

Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2004: July 1, 2003 to June 30, 2004

Supreme Court Cases:

1. Benson v. Casey Industrial, 12 Neb. App. 396, 674 N.W.2d 798 (2004)

MAXIMUM MEDICAL IMPROVEMENT

ATTORNEY FEES

The Supreme Court found the trial court was clearly wrong in determining that plaintiff had reached maximum medical improvement (MMI), and remanded the cause to the review panel for further remand to the trial court with directions to vacate its findings.

On January 15, 2001, plaintiff was injured while working for defendant and immediately reported the injury to his foreman, who placed plaintiff on light duty. Between the date of injury and August 2, 2001, when plaintiff was fired, he continued on light duty and was treated with prescription medications and physical therapy. The trial court found that plaintiff reached MMI August 1, 2001 and denied temporary total disability benefits after that date. The trial court also found that plaintiff failed to present evidence that he was permanently injured, but did award attorney fees because no reasonable controversy existed as to whether plaintiff required medical care after July 31, 2001. The review panel affirmed the decision of the trial court except as to the award of attorney fees.

On appeal, plaintiff argued that the trial court erred in finding plaintiff had reached MMI. The Supreme Court stated that the only evidence in the record regarding MMI was the opinion of Dr. Rhyne who, in July 2001, stated that if the plaintiff completed physical therapy he would reach MMI in three to six months. However, plaintiff's physical therapy was canceled after his termination in August 2001 and there was no evidence in the record to show that plaintiff had completed or been discharged from therapy. The Supreme Court also noted that defendants' obligation to pay benefits did not cease upon the firing of the plaintiff. The Court concluded that the trial judge was clearly wrong in finding plaintiff had reached MMI no later than August 1, 2001. On remand, the trial court was ordered to vacate its findings regarding entitlement to benefits, and to reopen the question of entitlement to attorney fees and the existence of a reasonable controversy.

2. Bixenmann v. H. Kehm Construction, 267 Neb. 669, 676 N.W.2d 370 (2004)

VOCATIONAL REHABILITATION -- PLAN ACCEPTANCE

TEMPORARY TOTAL DISABILITY

The Supreme Court affirmed the compensation court's denial of retroactive temporary total disability benefits during plaintiff's vocational rehabilitation.

Plaintiff sustained a work-related injury after which a vocational rehabilitation plan was developed and was approved by a compensation court rehabilitation specialist. The plan was then sent to defendant for approval. After 14 days elapsed with no response, the court's rehabilitation specialist presumed that defendant had accepted the plan and agreed to pay temporary total disability benefits pursuant to Rule 36 of the Workers' Compensation Court Rules of Procedure.

At trial, plaintiff sought the court's approval of his vocational rehabilitation plan, which was already underway, and for the court to award temporary total disability benefits retroactively to the date the vocational rehabilitation plan commenced. The trial court found that the plaintiff was entitled to vocational rehabilitation benefits and that the plan was appropriate. However, the court declined to award TTD benefits retroactively based on §48-121(5). That section provides an employee is entitled to temporary benefits while undergoing vocational rehabilitation if the rehabilitation was "voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court." In the instant case, there was no evidence that defendant offered vocational rehabilitation, nor was such rehabilitation court-ordered prior to trial. The trial judge concluded that Rule 36 could not confer power for the court to award benefits that were prohibited by statute.

The Supreme Court agreed, stating that although the compensation court is entitled to promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act, the rules "cannot modify, alter, or enlarge provisions of a statute entrusted to its administration." Therefore, Rule 36 was an incorrect statement of the law and defendants were not deemed to have accepted the plan by reason of their failure to respond within 14 days. In addition, because the Rule 36 issue was previously unanswered, a reasonable controversy existed. Therefore the Supreme Court agreed with the review panel's denial of plaintiff's request for waiting time penalties, attorney fees and interest.

3. Brown v. Harbor Financial Mortgage Corp., 267 Neb. 218, 673 N.W.2d 35 (2004)

WAITING-TIME PENALTY

STATUTORY CONSTRUCTION

The Supreme Court reversed the compensation court's award of waiting-time penalties and attorney fees.

The trial court entered an award of disability benefits on August 28, 2002 for plaintiff's work-related back injury. On September 26, 2002, defendant mailed a check representing payment due pursuant to the award. That payment arrived at counsel for plaintiff's office on September 30, 2002. Plaintiff filed a motion pursuant to §48-125 for waiting-time penalties, claiming that she received the check more than 30 days after the entry of the award. The trial court determined that payment was delinquent, based on §48-101. That statute states, in pertinent part, "When personal injury is caused to an employee . . . such employee shall receive compensation therefor from his or her employer . . ." (emphasis added). The trial judge awarded plaintiff a 50 percent penalty and an attorney fee. Defendant appealed to the review panel, which affirmed the trial court and assessed an additional attorney fee.

The Supreme Court disagreed with the compensation court, citing rules of statutory analysis. A court must determine and give effect to the legislative intent as ascertained from the entire statute considered in its plain, ordinary and popular sense. In re Interest of Tamantha S., 267 Neb. 78, 672 N.W.2d 24 (2003). Further, to the extent that there is a conflict between two statutes on the same subject, the specific statute controls over the general statute. Ponseigo v. Mary W., 267 Neb. 72, 672 N.W.2d 36. The Supreme Court used these principles to conclude that the specific language used in §48-125(1) controlled, rather than the general language of §48-101. Section §48-125(1) states:

Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court. Such payments shall be sent directly to the person entitled to compensation or his or her designated representative.

Noting that "such payments" in the second sentence of §48-125(1) refers to "all amounts of compensation" in the first sentence, the Supreme Court held that compensation "sent" within 30 days is not delinquent. Since the payment was postmarked September 26, 2002, it was not "sent" after 30 days from the date of the August 28, 2002 award. Therefore payment was not delinquent, and the waiting-time penalty and attorney fees were not appropriate.

4. Dawes v. Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N.W. 2d 167 (2003)

JURISDICTION -- APPEALABLE ORDERS

ACCIDENT vs. OCCUPATIONAL DISEASE

REBUTTABLE PRESUMPTION

REPETITIVE TRAUMA

STATUTE OF LIMITATIONS

SUBROGATION

The Supreme Court affirmed in part and reversed in part the compensation court's decision encompassing multiple issues.

Plaintiff claimed a work-related back injury in 1996. The workers' compensation carrier provided a letter to plaintiff denying the claim, but in actuality paid indemnity benefits. According to the claims adjuster, the purpose of the letter was for plaintiff to show his health insurance carrier so medical expenses would be covered by the health carrier. In October 1999, plaintiff stopped working due to back problems and underwent a fusion. The workers' compensation carrier again denied benefits, and in March 2000 plaintiff filed a petition in the compensation court.

The trial court awarded plaintiff benefits for the 1999 injury finding that heavy labor over the years resulted in repetitive trauma, and specifically, an accident on October 25, 1999. Plaintiff was awarded temporary benefits and permanent benefits for a 40 percent loss of earning capacity. The trial court also awarded payment of certain medical expenses from the 1999 injury and found that plaintiff's health insurance carrier was entitled to reimbursement for any expenses it may have paid. The single judge found that the 1996 injury was work related, but any claim for benefits was time barred.

The review panel affirmed the finding that the 1999 injury was work related, but remanded the case for reconsideration of plaintiff's loss of earning capacity. The trial court had determined that the opinion of the court-appointed vocational counselor was rebutted by the defendant's expert. The review panel stated the trial court erred when it continued to afford the court-appointed counselor the statutory rebuttable presumption of correctness after contrary evidence was submitted. According to the review panel, such a presumption "disappears" after the introduction of contrary evidence. The panel also directed the trial court to consider the amount to be reimbursed to plaintiff's health insurance carrier. Plaintiff petitioned the Supreme Court to bypass the Court of Appeals, which petition was granted.

The Supreme Court first addressed the jurisdictional question of whether the trial court's award was a final, appealable order. The trial court was silent on a number of claims presented to it. Had the trial judge expressly reserved ruling on those matters not addressed, the award would not have been final. In the instant case, the Supreme Court held that the single judge effectively denied plaintiff's remaining claims which resulted in a final, appealable order. To the extent the Appeal Court's recent decisions in *Delgado v. IBP, Inc.*, 11 Neb. App. 165, 645 N.W.2d 831 (2002) and *Martinez v. Greater Omaha Packing*, 12 Neb. App. 10, 664 N.W.2d 486 (2003) would indicate otherwise, they were disapproved.

Regarding whether plaintiff sustained an accident, both parties had urged the Supreme Court to hold that a repetitive trauma injury is an occupational disease. The Court declined to do so, noting that it had previously invited the legislature to address this issue, but no statutory

changes have been made. The Court stated that it is presumed the legislature acquiesces in the traditional interpretation of a statute when there is no legislative action to the contrary.

The Supreme Court then addressed the statute of limitations. The Court rejected plaintiff's claim that payments made by his health insurance carrier in 1998 and 1999 tolled the statute of limitations. Payment of wages or medical expenses by an employer under an employee benefit plan does not constitute remuneration in lieu of workers' compensation benefits so as to toll the statute of limitations unless the employer is aware that it constitutes payment of compensation. *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985). Moreover, in the instant case the health insurance carrier was not associated with the employer. Thus there was no possibility of confusion on plaintiff's part regarding the source or character of the medical coverage. The Court concluded that payment by this collateral source was not "compensation" sufficient to toll the statute of limitations.

Plaintiff had also argued that the statute of limitations was tolled for the 1996 injury pursuant to §48-144.04 because defendant failed to file a subsequent report of payment as required by Rule 30 of the compensation court's Rules of Procedure. The Supreme Court held that the plain language of §48-144.04 does not support plaintiff's argument. When read together with §48-144.01, §48-144.04 is clearly referencing the initial report of injury required by §48-144.01. The initial report was timely filed for the 1996 injury; therefore, plaintiff's argument was without merit.

The Supreme Court next found that the rebuttable presumption of correctness given to the court-appointed counselor's loss of earning assessment was not rebutted merely by the existence of contrary evidence, as stated by the review panel. Rather, there must be evidence showing that the rebuttal opinion was more probable than that of the court-appointed counselor in order for the presumption of correctness to be rebutted. *Variano v. Dial Corp.*, 256 Neb 318, 589 N.W.2d 845 (1999). Therefore, the single judge correctly applied the rebuttable presumption and her loss of earning determination was affirmed.

Finally, the Supreme Court found that the review panel erred in directing the trial court to determine the extent of the health insurer's subrogation interest. As a statutorily created court, the Workers' Compensation Court is a court of limited and special jurisdiction. A party's right to subrogation may arise under equity, contract or may be set out in statute. The Workers' Compensation Court does not have general equitable jurisdiction, nor is there a statute which affords jurisdiction to resolve contractual disputes between employees and third-party insurers. Therefore, the compensation court does not have jurisdiction to determine whether or to what extent the health insurance carrier may have a subrogation interest in the proceeds of plaintiff's workers' compensation award. The single judge's order was reversed to the extent that it ordered reimbursement to the health insurance carrier.

5. Ludwick v. TriWest Healthcare Alliance and Physicians Clinic, Inc., 267 Neb. 887, 678 N.W.2d 517 (2004)

DATE OF INJURY

DATE OF DISABILITY

OCCUPATIONAL DISEASE

The Supreme Court affirmed the decision of the Court of Appeals and compensation court, but relied on different grounds in their affirmance.

Plaintiff worked as a nurse for Bergan Mercy Hospital between 1981-1993, Physicians Clinic 1994-1997, and TriWest Healthcare 1997-1999. In 2001, plaintiff filed a petition against Physicians and TriWest alleging an injury on February 12, 1999 due to her latex allergy. While employed at Bergan Mercy, plaintiff experienced symptoms for which she received medical attention. Plaintiff's symptoms and treatment continued during her employment with Physicians and TriWest.

The trial court dismissed plaintiff's petition, finding that plaintiff did not sustain an occupational disease during her employment with Physicians or TriWest. The judge found that plaintiff's "last injurious exposure" to latex was prior to her employment at Physicians or TriWest. The review panel affirmed the trial court, which decision was affirmed by the Court of Appeals.

The Supreme Court stated that under the Nebraska Workers' Compensation Act, an occupational disease has caused an injury within the meaning of the act at the point it results in disability. See Neb. Rev. Stat. §48-151(3) (Cum. Supp. 2002). The Court noted that it is crucial to determine the date of disability because until that date, the employee has not suffered a compensable injury. In occupational disease cases, the rule is that the date of injury is the date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W. 2d 436 (2003). The Court clarified that there is no requirement the employee be totally disabled in order for the date of injury to be established. The "no longer able to render further service" language in occupational disease case law refers to nothing other than the date of disability, whether partial or total. Restated, a worker becomes disabled, and thus injured, at the point when a permanent medical impairment or medically assessed work restrictions result in labor market access loss.

In the instant case, the Court of Appeals incorrectly relied on the test from repetitive trauma cases to determine the date of injury, i.e., the date plaintiff was forced to seek medical attention and cease work. However, the Supreme Court agreed with the ultimate conclusion that the injury and disability occurred in 1992 when plaintiff was employed by Bergan Mercy. The medical and vocational evidence showed that the employee suffered permanent impairment in 1992; therefore, this was the date of injury. The Court concluded that it was not clearly erroneous for the trial court to find that neither Physicians nor TriWest was liable.

6. Martinez v. Greater Omaha Packing, 12 Neb. App. 10, 664 N.W.2d 486 (2003)

JURISDICTION

FINAL ORDER

The Supreme Court dismissed defendant's appeal for lack of jurisdiction, vacated the review panel's affirmance of the trial court, and directed the review panel to dismiss the appeal from the trial court.

The single judge found that plaintiff was injured in the course and scope of his employment and awarded temporary total disability benefits, vocational rehabilitation, and ordered defendant to pay medical expenses. The court did not address the issues of attorney fees and interest. The review panel affirmed.

The Supreme Court first noted that it is the duty of an appellate court to determine whether it has jurisdiction over the merits of an appeal because the order appealed from was entered by a tribunal lacking jurisdiction. *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W. 2d 571 (2002), *Delgado v. IBP, inc.*, 11 Neb. App. 165, 645 N.W. 2d 831 (2002). As the Supreme Court previously discussed in *Hamm* and *Delgado*, an order that does not determine all issues submitted to the court is not a final order and remains interlocutory until all issues are decided. If an order of the Nebraska Workers' Compensation Court is not final, that order is not appealable. The review panel does not have jurisdiction to consider an appeal from a nonfinal order; thus, the Supreme Court lacks jurisdiction to consider an appeal from a decision of the review panel which purports to review such a nonfinal order.

Because the trial court's order failed to decide the issues of attorney fees and interest, it was not final. Therefore, the review panel's affirmance could not stand, since the review panel lacked jurisdiction as well.

7. Morris v. Nebraska Health System, 266 Neb. 285, 664 N.W.2d 436 (2003)

OCCUPATIONAL DISEASE

LAST INJURIOUS EXPOSURE

DATE OF INJURY

LATEX ALLERGY

The Supreme Court affirmed the compensation court's finding that the date of injury was the day plaintiff ceased employment, and that her last injurious exposure to latex occurred while employed by defendant.

Plaintiff was employed as a nurse in the 1980s through 1998 almost continually. In 1994, plaintiff began limiting her schedule to part-time work because she was experiencing fatigue and shortness of breath. Plaintiff was first diagnosed with a latex allergy in 1997, and in the spring of 1998 further limited her work hours. On October 9, 1998, plaintiff suffered a reaction to latex requiring her to go to the emergency room for treatment. Plaintiff ceased employment with defendant after this incident and filed a petition with the compensation court. At hearing, the parties stipulated that plaintiff suffered from a work-related latex allergy. Defendant argued that the plaintiff's date of injury was in 1996 or 1997 (during plaintiff's employment with another entity) when plaintiff stopped work and sought medical treatment. Defendant relied on the "discontinuation of employment" standard enunciated in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999) and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

The Supreme Court disagreed, affirming the compensation court's finding that plaintiff's date of injury was October 9, 1998, the date after which the causal connection between plaintiff's latex allergy and her symptoms was finally made and plaintiff ceased employment with defendant. After review of the case law regarding the date of injury in occupational disease cases, the court set forth the rule that in an occupational disease context, the "date of injury" is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. The Court stated, "Any suggestion in either *Jordan* or *Vonderschmidt* that the "discontinuation of employment" standard is the same for both repetitive trauma and occupational disease cases is dicta and contrary to this state's line of occupational disease case law."

Regarding defendant's assertion that the compensation court erred in concluding that plaintiff's last injurious exposure to latex occurred while she was employed by defendant, the Court cited the case of *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). That case stated, "In the case of occupational disease, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation." To determine the last injurious exposure, courts must first determine the date of disability, and then search backward to find the last causal relationship between the exposure and the disability. Although the plaintiff exhibited symptoms associated with latex allergy prior to 1998, she had been able to continue her employment until her condition worsened to the point she was unable to continue her employment on October 9, 1998. This supported the compensation court's conclusion that the exposure bore the requisite causal relationship to her disability and that defendant was properly held liable for workers' compensation benefits under the last injurious exposure rule.

8. Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003)

LOSS OF EARNING POWER EVALUATION

VOCATIONAL REHABILITATION

PERMANENT IMPAIRMENT

The Supreme Court affirmed the review panel's finding that an employee could receive a loss of earning power evaluation and vocational rehabilitation benefits without having been assigned a permanent functional impairment rating, as long as a physician had assigned permanent restrictions.

The trial court determined that the employee had sustained injury to his low back from a motor vehicle accident while test-driving a vehicle in a parking lot for the employer. The opinion of the employee's treating physician was found to be credible over a conflicting expert medical opinion that opined that the employee's need for surgery after the accident was the result of a natural progression of a pre-existing back injury. Temporary total disability and medical benefits were awarded to the employee, but the trial court did not award permanent partial disability benefits or vocational rehabilitation benefits because the treating physician did not assign a permanent functional impairment rating. The review panel held that *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002) did not preclude an award of loss of earning power or vocational benefits in the absence of a permanent functional impairment rating as long as permanent restrictions had been imposed by a physician. The review panel determined that the trial court had erred as a matter of law in finding no evidence of a permanent impairment and reversed the trial court on this single issue, remanding the case for a determination.

The Supreme Court affirmed the review panel, stating that an impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury. A physician-ordered permanent physical restriction based on a medically established permanent impairment of a body function establishes a permanent medical impairment for purposes of determining loss of earning capacity. There is no suggestion in *Green* that a permanent functional impairment rating is a necessary prerequisite to an award of indemnity or vocational rehabilitation services in loss of earning power cases. (Emphasis in the original). While medical impairment can be established only through properly qualified medical testimony, that testimony need not establish a specific percentage impairment rating in order to be legally sufficient. In the instant case, the physician's opinion that the employee was permanently injured and subject to permanent physical restrictions was sufficient to sustain a finding of a permanent medical impairment, if the trial court had properly considered that issue.

9. Veatch v. American Tool, 267 Neb. 711, 676 N.W.2d 730 (2004)

EVIDENCE

EXPERT TESTIMONY

DUE PROCESS

The Supreme Court affirmed the compensation court's finding that the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) do not apply to workers' compensation cases because they are only applicable to cases where the Nebraska Rules of Evidence apply.

Plaintiff was diagnosed with tendonitis of his left wrist and received workers' compensation benefits for this injury. Almost two years later, plaintiff had a motor vehicle accident and complained of ongoing left wrist pain. A physician diagnosed plaintiff with avascular necrosis. The physician testified in his deposition that there were different views on the issue, but it was his opinion that this condition was caused by microtrauma from repetitive stress due to plaintiff's employment. At trial, defendant objected to the physician's testimony, arguing that it lacked foundation, was irrelevant, and was inadmissible under *Daubert*. Defendant claimed the physician was not fully informed regarding the details of the plaintiff's employment and medical history and there was a lack of studies and information about the role of repetitive motion in causing avascular necrosis. The trial court overruled defendant's motion, finding that the injury was work related and caused by repetitive trauma. Additionally, the trial court found that the injury was an accident instead of an occupational disease as defendant had claimed. The review panel affirmed.

On appeal, defendant argued that due process requires the use of *Daubert* to determine whether expert testimony is admissible even if the rules of evidence do not apply to workers' compensation cases. The Court cited Neb. Rev. Stat. §48-168(1) and *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997), stating, "As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence." The Court held that because the application of *Daubert* standards in Nebraska is limited to cases in which the Nebraska Rules of Evidence apply, and those rules do not apply in the compensation court, the *Daubert* standards do not apply in a workers' compensation case. Rather, the admissibility of the physician's testimony in this case should be analyzed under due process. In *Sheridan*, the Court stated, "a trial court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant." Despite these foundational and relevancy requirements outlined in *Sheridan*, due process does not require that the *Daubert* standards be applied. Therefore, the compensation court did not abuse its discretion in determining that the physician's testimony was relevant and based on proper foundation. The Court also held that a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident, not occupational disease, consistent with precedent followed in *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

Court of Appeals Cases (Designated for Permanent Publication):

1. *Dukes v. University of Nebraska*, 12 Neb.App. 539, 679 N.W.2d 249 (2004)

LUMP SUM SETTLEMENTS

MAXIMUM WEEKLY BENEFIT

STATUTORY CONSTRUCTION

The Court of Appeals reversed and remanded the compensation court's decision concerning calculation of permanent total benefits.

An exploding air tank caused injuries to plaintiff's right arm during the course of his employment. In addition to the physical injuries to his arm, plaintiff also suffered from depression, sleeping problems, and trouble with his memory and concentration.

Plaintiff and defendant entered into an agreement to pay plaintiff a lump sum settlement based on 100 percent impairment to his right upper extremity. The lump sum settlement agreement specifically stated that it did not extend to any alleged injury to plaintiff's body as a whole resulting from the accident. The settlement also stipulated that \$15,000.00 of the lump sum would be paid as plaintiff's attorney fee and that the balance of \$31,453.41 represented a weekly payment of \$24.81 per week over the term of plaintiff's projected life expectancy.

Two years after the compensation court's approval of the lump sum settlement, plaintiff filed a petition alleging he suffered a psychological injury as a result of the accident and that he was permanently and totally disabled. The trial court agreed. The judge further found that since the previous lump sum settlement contained an agreement that payment was to be considered a weekly benefit for plaintiff's upper extremity injury, his weekly permanent and total disability benefits, which were subject to the statutory maximum, should be reduced by \$36.64 per week. (The court divided the \$15,000.00 attorney fee over the projected life expectancy and added that to the \$24.81 weekly benefit.) The trial court reasoned that the maximum amount plaintiff could receive for the accident was limited to the statutory maximum amount, regardless of the number of resulting injuries. The review panel agreed with the trial court's reduction of plaintiff's weekly benefits based on the previous lump sum settlement.

The Court of Appeals disagreed, citing §§48-139, 48-140, and 48-141, which provide that lump sum settlements are final and conclusive. The plain meaning of these statutes dictate that lump sum settlements cannot be considered in determining future workers' compensation awards because the settlements are final. Thus, the lump sum settlement amount has no bearing on the statutory maximum, and cannot be used to reduce the amount of benefits awarded to plaintiff.

2. Lyle v. Drivers Management, Inc., 12 Neb. App. 350, 673 N.W.2d 237 (2004)

LUMP SUM SETTLEMENT

APPEAL PROCEDURE

JURISDICTION

The Court of Appeals dismissed plaintiff's appeal of the decision of the single judge of the compensation court where the judge vacated his previous order approving a lump sum settlement for lack of jurisdiction.

Plaintiff and defendant entered into a lump sum settlement agreement and submitted an application to the compensation court for approval. An order was entered approving the settlement, specifically providing that defendant would pay the lump sum amount, less any advances previously made or any amounts payable to satisfy plaintiff's child support liens. The settlement was payable upon receipt by defendant of child support lien letters from the relevant officials. Defendant had not obtained the child support lien letters within 30 days after the order was entered, and plaintiff filed a motion for penalties and attorney fees. The presiding judge of the compensation court entered an order vacating his approval of the lump sum settlement because the settlement was "conditioned upon an action in the future" and therefore void. Plaintiff did not apply for review by a three-judge panel of the compensation court, but rather appealed directly to the Court of Appeals, arguing that the judge did not have jurisdiction to modify or vacate his own judgment.

The Court determined that the proper issue was whether the statutory procedure for an appeal under the act was followed, rather than whether the order of vacation was a final order. The Court cited *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999), noting that "The statutes as currently written do not provide for an appeal to this court or the Court of Appeals without a properly constituted review by the compensation court." Under Neb. Rev. Stat. §48-170, "Every order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days after the date of entry of the order or award." Under §48-179, an application for review by a three-judge panel is the only remedy for one who refuses to accept the findings of the compensation court on the original hearing. The Court concluded that there could be no appeal to the Court of Appeals without the complaining party first having sought review by a three-judge panel of the compensation court. Therefore, plaintiff's appeal was dismissed for lack of jurisdiction.

3. Martinez-Najarro v. IBP, Inc., 12 Neb. App. 504, 678 N.W.2d 114 (2004)

LOSS OF EARNING POWER

PREEXISTING CONDITION

APPORTIONMENT

The Court of Appeals reversed and remanded the compensation court, holding that it was inappropriate to consider lifting restrictions from a prior injury in determining the loss of earning power and that there was no basis for apportionment when the prior injury was to a member rather than to the body as a whole.

Plaintiff had a lifting restriction from a 1997 shoulder injury. There was no evidence plaintiff was ever compensated for this injury. In 1999, plaintiff sustained a hernia from pushing boxes while at work, and he was placed on a lesser lifting restriction than that which was in place due to the 1997 injury. The trial judge took the preexisting lifting restriction into account when determining that plaintiff sustained a 5 percent loss of earning power, and the review panel affirmed stating, "You take the plaintiff as you find him."

In reversing, the Court of Appeals found the compensation court's decision apportioning plaintiff's loss of earning capacity based solely on his lifting restrictions to be clearly wrong in light of Nebraska case law including *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). That case held an employer is liable to an employee for a work-related injury regardless of a preexisting condition. To be apportionable, an impairment must have been independently producing some degree of disability before the accident and must be continuing to operate as a source of disability after the accident, and a prior loss of earning capacity must already exist. Plaintiff's prior injury in 1997 was to the shoulder rather than the body as a whole and did not result in a permanent partial disability involving loss of earning capacity. Additionally, there was no indication that plaintiff was compensated for the prior injury. Therefore, apportionment of plaintiff's loss of earning capacity was not appropriate.

4. Sweeney v. Kerstens & Lee Inc, 12 Neb. App. 314, 672 N.W. 2d 257 (2003)

CAUSATION

PSYCHIATRIC DISORDER

The Court of Appeals found the compensation court erred in determining that plaintiff's psychiatric disorder was not work-related. The review panel was reversed and the cause remanded to the trial court.

Plaintiff was initially injured in 1997 when he was struck on the head by a large dirt clod. Shortly after returning to work in 1998, plaintiff suffered an injury to his neck. Surgery was recommended and scheduled, but canceled by the defendant carrier. The trial court found both injuries to be compensable, that the plaintiff suffered a 5 percent loss of earning power for the head injury, and ordered defendant to pay for the recommended surgery for the neck injury. In 2001, plaintiff participated in a job placement vocational rehabilitation plan, but due to his physical limitations, lack of education, and illiteracy, he did not receive any job offers. A loss of earning power evaluation was then completed which showed a loss of earning power in the range of 55 to 60 percent.

In 2002, defendant filed an application to modify plaintiff's previous award and asked the court for a determination on any loss of earning power. The trial court found the plaintiff was entitled to a 55 percent loss of earning power and that defendant should continue to pay for medical bills related to the neck injury. However, the single judge concluded that the plaintiff's psychiatric disorder and resulting care were not due to the accidents. The review panel affirmed.

In reaching its decision regarding the compensability of plaintiff's psychiatric disorder, the trial judge had considered the opinions of two psychiatrists. The first diagnosed plaintiff with major depression and anxiety caused by the stress and loss since his work-related injuries. The second testified that plaintiff's depression was not caused by his work-related accidents, but by his disappointment following the determination that his loss of earning was 55 to 60 percent. The Court of Appeals found that in either case, the psychiatric disorder and treatment were compensable. Even assuming the depression resulted from the loss of earning capacity power evaluation, without the injury, there would have been no evaluation, and thus no depression resulting from that evaluation. The Nebraska Supreme Court has stated that when an injury arises out of a person's employment, every natural consequence that flows from the injury likewise arises of the employment. *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W. 2d 59 (1991). Because plaintiff's depression was caused by his accident, the bills for his psychiatric care were compensable and the trial court erred in finding otherwise.