provides an alternative basis for calculation for elected or appointed officials.

immediately preceding the injury."). *Id.* The workers' compensation commissioner awarded benefits, but found they should be calculated only on the income received from the city under then-section 85.36(5) ("In the case of an employee who is paid on a yearly pay period basis, the weekly earnings shall be the yearly earnings divided by fifty-two."). *Id.* The district court affirmed. *Id.*

On appeal, the claimant-appellants argued the "weekly earnings" calculation called for by the initial paragraph in section 85.36 "is to be governed by the method that best approximates the injured employee's total wage income from all current employers." *Id.* That calculation would have entailed aggregating their income "from all sources, including amounts received for their private sector employment, thus resulting in a higher workers' compensation benefit." *Id.* at 566. Although the supreme court noted it was "sympathetic to the plight of appellants," it nonetheless rejected their claim, finding "the statute as drafted does not permit claimants to avail themselves of subparagraph ten merely because the weekly earnings arising from the employment in which the injury occurred do not approximate the total wage income of the injured employee." *Id.*

Because—under *King*—the workers' compensation scheme cannot consider Brehm's earnings from his job at Bechen Electric, the estate argues workers' compensation law does not provide an adequate remedy. To determine whether the workers' compensation scheme provides the estate with an adequate remedy, a review of Iowa caselaw is helpful. The appellee argues *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812 (Iowa 1998) supports its

position that workers' compensation provides an adequate remedy for Brehm's damages. The estate argues *Ganske* is distinguishable.

In *Ganske*, an employee developed an occupational disease, but not within the statute of limitations for recovery provided in the workers' compensation statute. He argued because his workers' compensation recovery was precluded, he should be allowed to recover under a common-law right of recovery. *Ganske*, 580 N.W.2d at 814. In rejecting this claim, our supreme court cited with approval the notion that "if an injury is, in general, compensable under workers' compensation, a worker who does not actually realize the benefits because of the specific facts of that worker's case may still be denied a common-law remedy under the exclusivity rationale of the statutes." *Id.*

> Thus, "[t]he compensation remedy is exclusive of all other remedies by the employee or his dependents against the employer and insurance carrier for the same injury, if the injury falls within the coverage formula of the act. If it does not, as in the case where occupational diseases were deemed omitted because not within the concept of accidental injury, the compensation act does not disturb any existing remedy. However, if the injury itself comes within the coverage formula, an action for damages is barred even [ ]though the particular element of damage is not compensated for, as in the case of disfigurement in some states, impotency, or pain and suffering." In such case, "[a] distinction must be drawn . . . between an injury which does not come within the fundamental coverage provisions of the act, and an injury which is in itself covered but for which, under the facts of the particular case, no compensation is payable."

Id. at 814-15 (quoting 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 65.00, at 12-1, § 65.40, at 12-55 (1998)) (internal citation omitted). The question then is whether the estate's claim falls outside the fundamental coverage provisions of the Workers' Compensation Act, or whether

the injury is in itself covered but—under the facts of this particular case—the compensation is inadequate.

The estate attempts to distinguish *Ganske* from the facts at bar by noting in *Ganske*, the workers' compensation law offered the claimant a remedy, but the claimant failed to avail himself of it within the required time. The present case differs, the estate alleges, because the law does not provide for recovery of loss of earnings from a second job.

The school district counters that *Ganske* is on point. In *Ganske*, the claimant's injury—occupational disease—was covered by the workers' compensation statute. In the present case, the workers' compensation statute provides a remedy for employees and dependents when an employee suffers a work-related death. The court in *Ganske* held the claimant was limited to recovery under the workers' compensation scheme even though the law completely prohibited recovery; accordingly, the workers' compensation scheme applies to Brehm's claim for lost wages even though it only covers a portion of lost wages and not the entire amount.

In addition, the school district cites the following rationale for restricting recovery to the workers' compensation scheme even though in some situations, an employee will be barred from recovery or recover less:

> The theory of workers' compensation is that workers and employers, as groups and not as individuals, are deemed to relinquish certain of their common-law rights in exchange for a limited, relatively certain recovery under workers' compensation.
>
> As the *Weldon* court observed, "[t]he statutory scheme thus operates on a law of averages. In some instances where he could prove negligence, an employee may receive less compensation than he would recover in damages in a common law suit. In other

> situations, an employer may have to pay compensation where he would not be liable for any sum at common law. *Despite inequities in specific cases, the underlying assumption is that, on the whole, the legislation provides substantial justice.*"

Ganske, 580 N.W.2d at 815-16 (quoting *Weldon v. Celotex Corp.*, 695 N.W.2d 67, 70 (3d Cir. 1982)). The school district also notes that, in general, the workers' compensation scheme only covers eighty percent of an employee's weekly spendable earnings. *See* Iowa Code §§ 85.31(1); 85.34(2), (3); 85.37. The fact that Brehm will not be compensated for one hundred percent of his lost wages, it argues, does not mean workers' compensation provides an inadequate remedy.

Our appellate courts have explored the adequacy of the workers' compensation remedy in a number of other contexts. We have found the Workers' Compensation Act is an adequate remedy when the act provides a means for an employee to recover. *See Good v. Tyson Foods, Inc.*, 756 N.W.2d 42, 46 (Iowa Ct. App. 2008) (finding the act provided an adequate remedy for an employee dissatisfied with the employer's delay in providing care because section 85.27(4) allows an employee to request alternate care when dissatisfied with an employer's delay); *see also Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385, 389 (Iowa 2000) (finding the act provides an adequate remedy for an employee's claim for damages arising out of false imprisonment and battery by co-workers because the employee was claiming damages for physical and mental injuries, which are covered under the act); *Kloster v. Hormel Foods Corp.*, 612 N.W.2d 772, 774-75 (Iowa 2000) (holding a claim that an employer improperly interfered with an employee's medical care falls within the ambit of the

Act because section 85.27 allows an employee who is dissatisfied with medical care to petition for alternative care); *Barnes v. State*, 611 N.W.2d 290, 291 (Iowa 2000) (finding workers' compensation provides adequate relief for workers alleging their employer violated section 85.27 by making them use their sick leave or vacation time to attend medical appointments for workers' compensation injuries because section 85.27 "clearly gives them the right to receive wages for time lost for medical appointments").

Where the facts of a case are not within the contemplation of the workers' compensation scheme, our courts have found the act fails to provide an adequate remedy. *See Cincinnati Ins. Co.*, 801 N.W.2d at 861 (holding an employer could bring suit for employee's fraudulent acts in collecting workers' compensation benefits because the claimant sought and received medical treatment for a self-inflicted injury rather than a work-place injury; "In the event the treatment provided was caused by the claimant rather than the work injury, the Act provides no remedy for the recovery of the fraudulently procured medical payments."); *see also* *Wilson v. IBP, Inc.,* 558 N.W.2d 132, 136-38 (Iowa 1996) (allowing an employee to file a breach of fiduciary duty suit against an employer when a company nurse falsely represented to a treating physician that the employee was not following through with his prescribed lifestyle restrictions because the intentional torts of breach of fiduciary duty and defamation fall outside the exclusive jurisdiction of the workers' compensation commissioner); *Boylan v. Am. Motorists Ins. Co.,* 489 N.W.2d 742, 742-44 (Iowa 1992) (holding the act provides an inadequate remedy where an employee makes a bad-faith

tort claim against his employer's workers' compensation carrier, alleging it had delayed and then terminated his benefits "arbitrarily and capriciously, without notice and in bad faith" because statutory benefits under the act cover only a *negligent* delay in payment of weekly benefits, not a *willful or reckless failure* to pay medical benefits); *accord Reedy v. White Consol. Indus., Inc.*, 503 N.W.2d 601, 603 (Iowa 1993) (extending the holding in *Boylan* to cover self-insured employers).

The supreme court clearly articulates the exclusivity concept in *Tallman v. Hanssen*, 427 N.W.2d 868 (Iowa 1988). In that case an employee settled his workers' compensation claim with his employer and then filed a pro se petition alleging that by refusing to pay his medical bills or to provide him a physician following his work-related injury, his employer "willfully and knowingly caused physical damage to [him], inflicting an extreme amount of pain and mental anguish upon [him]." *Tallman*, 427 N.W.2d at 870. Although the district court and a majority of this court found his claim was one for mere nonpayment of medical bills—and therefore was under the exclusive jurisdiction of the workers' compensation commissioner—the supreme court interpreted the petition as alleging a bad faith claim. *Id.* The court outlined the distinction:

> It is axiomatic that an employee's rights and remedies arising from an injury suffered in the course of employment are exclusively provided under Iowa Code chapter 85. *See* Iowa Code section 85.20 (1987). A district court would ordinarily have no subject matter jurisdiction over a claim that an employee is entitled to workers' compensation benefits. But this exclusivity principle is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of an employer's insurer. *See Fabricius v. Montgomery Elevator,* 254 Iowa 1319, 1329, 121

> N.W.2d 361, 366 (1963) (action allowed against insurance company based on negligent inspection).

Id. The court went on to hold that the exclusivity provision of the Workers' Compensation Act does not bar an action by an employee against an insurance carrier for the commission of an intentional tort because an intentional tort is not compensable under the act. *Id.* at 871.

Following the rationale set forth in *Tallman*, the estate's argument cannot prevail. The estate's claim stems from an injury—Brehm's death—that is job-related. The act was enacted to exclusively compensate for such injuries. The fact that the statute does not compensate for wages earned at second or third jobs does not make the workers' compensation remedy inadequate; the legislature simply chose not to make an employer liable for income lost in other employment.

The estate argues the trial court's summary judgment order denies Brehm's children the opportunity to recover for lost consortium. *See* Iowa Code § 613.15 (allowing consortium damages for a child on the loss of a parent). Because the workers' compensation scheme does not provide for loss of consortium damages, the estate alleges the remedy is inadequate. In *Johnson v. Farmer*, 537 N.W.2d 770, 773 (Iowa 1995), our supreme court held the exclusive remedy provisions of the Workers' Compensation Act preclude loss-of-consortium claims for spouses and children of those suffering worker-related injuries. The estate argues that because the act only provides compensation to minor children, the remedy is inadequate for claims of loss of consortium for adult children. For the reasons already articulated, we reject this claim.

Because the Workers' Compensation Act provides a remedy for workers who are killed while performing their job duties, the estate's claims fall exclusively within the rights and remedies provided by the act. We affirm the district court order granting summary judgment in favor of the school district on the estate's declaratory judgment action.

AFFIRMED.