

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

Fiscal Year 2007: July 1, 2006 to June 30, 2007

## ***Supreme Court Cases:***

### **1. Riesen v. Irwin Industrial Tool Company, 272 Neb. 41, 717 N.W.2d 907 (2006)**

RETALIATORY DISCHARGE

BURDEN OF PROOF

SUMMARY JUDGMENT

The Supreme Court reversed the trial court's order granting summary judgment in favor of defendant and remanded the cause for further proceedings.

Plaintiff injured his shoulder in 2001. He continued working for the defendant with the exception of days missed due to the injury, and was terminated on April 30, 2002. Plaintiff claimed he was fired for filing a workers' compensation claim and pursuing his rights under the Act. Defendant claimed plaintiff was terminated because he falsified his employment application by limiting his employment history to only three previous employers, rather than all his previous employers. The trial court sustained defendant's summary judgment motion, reasoning that plaintiff's evidence failed to establish that defendant was motivated by retaliation or that the justification for termination was pretextual.

The Supreme Court began its analysis by noting that the plaintiff was hired on an at-will basis. In Nebraska, an action for retaliatory discharge is allowed under the public policy exception to the at-will doctrine when an employee has been discharged for filing a workers' compensation claim. Jackson v. Morris Communications Corp., 265 Neb. 423, 657 N.W.2d 634 (2003). In cases involving claims of employment discrimination, albeit not involving workers' compensation claims, the Court previously recognized the burden-shifting analysis which originated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In the instant case, the Court found that the trial court correctly applied the burden-shifting analysis. To satisfy the first step, demonstrating a prima facie case of retaliatory discharge for filing a workers' compensation claim, the plaintiff had to establish: (1) that he filed a workers' compensation claim, (2) that he was terminated from employment, and (3) that a causal link existed between the termination and the workers' compensation claim. Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551 (1986).

The Court determined that the plaintiff satisfied the first two elements of a prima facie case. He filed a workers' compensation claim arising from the injury, and defendant fired him on April 30, 2002. Regarding the third element, the Court disagreed with the trial court's finding that no causal link existed. Such a link often must be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive. Rebarchek v. Farmers Co-op. Elevator, 272 Kan. 546, 35 P.3d 892 (2001). The Court found that the proximity of two days between plaintiff's notice that he needed additional surgery and his termination, coupled with evidence of his positive performance reviews, created the causal nexus necessary to satisfy the third prima facie element. Therefore, plaintiff met his burden of establishing a prima facie case. Continuing through the burden-shifting analysis, the Court next found that because defendant claimed plaintiff was terminated for misrepresenting his employment history, the employer met the second step of the McDonnell Douglas test by articulating a nondiscriminatory reason for

plaintiff's discharge. The burden then shifted back to the plaintiff to prove that the stated reason was pretextual. In this case, in addition to the timing of plaintiff's termination, there was also evidence that other employment applications only listed three prior employers, rather than listing all prior employers by adding an additional page. There was testimony from the employer that in six years, no other employee had been disciplined or terminated for that reason. Plaintiff also offered evidence of statements made by the employer questioning the legitimacy of plaintiff's injury, and evidence that the employer refused to sign an insurance form regarding his off-work status.

Based on the foregoing analysis, the Court concluded that the evidence, viewed in a light most favorable to the plaintiff, created a genuine issue of fact as to whether the reason for termination was a pretext for an impermissible termination. Thus, the trial court erred in granting summary judgment.

**2. Worline v. ABB/Alstom Power Integrated CE Services, 272 Neb. 797, 725 N.W.2d 148 (2006)**

PSYCHOLOGICAL INJURY

CONFLICTING MEDICAL EVIDENCE

The Supreme Court affirmed the judgment of the trial court which found plaintiff's psychological injury was compensable.

The trial court found that the plaintiff injured his right shoulder, neck and lower back, and that he suffered a psychological injury due to the accident. The trial court also found that the claimant had not reached maximum medical recovery for the psychological injury. The plaintiff was awarded temporary benefits, future medical care including counseling for anger and frustration, and vocational rehabilitation services. The review panel affirmed.

The evidence before the trial court included conflicting opinions from physicians regarding whether the neck and back injuries were work-related. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. Sweeney v. Kerstens & Lee, Inc., 268 Neb. 752, 688 N.W.2d 350 (2004). In addition, the trial court is entitled to accept the opinion of one expert over another. Zessin v. Shanahan Mechanical & Elec., 251, Neb. 651, 558 N.W.2d 564 (1997). The Court found that there was sufficient evidence to substantiate the factual conclusions reached by the trial court.

Regarding the award of counseling, the Court stated that a worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability. Sweeney v. Kerstens, *supra*. Relying on the Supreme Court's decision in Dyer v. Hastings Indus., 252 Neb. 361, 562 N.W.2d 348 (1997), defendant claimed that any psychological injury was due to mental stimuli and not to plaintiff's physical injuries. The Court found Dyer to be distinguishable because in that case, no physical injury had caused the claimant's depression. In Dyer, the claimant argued that the "accident" occurred when he was harassed by his supervisors. In this case, there was a physical injury and evidence that the plaintiff's psychological condition resulted from it. The Court cited evidence that plaintiff's anger and frustration were due to his inability to return to his previous position. In addition, plaintiff testified he had never received psychiatric treatment prior to the work-related injury.

The Court declined to substitute its judgment for that of the trial court and concluded that the record presented sufficient evidence to permit the trial court to find the psychological injury compensable.

### 3. D'Quaix v. Chadron State College, 272 Neb. 859, 725 N.W.2d 558 (2007)

ATTORNEY FEES

FINAL ORDERS

WAITING-TIME PENALTY

The Supreme Court upheld the compensation court's denial of plaintiff's motion for a waiting-time penalty and attorney fees.

On October 1, 2004, the trial court found that plaintiff sustained a compensable injury on July 29, 1998, and reached maximum medical improvement on March 2, 2000. The record established that defendant voluntarily made payments of temporary total and permanent partial disability benefits prior to trial. The trial court awarded additional temporary total and permanent partial disability benefits, but the award did not give defendant credit for indemnity payments already made.

The defendant issued a check to plaintiff on October 29, 2004, covering the balance due from the award after subtracting the benefits already paid prior to trial. On June 20, 2005, plaintiff filed a motion in the compensation court seeking waiting-time penalties and attorney fees because defendant did not pay all that was due from the award within 30 days. The single judge found that the voluntary payments claimed by the defendant had been made prior to the award and that no indemnity payments remained unpaid 30 days after entry of the award. Therefore, the plaintiff's motion for a waiting-time penalty and attorney fees was denied. The review panel affirmed.

Plaintiff argued that the failure of the trial judge to credit the defendant for benefits previously paid operated as a denial of such credit. The Supreme Court began by stating that when an order is clearly a final judgment, the silence of the order on requests for relief can be construed as a denial of those requests. See Dawes v. Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N. W.2d 167 (2003). However, the Court found that the trial court was not asked to decide the extent to which the defendant was entitled to credit for disability benefits already paid. Thus, a request for relief could not be implicitly denied if it was never made in the first place. There is no requirement in the Nebraska Workers' Compensation Act that a credit against an award for payments already made be determined by the court. Where the court, by oversight, fails to give credit for the amount already paid, the defendant is still entitled to receive credit. See Rapp v. Hale, 170 Neb. 620, 103 N.W.2d 851 (1960). The Supreme Court held that the award did not deny defendant credit for payments it had already made prior to the award. Therefore, the compensation court did not err in denying plaintiff's motion for a waiting-time penalty and attorney fees because the defendant paid the balance of the award within 30 days.

#### 4. Foster v. BryanLGH Medical Center East, 272 Neb. 918, 725 N.W.2d 839 (2007)

ATTORNEY FEES

STATUTORY CONSTRUCTION

JURISDICTION

The Supreme Court reversed the Court of Appeals' dismissal for lack of jurisdiction and remanded the case to the review panel to consider whether the trial court erred in finding that the plaintiff's former attorney was not entitled to additional amount for his attorney fee, as the review panel had only considered the jurisdictional issue.

The plaintiff initially hired an attorney to represent her in litigation in the Workers' Compensation Court. The initial attorney requested to withdraw and entered a notice of lien when the plaintiff hired a new attorney. The Workers' Compensation Court granted the request to withdraw and allowed the lien. The new attorney represented the plaintiff at a trial and aided her in procuring a settlement. Subsequent to the Workers' Compensation Court's approval of the settlement, the initial attorney requested additional fees pursuant to the attorney lien. The trial judge declined to award further fees or costs, finding that the initial attorney had received all sums due under the fee agreement. The review panel dismissed the appeal for lack of jurisdiction and remanded with directions to vacate the order determining the fee amount. The Court of Appeals also dismissed the appeal for lack of jurisdiction pursuant to its decision in Wells v. Goodyear Tire & Rubber Co., 14 Neb. App. 384, 707 N.W.2d 438 (2005), which held that the Workers' Compensation Court is without authority to determine a fee dispute between current and former counsel.

The Supreme Court looked to the language of §48-108, which provides that no attorney lien is valid unless approved by the Workers' Compensation Court. The Court noted that principles of statutory construction required it to construe the statute so as not to lead to an absurd result that would be contrary to the legislative intent. The purpose of §48-108 is to allow an attorney representing a claimant in a workers' compensation case to secure a lien to ensure payment for services rendered, and the Legislature intended that the Workers' Compensation Court be the forum to determine the fee. It would be illogical to limit the determination only to fee disputes involving current counsel because that determination is inseparable from a determination of former counsel's lien. The compensation court's authority to grant a lien is only effective if the compensation court has the full power to enforce the lien, regardless of whether the attorney seeking enforcement is present or former counsel. Additionally, the compensation court is a sensible venue for fee disputes in compensation cases because of its familiarity with the circumstances in each case.

The Supreme Court expressly disapproved of the Appeal Court's holding in Wells, supra, to the extent it held that the compensation court was without jurisdiction to determine fee disputes involving a claimant's former counsel.

## 5. Zach et al v. Nebraska State Patrol, 273 Neb. 1, 727 N.W.2d 206 (2007)

ACCIDENT

OCCUPATIONAL DISEASE

PSYCHOLOGICAL INJURY — MENTAL STIMULUS

The Supreme Court found the Court of Appeals erred in affirming the judgment of the review panel which reversed the order of dismissal by the trial court.

The decedent was a state trooper who stopped multiple suspects in a motor vehicle and found one of them armed with a pistol. Due to miscommunication or error, the handgun was not identified as stolen and the decedent let the suspects go. Subsequently, the suspects were involved in a bank robbery in which several people were murdered. The decedent felt responsible, became distraught, and two weeks later committed suicide.

The petition alleged that decedent suffered an “accident” because the sudden stimulus of being advised of the consequences of his error caused his brain to undergo physical changes, or in the alternative, that he suffered an “occupational disease” because exposure of the stress resulted in mental disease. The trial court found that because the petition failed to allege a physical injury, whether deemed from an accident or occupational disease, it failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the Nebraska Rules of Pleadings in Civil Cases. Both the review panel and Court of Appeals disagreed, concluding that the petition stated a workers’ compensation claim based upon an accidental injury.

The Supreme Court began its analysis by noting that more than 60 years ago, it decided that an accident must be accompanied by violence to the physical structure of the body. There is a clear distinction between physical and bodily injury on the one hand, and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. Bekelski v. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942). The Court found the allegation that plaintiff’s brain underwent physical changes simply identified the objective symptoms of the injury and that there was no allegation that such changes were caused by any physical stimulus. To the contrary, it was specifically alleged that the changes to plaintiff’s brain were caused by “being advised of the consequences of an error,” which was clearly a mental stimulus. Based on principles articulated in Bekelski and subsequent cases, the Court stated that an injury caused by a mental stimulus does not meet the requirement in Neb. Rev. Stat. §48-151(4) that a compensable accidental injury involve “violence to the physical structure of the body.”

The Court next addressed the alternative theory that plaintiff sustained a compensable injury as a result of an occupational disease. The first two sentences of Neb. Rev. Stat. §48-151(4) read: “Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment.” The question, according to the Court, was whether both sentences, or only the second, apply to injuries caused by occupational disease. It concluded that the plain meaning of the two sentences read together is that disability due to occupational disease is compensable only if it results from violence to the physical structure of the body. Because the injury in this case was alleged to have resulted entirely from a mental stimulus, the Court found that no claim was stated for an injury caused by occupational disease.

The Court noted that Nebraska is one of only five states having workers’ compensation statutes which define compensable injury in terms of violence to the physical structure of the body. Whether to allow compensation for work-related injuries caused by a mental stimulus, however,

is a question that involves economic and social policy considerations that fall within the province of the Legislature.

The judgment of the Court of Appeals was reversed and the cause remanded with directions to affirm the order of dismissal entered by the trial judge.

## 6. Knapp v. Village of Beaver City, 273 Neb. 156, 728 N.W.2d 96 (2007)

RIGHT TO DISMISS

STATUTORY CONSTRUCTION

LEGISLATIVE HISTORY

The Supreme Court affirmed the decision of the review panel which affirmed the order of the trial judge dismissing the plaintiff's action without prejudice to a future action.

Plaintiff filed a petition in the compensation court and the matter was set for trial. Plaintiff then filed a motion to continue which was denied by the trial court. Plaintiff filed for a dismissal without prejudice under §48-177. Defendant objected, claiming that §48-177 is discretionary and not a matter of right. Therefore, plaintiff needed to show cause for the dismissal to be granted. The trial court granted the dismissal. The review panel affirmed, stating that §48-177 had been amended in 2005 to create a nondiscretionary right to dismiss without prejudice.

The Supreme Court began by stating that under §25-601(1), plaintiffs in civil actions may dismiss the action without prejudice before final submission of the case. This right is not a matter of judicial grace or discretion. Holste v. Burlington Northern RR. Co., 256 Neb. 713, 592 N.W.2d 894 (1999). It is a matter of right. Kansas Bankers Surety Co. v. Halford, 263 Neb. 971, 644 N.W.2d (2002). The Court acknowledged its holding in Grady v. Visiting Nurse Assn., 246 Neb. 1013, N.W.2d 559 (1994), that §25-601(1) does not apply to a workers' compensation action. In 2005, however, the Legislature amended §48-177 and made it "substantially similar" to §25-601(1).

Defendant argued that the two sentences in §48-177 are ambiguous; therefore, the Court should look to legislative history to ascertain their meaning. In order to inquire into legislative history, the statute must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be ambiguous. Zach v. Eacker, 271 Neb. 868, 716 N.W.2d 437 (2006). The Court found no ambiguity and had no difficulty determining the intent from the plain language of the statute: The 2005 amendment gave plaintiffs a statutory right for a dismissal which did not previously exist. Therefore, the plaintiff had a statutory right to dismiss her action in the Workers' Compensation Court.

Defendant alternatively argued that dismissal under §48-177 would be subject to exceptions similar to those that apply to the right of dismissal in civil actions. Although the Court declined to decide whether similar exceptions would apply under §48-177, it found no such exceptions existed in the record for this case.

## **7. Bennett v. Saint Elizabeth Health Sys., 273 Neb. 300, 729 N.W. 2d 80 (2007)**

EXCLUSIVE REMEDY

EMPLOYER NEGLIGENCE

PHYSICAL THERAPY

The Supreme Court affirmed the district court determination that the Workers' Compensation Act is the exclusive remedy for consequential injuries. Summary judgment was granted in favor of the defendant and the plaintiff's petition was dismissed.

There was no factual dispute that the plaintiff injured her left shoulder while employed by the defendant as a nurse. After plaintiff underwent surgery on the left shoulder, her surgeon prescribed physical therapy which was administered by the defendant's physical therapy department. Plaintiff alleged that as a result of the physical therapy, her left shoulder was reinjured and required a second surgery. Plaintiff's medical expenses and temporary total and temporary partial disability benefits for both injuries were paid by the defendant's workers' compensation insurer.

Plaintiff then filed a medical malpractice action against the defendant alleging that defendant negligently performed physical therapy on her left shoulder. The defendant filed a motion for summary judgment, claiming that plaintiff's initial injury was compensable under workers' compensation; therefore, all subsequent aggravations to that injury were also workers' compensation related and, pursuant to §§48-111 and 48-148, the plaintiff was barred from pursuing her medical malpractice action. Nonetheless, plaintiff asked the court to ignore the exclusivity provisions, disregard the defendant's status as her employer, and instead consider the defendant as a third party against which a claim would be available under §48-118. Plaintiff argued that because the second injury to her shoulder occurred while she was a patient receiving medical treatment from defendant, she should be allowed to sue the hospital for additional damages in tort.

The Supreme Court declined to accept plaintiff's claim, stating that once an employee's injury is covered under the Act, and notwithstanding the availability of a claim against a third party (see Neb.Rev.Stat. §48-118 et seq.), an employee "surrender[s]" his or her "rights to any other method, form, or amount of compensation" from his or her employer pursuant to §48-111. In addition to §48-111, the Court's analysis cited Neb.Rev.Stat. §§48-112 and 48-148 as authority for the rule of law that the Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer. In this case, it was undisputed that the employee was not performing any work duties when she re-injured her shoulder in rehabilitation. However, an injured worker may recover workers' compensation benefits for a new injury or aggravation of a compensable injury resulting from medical treatment of a compensable injury, even though the new injury was not incurred while performing work duties. See Smith v. Goodyear Tire & Rubber Co., 10 Neb. App. 666, 636 N.W.2d 884 (2001). Relying on Smith, the Supreme Court concluded that because plaintiff would not have undertaken the physical therapy but for the original compensable injury, the consequential injury to the left shoulder was related to her employment and thus was a covered injury under the Act. Because it was a covered injury, the district court correctly found that plaintiff's medical malpractice action was barred by the exclusivity provisions of the Act.

## 8. Olivotto v. DeMarco Bros. Co., 273 Neb. 672, 732 N.W.2d 354 (2007)

### EVIDENCE

### OCCUPATIONAL DISEASE

### LAST INJURIOUS EXPOSURE

### STIPULATIONS

### DOUBLE RECOVERY

The Supreme Court upheld the review panel's findings in all respects, except that the award of medical expenses was reduced to prevent double recovery.

The decedent worked installing tile from 1954 to 1980 and was allegedly exposed to asbestos during that time. He retired in 1980 due to an unrelated heart condition. The decedent was diagnosed with malignant pleural mesothelioma and died from that condition in 2004. Prior to his death, he filed a petition in the Workers' Compensation Court seeking compensation and medical benefits. Upon his death, the parties stipulated that the petition could be amended to substitute his widow as the named plaintiff. She also claimed burial and dependent benefits.

The trial court determined that the plaintiff sustained her burden of proving that exposure to asbestos while working for the defendant employer caused the decedent's mesothelioma. The date of injury was determined to be the date the decedent sought treatment and became disabled as a result of the exposure (January 29, 2003). The trial court determined that the date of the last injurious exposure was September 30, 1980, the last date the decedent worked for the defendant employer. The trial judge awarded payment of medical expenses, travel expenses for medical treatment, and reimbursement of the health insurance deductible. The trial court also awarded burial expenses and dependent benefits to the plaintiff. The review panel affirmed all of the trial court's findings except the determination that the plaintiff was entitled to dependent benefits. The panel reasoned that at the time of the injury, the decedent had been retired for 23 years and had no earnings at the time of injury.

The Supreme Court upheld the trial court's determination that the last injurious exposure was September 30, 1980, the last day the decedent worked for the defendant employer. In Hull v. Aetna Ins. Co., 247 Neb. 713, 529 N.W.2d 783 (1995), the Supreme Court indicated that in an occupational disease case, an employee is injured only when exposure causes disability. Additionally, if the worker's employment at the time of disability involved exposure of a kind that contributed to the disease, liability is generally assigned to the compensation carrier covering the risk when the disease resulted in disability. If there is no exposure at the time of disability, the insurer at the time of the last injurious exposure is generally liable. As set forth in Morris v. Nebraska Health System, 266 Neb. 285, 664 N.W.2d 436 (2003), the date of disability should be determined first, and then the trier of fact must search backward to find the last causal relationship between the exposure and the disability. For an exposure to bear a causal relationship to an occupational disease, it "must be of the type which could cause the disease, given prolonged exposure." Osteen v. A. C. and S., Inc., 209 Neb. 282, 290, 307 N.W.2d, 514, 520 (1981). In this case, the trial court found that the decedent was injured when he became disabled and sought treatment on January 29, 2003. He was not employed on that date, so the trial court searched back to determine the last injurious exposure date. There was no evidence that the decedent was exposed to asbestos in any context but that of his employment with the defendant employer. The trial court was not clearly wrong in determining that the last injurious exposure was the last date worked for the defendant employer. The Supreme Court declined to find that the last injurious exposure was the last date that the defendant employer had compensation coverage on the decedent before he retired, as argued by the defendant.

Regarding the award of medical benefits, the Court noted that Neb. Rev. Stat. 48-120(1) provides for payment of medical expenses, and §48-122(3) expressly disallows reduction of burial expenses due to previously paid medical expenses. Thus, the statute contemplates an obligation to pay medical expenses to a surviving dependent. However, the Supreme Court reversed the award of medical expenses to the extent it constituted double recovery. The trial court awarded expenses totaling \$113,594.25 plus reimbursement of \$4,800.00 for the insurance deductible. The plaintiff testified that the \$113,594.25 amount awarded already included the insurance deductible. It was therefore double recovery for the trial court to award payment of both.

The defendant also argued that plaintiff should be required to file a revivor action prior to proceeding with her claim as surviving widow. The Court noted, however, that defendant had entered into a stipulation allowing the widow to be substituted for the decedent as a named plaintiff. Therefore, the defendant could not complain of a failure to file a revivor action when it had agreed to the substitution.

Finally, the Supreme Court determined that the review panel was correct to reverse the trial court's award of dependent benefits. Because the decedent had been retired for 23 years prior to the date of disability, he had no diminution of employability or impairment of earning capacity.

## 9. **Burns v. Nielsen, 273 Neb. 724, 732 N.W.2d 640 (2007)**

### SUBROGATION

### DISTRIBUTION OF SETTLEMENT PROCEEDS

### STATUTORY CONSTRUCTION

The Supreme Court reversed the district court's application of equitable principles barring an employer from recovering any of its subrogation interest from an employee's third-party settlement.

The employee suffered a work-related accident and injury on the premises of a third party. The employer voluntarily paid medical and disability benefits. When the employee claimed more medical expenses, the employer denied payment of any further benefits based on a question of causation. The employee then filed a workers' compensation claim, which was settled prior to trial with a lump sum payment approved by the compensation court. The employee also filed a third-party negligence claim which was settled as well. The district court then made a determination of the employer's subrogation interest in the negligence claim. That court barred the employer from recovering any of its subrogation interest in the third-party action by applying the equitable principles of unclean hands and equitable estoppel because the employer had denied the employee's workers' compensation claim.

The Supreme Court began by stating that §48-118 grants an employer who paid workers' compensation benefits a subrogation interest in any third-party recovery, and that §48-118.04 directs the court to make a "fair and equitable distribution" of the third-party settlement proceeds when the parties cannot agree on the distribution. Relying on legislative history, the Court explained that §48-118.04 applied the law of equity to the statutory right of subrogation. Jackson v. Branick Indus., 254 Neb. 950, 581, N.W.2d 53 (1998). However, subrogation in workers' compensation cases is still based on statute, and not in equity, so the Court has applied statutory subrogation and rejected pure equitable subrogation in such cases. Turco v. Schuning, 271 Neb. 770, 716 N.W.2d 415 (2006).

After an extensive review of §48-118, legislative history, and public policy considerations, the Supreme Court found that an employer can defend against a workers' compensation claim and still claim a subrogation interest in the proceeds of the third-party claim. The determination of the reasonableness of the employer's defense of the workers' compensation claim is made by the Workers' Compensation Court under the Workers' Compensation Act, and not in the district court by using equitable principles.

The Court explained further that the phrase "fair and equitable distribution" in §48-118.04 simply requires the court to determine a reasonable division of the proceeds among the parties. Therefore, the district court erred in concluding that equitable principles barred the employer from recovering its subrogation interest in the third party settlement. The decision was reversed and remanded to the district court to make a reasonable division of the proceeds of the third-party settlement.

## ***Court of Appeals Cases (Designated for Permanent Publication):***

### **1. Michel v. Nuway Drug Service, Inc., 14 Neb. App. 902, 717 N.W.2d 528 (2006)**

CAUSATION

REASONABLE MEDICAL CERTAINTY

EVIDENCE — FAILURE TO OBJECT

REASONABLE MEDICAL EXPENSES — RESIDENTIAL CARE

The Court of Appeals affirmed the trial court and review panel's determination that the plaintiff's small bowel obstruction was a compensable consequence of and causally related to his work-related injury. Additionally, the Court of Appeals affirmed the award of related medical expenses, including residential care for the plaintiff.

On January 5, 1973, plaintiff suffered a gunshot brain injury and resultant partial paralysis. Plaintiff was awarded permanent total disability benefits as a result of his compensable injuries. On July 6, 2001, plaintiff went to the emergency room where a tracheotomy was performed. Plaintiff was diagnosed with a small bowel obstruction of uncertain etiology and sepsis secondary to a line infection, which the trial court found to be causally related to his brain injury. The defendant was ordered to pay all of plaintiff's medical expenses relating to the bowel obstruction, including residential care and any future medical expenses deemed reasonably necessary.

At trial, plaintiff had introduced medical opinions stating the small bowel obstruction was "most probably" a complication of his posttraumatic brain condition. Defendant argued these medical opinions did not establish a causal link between plaintiff's January 5, 1973 injury and the July 6, 2001 bowel obstruction because they were not based on a reasonable degree of medical certainty, as required under Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998). The Appeal Court noted, however, that the Supreme Court has also stated, "Magic words' indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary." Paulsen v. State, 249 Neb. 112,121, 541 N.W.2d 636, 643 (1996). In addition, medical testimony expressed in terms of "possibility" was not sufficient, while such testimony in terms of "probability" was sufficient in Miner v. Robertson Home Furnishing, 239 Neb. 525, 532, 476 N.W.2d 854, 860 (1991), quoting Welke v. Ainsworth, 179 Neb. 496, 504, 138 N.W.2d 808, 813 (1965). Here, the Court held that although neither doctor used "magic words," both opinions indicated a conclusion to a reasonable degree of medical certainty that plaintiff's bowel obstruction was causally related to the gunshot injury he suffered in 1973.

Defendant also argued that one physician's opinion was suspect since the physician did not know the exact date of plaintiff's tracheotomy. The Court found no merit in the argument, noting that the date the tracheotomy was performed was not relevant to the causation question. Moreover, the defendant made no objections to the physician's opinion on the ground of insufficient factual basis during the deposition. See Diversified Telecom Servs. v. Clevinger, 268 Neb. 388, 683 N.W.2d 338 (2004). A party who fails to object to evidence when offered waives whatever objection the party may have had thereto. *Id.* Therefore, defendant was deemed to have waived that objection to the physician's opinion.

Finally, defendant argued that the trial court erred in finding that plaintiff's expenses related to his small bowel obstruction were necessary, fair, and reasonable and that defendant was liable for plaintiff's residential care in addition to his future medical expenses. The defendant, however, did not discuss this issue in its brief. In the absence of plain error, an appellate court

considers only claimed errors which are both assigned and discussed. County of Sarpy v. City of Gretna, 267 Neb. 943, 678 N.W.2d 740 (2004). The Court found no plain error, and thus did not consider the issue of whether the awarded expenses were necessary, fair, and reasonable.

## 2. Snowden v. Helget Gas Products, Inc., 15 Neb. App. 33, 721 N.W.2d 362 (2006)

### NOTICE OF INJURY

#### RULE 11

#### WILLFUL NEGLIGENCE

The Court of Appeals reversed the trial court's finding of lack of notice, vacated the determination that the employee's death was due to willful negligence, and remanded the case to the trial court to determine the remaining issues presented at trial.

On February 18, 2002, the employee loaded several gas cylinders into a truck. Later in the afternoon while driving the truck, he hit a parked car. His supervisor came to the scene of the accident, and the employee was sent home. The employee returned to work the next day, but he called in sick one time over the next several weeks. The supervisor observed the employee wearing a back brace one week after the accident. The employee informed his supervisor that his back was a "little tight" but the back brace had nothing to do with the employer. The employee resigned from employment on March 8, 2002, after a meeting with his supervisor. In that meeting, the employee told his supervisor that he had been wearing a back brace under his uniform and taking medication for the pain. The employee signed a form indicating that he was resigning because of health concerns and productivity issues. On April 19, 2002, the workers' compensation carrier issued a payment for temporary total disability for 6 weeks of disability. The employee was evaluated by a psychiatrist and was diagnosed with depression. The employee died on March 13, 2004, as a result of drug toxicity. The employee's widow and child brought an action for benefits accrued prior to the employee's death as well as an action for widow and dependent benefits, claiming that the employee committed suicide as a consequence of his injury. The trial court determined that the employee sustained an injury to his back on February 18, 2002, but no benefits were due as the employee failed to give timely notice. Though indicating the issue was moot, the trial court determined that the employee's death was due to willful negligence by intentionally ingesting an overdose of narcotics. The review panel affirmed the trial court on the issue of notice, but declined to comment on the issue of willful negligence.

The Court of Appeals disagreed, noting first that §48-133 provides a bar for recovery if no notice is given to the employer in writing. However, lack of written notice does not bar a claim if the employer has actual notice. The purpose of the §48-133 notice requirement is to promote immediate medical care and facilitate timely investigation of the facts. The test for whether sufficient notice has been given, as set forth in Scott v. Pepsi Cola Co., 249 Neb. 60, 65, 541 N.W.2d 49, 53 (1995), is "notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further."

In the instant case, the trial court did not apply the Scott test and instead relied solely on Williamson v. Werner Enters., 12 Neb. App. 642, 682 N.W.2d 723 (2004). The Court of Appeals found that Williamson was not controlling. In Williamson, there was a substantial factual dispute regarding the underlying facts on the notice issue, and the standard of review applied was the "clearly erroneous" standard. In this case there was no dispute regarding the underlying facts of notice, and the appropriate standard of review was the "de novo" standard. Secondly, this case could be distinguished because, unlike Williamson, there was payment of workers' compensation benefits within two months of the injury, the benefits continued for a period of time, and medical expenses were also paid. The Court noted that while payment of benefits under the Workers' Compensation Act is not an admission of liability, payments can be used as evidence to support a claim that the employer or compensation carrier had actual notice.

Because the trial court did not apply the Scott standard to the undisputed facts in the case, the Court of Appeals independently examined the record to determine whether there was sufficient knowledge to establish actual notice as a matter of law. The Court found, pursuant to Scott, that a reasonable employer knowing what this employer did would conclude that a potential workers' compensation claim existed, and it should investigate. As support, the Court noted that the employer had immediate knowledge of the lifting and motor vehicle accident on the date of the accident, the supervisor had knowledge within the week that the employee was wearing a back brace, the employee worked less than three weeks before he resigned and his resignation was due in part to health concerns, and the compensation carrier issued a check less than two months following the accident.

The Court of Appeals also vacated the trial court's determination that the employee's death was the result of willful negligence. The Court indicated that while the trial court characterized the issue of willful negligence as moot, it nonetheless made a determination on that issue. Further, the trial court did not analyze the willful negligence issue in light of Friedeman v. State, 215 Neb. 413, 339 N.W.2d 67 (1983), which held that not all suicides will result in a finding of willful negligence, but when an employee's injuries result in a lapse of normal judgment and disturbance of mind, the suicide may not be willful. Because of the trial court's failure to consider the past precedent and by issuing an opinion on a moot issue, the trial opinion did not satisfy Rule 11 as it did not provide a meaningful basis for appellate review.

### **3. Hubbart v. Hormel Foods Corp., 15 Neb. App. 129, 723 N.W.2d 350 (2006)**

MODIFICATION

BURDEN OF PROOF

CAUSATION

REASONED DECISION

The Court of Appeals held there was sufficient evidence for the trial court to find a causal relationship between plaintiff's work-related injury and her recurrent carpal tunnel syndrome. However, the Court of Appeals reversed the trial court's decision that plaintiff's depression was compensable and remanded the issue, instructing the trial court to apply the correct standard of proof.

Plaintiff filed a petition claiming repetitive trauma injuries to her upper extremities. The parties subsequently entered into a joint stipulation for dismissal agreeing that plaintiff's carpal tunnel syndrome was work-related. Defendant agreed to pay for reasonable and necessary medical expenses and vocational rehabilitation services.

Three years later, plaintiff filed an "Application to Modify," requesting that defendant pay for repeat left carpal tunnel surgery and for temporary total disability benefits previously awarded, which defendant had refused to pay. Plaintiff also alleged that she developed mental overlays secondary to her work-related injuries, and the mental overlays rendered her totally disabled. Defendant argued that plaintiff's application to modify should be dismissed with prejudice because her recurrent carpal tunnel syndrome was not a work-related injury, and her claim for benefits related to mental overlay was barred by the statute of limitations and by the doctrine of res judicata. The trial court found that physician, psychiatrist and psychologist reports attributing plaintiff's depression to her work-related injury, loss of function and pain syndrome, and other contributory stressors (unemployment, drug use, arrest and conviction) were sufficient evidence to prove plaintiff's depression was work-related. The court stated that it was not necessary for plaintiff to establish that the work injury was the sole cause of her depression, but only that the work injury was a significant, contributing cause of the depression. Plaintiff was awarded temporary total disability benefits due to her depression and future reasonable and necessary medical expenses for her depression and carpal tunnel syndrome.

On appeal, the review panel held that there was sufficient evidence for the trial court to find that plaintiff's depression was related to her work injury. However, since the trial court did not address the issue of whether plaintiff's claim for benefits due to her depression was barred by the statute of limitations or by res judicata, the review panel reversed and remanded the trial court decision pursuant to Rule 11 of the Rules of Procedure of the Nebraska Workers' Compensation Court which entitles parties to a reasoned decision.

The Court of Appeals affirmed the panel's decision to remand the issue of whether plaintiff's claim of depression was barred by the doctrine of res judicata or by the statute of limitations pursuant to Rule 11 since defendant specifically pled the affirmative defenses and there was evidence that may or may not have supported defendant's position. The Court further agreed that there was sufficient evidence for the trial court to find a causal connection between plaintiff's recurrent carpal tunnel syndrome and her work injury. However, the Court reversed the compensation court's decision that plaintiff proved a causal connection between her depression and her work-related accident.

The trial court had evaluated plaintiff's application to modify based on her depression using an incorrect standard. It applied the standard of proof required in proving causation for an original

application for workers' compensation benefits, rather than the standard required for a modification of an award of benefits. In order to prove causation in an original workers' compensation application, the plaintiff need only prove that the work accident was a significant, contributing cause of the injury, not that the work accident was the sole cause of the injury. The Court of Appeals stated that in order to obtain a modification of an award, the appropriate standard for proving causation between the increase or decrease in incapacity and the original accident is whether the change in incapacity was due solely to the injury resulting from the original accident. See Neb. Rev. Stat. §48-141, Bronzynski v. Model Electric, 14 Neb. App. 355, 707 N.W.2d 46 (2005). Therefore, the Court of Appeals remanded this issue to the review panel for remand to the trial court for evaluation of the claim using the proper standard.

**4. Ashland-Greenwood Public Schools v. Thorell, 15 Neb. App. 114, 723 N.W.2d 506 (2006)**

WORKERS' COMPENSATION TRUST FUND f/k/a SECOND INJURY FUND

WRITTEN RECORDS REQUIREMENT

STATUTORY CONSTRUCTION

EVIDENCE

The Court of Appeals reversed the decision of the review panel and remanded the case to the trial judge to determine the nature and extent of the contribution of the Workers' Compensation Trust Fund to the employee's permanent total disability payments.

The employee worked for the employer from 1972 through 1998. He suffered a serious work-related injury to his back in 1979. On November 20, 1987, a lump sum settlement agreement was filed and approved by the compensation court and by the district court. The settlement was based on a 25 percent permanent partial disability to the body as a whole. On January 5, 1995, the employee suffered another work-related injury to his back and neck.

On July 23, 2003, the employer filed a petition in the Workers' Compensation Court against the employee and the Trust Fund (formerly known as the Second Injury Fund) in order to shift a portion of the liability to the Trust Fund pursuant to §48-128. The trial court found that the employee's injury was causally connected to his employment and that he was permanently totally disabled as a result of the accident. The judge also found that to shift a portion of payments to the Trust Fund under §48-128(1)(b), an employer must show *current* possession of written records to establish that it had knowledge of the employee's permanent partial disability at the time the employee was retained in employment. Although the trial judge found that the employer possessed such records at some point in the past, the employer was unable to produce them at trial. Therefore, liability could not be shifted. The review panel affirmed.

The Court of Appeals disagreed, noting first that the employer's actual knowledge of the employee's permanent partial disability is insufficient as a matter of law to shift any burden for permanent total disability payments to the Trust Fund under §48-128. The purpose of the written records requirement in 48-128(1)(b) is to put in place a strictly limited method of proving a predicate fact before benefits shift to the Trust Fund. See Baughman v. United-A.G. Co-op, 7 Neb. App. 936, 586 N.W.2d 836 (1998). The Court then noted, however, that Baughman does not address whether current possession of written records is required under §48-128. The Trust Fund had argued that §48-128 requires an employer to produce written records at trial. The Court found nothing in the language of §48-128 that requires possession of written records at the time of the subsequent injury or at the time of determination of the Trust Fund contribution. The Court held that the written records requirement of §48-128 is merely an evidentiary rule that must be sensibly construed. In construing a statute, the court must look to the statute's stated purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction that would defeat it. Village of Winside v. Jackson, 250 Neb. 851, 553 N.W.2d 476 (1996). A requirement of current possession frustrates the purpose of §48-128 which is to provide an incentive for employers to hire workers with preexisting disabilities, and imposes an arbitrary and artificial element of proof not found in §48-128. Therefore, the Court concluded that current possession of written records is not required under §48-128.

In the instant case the Court of Appeals found that the lump sum settlement agreement and order were written records which established that the employer had knowledge of the employee's permanent partial disability. Testimony from another employee of the employer established that these documents were at one time retained in the employer's records.

Therefore, the written records requirement under §48-128 was satisfied. The case was remanded to the trial judge to determine the extent of the Trust Fund contribution.

## 5. Davis v. Crete Carrier Corp., 15 Neb. App. 241, 725 N.W.2d 562 (2006)

MODIFICATION

STIPULATIONS

STATUTE OF LIMITATIONS

ATTORNEY FEES

The Court of Appeals reversed the review panel's finding of error in the trial court's denial of the plaintiff's motion for penalties, interest, and fees.

The plaintiff suffered a compensable injury in 1989. In an award on rehearing dated February 2, 1993, the court ordered running temporary total disability benefits. The parties entered into a stipulation adopted by the court in November 1993 that the defendant would pay temporary total disability while the plaintiff was undergoing vocational rehabilitation. The plaintiff completed vocational rehabilitation on October 28, 1994, at which time defendant began paying permanent partial disability benefits. Such benefits continued until the expiration of 300 total weeks of benefits on December 29, 1994. In October 2003, the plaintiff filed a motion for penalties, interest, and fees, alleging he was entitled to temporary total disability benefits under the February 1993 award, and that the defendant was wrong to unilaterally terminate temporary benefits in October 1994 without an application to modify or an agreement of the parties. The defendant filed a motion for summary judgment alleging that the statute of limitations and various equitable principles barred the plaintiff's claimed recovery. The trial court denied the motion, finding that the two-year statute of limitations did not apply in an action where a petition was filed and an award entered. See Foote v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001). The trial court also held it had no power to allow equitable defenses, as the Workers' Compensation Court is not a court of equity.

After a hearing on the merits of the plaintiff's penalty motion, the trial court determined that the plaintiff was not due any additional temporary or permanent benefits. The judge found that no application to modify was required in the context of running temporary disability unless the parties disagreed on the issue of permanency, in which case the award would be modified retroactively to the date the plaintiff was no longer entitled to temporary benefits. The trial court also held that there was a reasonable controversy regarding the plaintiff's entitlement to additional benefits, and no penalties were due. On appeal, the review panel reversed the denial of the plaintiff's penalty motion and remanded the case to the trial court to determine what amounts were due in compensation and penalties. The panel reasoned that an application to modify or agreement of the parties was required to modify the running temporary disability award. Because the panel found that the November 1993 stipulation and order was not an agreement within the meaning of §48-141, and neither party had filed an application to modify, there had not been a modification of the 1993 award. The review panel also upheld the trial court's finding on the inapplicability of the statute of limitations.

The Court of Appeals reversed the panel's holding that an application to modify was required. Neb. Rev. Stat. §48-141 provides for modification of an award by a modification action or agreement of the parties. The Court determined that the November 1993 stipulation and order was an agreement within the meaning of §48-141. The Court found it necessary to review the entire record to determine the meaning of the November 1993 judgment. The February 1993 award ordered temporary total disability benefits "for so long as [the employee] was temporarily totally disabled." The November 1993 stipulation and order modified the duration of temporary total disability to "for so long as the employee was undergoing vocational rehabilitation." The order did not provide any additional rights or benefits. As such, it operated as an agreement by the parties solely to modify the duration of temporary disability benefits.

The Court went on to distinguish the instant case from ITT Hartford v. Rodriguez, 249 Neb. 445, 543 N.W.2d 740 (1996), and cases like it. In ITT Hartford, the running award was “for so long in the future as [the employee] shall remain temporarily totally disabled as a result of the accident.” In that case, the Supreme Court held that the employer could not make a unilateral determination that the employee was at maximum medical improvement. In this case, the parties entered into a stipulation that modified the duration of temporary disability, and therefore had an agreement within the meaning of §48-141.

The Court of Appeals did not address the statute of limitations issue, as a decision on that issue was not necessary for a final determination in light of its holding on the issue of the plaintiff’s penalty motion. Likewise, the Court agreed with the trial court’s finding that a reasonable controversy existed.

The plaintiff had also alleged error in the review panel’s failure to award him an attorney fee for his appeal to the panel. The panel did award the plaintiff an attorney fee for defense of the defendant’s cross-appeal at the review panel level. The Court of Appeals determined that no additional fee was due, because the plaintiff’s appeal to the panel was a motion to enforce an award, and he failed to obtain additional or new benefits. Therefore, the plaintiff had not “obtained an award” nor obtained “an increase” within the meaning of Neb. Rev. Stat. §48-125(1).

## 6. Garcia v. Platte Valley Construction Co., 15 Neb. App. 357, 727 N.W.2d 698 (2007)

CONDITIONAL ORDERS

FINAL ORDERS

MEDICARE SET-ASIDE ARRANGEMENTS

The Nebraska Court of Appeals dismissed plaintiff's appeal and remanded the cause for entry of a final order.

Plaintiff injured his back and was awarded benefits by the compensation court. In 2004, the parties filed an Application for Final Lump Sum Settlement which stated that plaintiff was a Medicare recipient, and that the application was "subject to the requirement for a Medicare Set-Aside Agreement and set-aside allocation." On January 12, 2005, the compensation court entered an order approving the application. On March 14, 2005, plaintiff filed a motion for waiting-time penalties and attorney fees, claiming that payment of the settlement proceeds on February 23, 2005, was not made within 30 days of the January 12, 2005 order. Defendant claimed that payment was made after plaintiff fulfilled his obligation to provide documentation that he had executed a Medicare Set-Aside Agreement and had provided it to the Centers for Medicare & Medicaid Services (CMS).

The trial court found that the order approving the settlement was a conditional order because it was subject to approval of the Medicare Set-Aside by CMS, and conditional orders are generally void. Lyle v. Drivers Mgmt., 12 Neb.App 350, 673 N.W.2d 237 (2004). The trial court went on to state that even if it were successfully argued that the order was an exception to the general rule because it was based upon a future condition i.e., approval by CMS, that condition was not met until February 17, 2005, and payment occurred February 23, 2005 — well within 30 days of the occurrence of the condition. The trial judge found that either way, plaintiff's motion for waiting-time penalty, attorney fees, and interest was denied. The review panel affirmed and plaintiff timely appealed.

The Court of Appeals agreed that the application contained conditional language in that it stated "this lump sum settlement will be subject to the requirement for a Medicare Set-Aside agreement." A judgment is a court's final determination of the rights and obligations of the parties to an action as those rights and obligations presently exist. Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006). Thus, orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as judgments and are wholly ineffective and void as such. Id. These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. Id. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. Id.

The record clearly indicated that the set-aside agreement was not completed at the time the order approving the settlement was entered. Because the order did not "perform in praesenti," the Court found the order void. Therefore, the plaintiff's appeal was dismissed for lack of a final, appealable order. The cause was remanded for entry of a final order.