

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

Fiscal Year 2008: July 1, 2007 to June 30, 2008

Supreme Court Cases:

1. Cruz-Morales v. Swift Beef Company, 275 Neb. 407, 746 N.W.2d 698 (2008)

DEFAULT JUDGMENT

NOTICE OF HEARING

RULES OF PROCEDURE

The Supreme Court reversed the trial court's order granting plaintiff's motion for default judgment and remanded the cause for further proceedings.

Plaintiff injured her back in 2005 and filed a petition in September 2006. In November 2006, plaintiff moved for default judgment because defendant had not filed an answer. Defendant did not appear at the hearing on the motion and the trial court awarded benefits.

Defendant filed a motion to stay entry of an order on plaintiff's motion for default judgment. Then, following entry of the award, defendant moved for an order vacating the default judgment or in the alternative, correcting an error pursuant to Neb. Rev. Stat. §48-180. Defendant argued that the compensation court lacked authority to enter default judgments or in the alternative, that defendant did not receive proper notice of the default judgment motion or hearing. Defendant presented evidence that the motion and notice of hearing was served at the mailing address for Sedgwick Claims, who was the third-party administrator for defendant's workers' compensation claims through July 2006. However, Sedgwick Claims was no longer the administrator when plaintiff sent notice of the default judgment motion.

The trial court overruled defendant's motions, finding that the compensation court had authority to rule on motions for default judgment under Neb. Rev. Stat. §48-162.03 and that the motion under Neb. Rev. Stat. §48-180 was improper because there was no obvious error in granting the default judgment. The review panel affirmed.

The Supreme Court found that the plain language of §48-162.03(1) provides the compensation court with authority to rule upon "any motion" except motions for new trial or motions for reconsideration. A motion for default judgment is neither of the exceptions.

The next issue addressed by the Court was the interplay between Rule 3 of the compensation court Rules of Procedure and Rule 5 of the Nebraska Court Rules of Pleadings in Civil Actions. Rule 3 requires the initiating party to serve motions on each party. However, Rule 5(a) states that "no service need be made on parties in default for failure to appear..." Ct. R. of Pldg. in Civ. Actions 5. The review panel found no "...statute that would support a credible argument that the procedural rule of the Nebraska Workers' Compensation Court ought to supersede or supplant Rule 5 as adopted by the Supreme Court." The Court disagreed, citing Neb. Rev. Stat. §48-163 which allows the compensation court to adopt rules necessary for carrying out the intent and purpose of the Act, and Neb. Rev. Stat. §48-168 which states that the compensation court is not bound "by any technical or formal rules of procedure."

The review panel had also relied on Phillips v. Monroe Auto Equip. Co., 251 Neb. 585, 558 N.W.2d 799 (1997) in finding that "procedural, evidentiary, and discovery rules established by

the compensation court may not be more restrictive or onerous than those of the trial courts in this state.” In this case, the Supreme Court found that Rule 3 does not restrict the procedural safeguards offered under Rule 5 and the common law. Instead, Rule 3 expands the protections in those rules because it requires that even a defaulting party should receive notice. Therefore Rule 3 is not more restrictive than the rules of this state’s trial courts, and is the applicable rule in this case.

The Court concluded that the compensation court has authority to enter default judgments, but the defaulting party must receive notice of the motion under Rule 3 of the Workers’ Compensation Court Rules of Procedure. Since defendant did not receive notice, the Court found that the trial court acted without or in excess of its powers.

2. Davis v. Crete Carrier Corp., 274 Neb. 362, 740 N.W.2d 598 (2007)

MODIFICATION

The Supreme Court affirmed the judgment of the Court of Appeals in Davis v. Crete Carrier Corp., 15 Neb. App. 241, 725 N.W.2d 562 (2006) on the issue of whether the defendant's termination of temporary total disability benefits was procedurally correct, though the Supreme Court utilized different reasoning in so finding.

The plaintiff was awarded ongoing temporary total disability benefits in a 1993 award on rehearing. That award provided that when plaintiff's "temporary total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury," and when the total disability ceased "if thereafter the parties cannot agree on the extent of . . . disability, if any, then a further hearing may be had herein on the application of either party." In November 1993, the trial judge entered an order pursuant to the stipulation of the parties that defendant would pay temporary total disability benefits "while [Davis] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan of which the stipulation is a part." Defendant stopped paying temporary total disability benefits and began permanent partial benefits when the plaintiff completed the vocational rehabilitation plan. There was no hearing prior to termination of temporary total disability benefits. Nine years later, plaintiff requested temporary total benefits under the 1993 award on rehearing from the date of that order and continuing. The trial court declined to award such benefits. The review panel remanded the case, finding that termination of benefits required a hearing to terminate the benefits under the original award. The Court of Appeals reversed the review panel decision, holding that the November 1993 order was a modification of the award by agreement under §48-141.

The Nebraska Supreme Court opinion primarily addressed the modification issue, and it employed different reasoning but affirmed the judgment of the Court of Appeals. The Supreme Court framed the broad question as whether defendant complied with proper procedures when terminating plaintiff's temporary total disability benefits, and found defendant did.

The Supreme Court distinguished the present case from Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998), which held that an employer improperly terminated awarded permanent total disability benefits unilaterally, and from Hagelstein v. Swift-Eckrich, 261 Neb. 305, 622 N.W.2d 663 (2001), which held that the employee who was awarded benefits for an indefinite period was entitled to those benefits until a modification request. In the present case, the award on rehearing contained language indicating that plaintiff would be entitled to residual permanent benefits after temporary disability ceased and that the parties could apply for further hearing if there was disagreement on the extent of permanent disability. While benefits were awarded for an indefinite period in both the above-cited and present cases, in this case the terms of the award allowed either party to request a hearing to determine permanent benefits. There was also the approved stipulation of the parties indicating that temporary benefits continued while vocational rehabilitation was ongoing, and the plaintiff had completed the vocational plan. Based on those facts, the Supreme Court concluded no application for modification was required in order to cease payment of temporary benefits. It noted that plaintiff could have applied for a hearing upon termination of temporary total benefits.

The Supreme Court also affirmed the Court of Appeals finding that a reasonable controversy existed regarding the claimed continuing temporary total disability benefits as the termination was not improper.

3. **Giboo v. Certified Transmission Rebuilders, 275 Neb. 369, 746 N.W.2d 362 (2008)**

LOSS OF EARNING POWER

RELEVANT LABOR MARKET

REBUTTABLE PRESUMPTION

The Supreme Court reversed the review panel and remanded the case to the trial judge with instructions.

The plaintiff suffered a back injury at work, resulting in permanent restrictions. After the accident, she relocated from Omaha to Dunlap, Iowa, which is 50 miles east of Omaha. At trial, the agreed-on counselor offered an opinion on plaintiff's loss of earning capacity based on the Omaha/Council Bluffs labor market, even though the plaintiff was then residing in Dunlap. The plaintiff presented testimony from another vocational rehabilitation counselor that the correct labor market was Dunlap, but Omaha/Council Bluffs could be used in assessing loss of earning capacity if it was reasonable to expect plaintiff could travel there for work. The trial court accepted the agreed-on counselor's opinion and rejected the plaintiff's vocational expert's opinion in assessing plaintiff's loss of earning power. In a 2-to-1 decision, the review panel affirmed the trial court's decision.

The Nebraska Supreme Court first determined that the relevant labor market was Dunlap. The Court noted that contrary to the trial court's decision, Harmon v. Irby Constr. Co., 258 Neb. 420, 604 N.W.2d 813 (1999), did not establish that the relevant labor market in determining loss of earning is the market in which plaintiff lived at the time of the accident, but instead it established that a claimant cannot be compelled to move to a larger labor market in order to find employment. However, in this case, the employee voluntarily relocated, leaving the Nebraska Supreme Court to determine how the compensation court should assess the proper labor market when the claimant has relocated. The Supreme Court stated that the labor market determination when a claimant relocates should be to determine the hub community and then determine what additional surrounding areas are includable in the labor market. When a claimant relocates after the injury, the hub community is the new community to which the claimant has relocated, so long as the move was made for legitimate reasons.

The Supreme Court declined to adopt a rule that would include consideration of the original labor market at the time of the accident because it might be based on unrealistic employment opportunities that would distort the picture of the claimant's loss of earning capacity. Additionally, such an approach might cause a claimant to decline to relocate to improve his or her economic situation out of a concern for a reduction in compensation. The Court held that the compensation court should determine whether relocation was reasonable by deciding whether the move was made "in good faith, and not for improper motives." Giboo, 746 N.W.2d at 372. It is not necessary for the claimant to justify relocation with purely economic motives. The plaintiff bears the burden of establishing that the relocation was motivated by legitimate reasons rather than out of a desire to increase industrial disability. If the claimant is unable to show a legitimate reason, the hub is the location where the claimant resided at the time of the accident. In the instant case, there was evidence showing plaintiff's move was for the legitimate reason of wanting to live with the father of her child. Further, defendant's brief essentially conceded the move was legitimate. Thus, the Supreme Court concluded that Dunlap was the hub community, and no remand on that issue was necessary.

The Court went on to state that once the hub community has been identified, additional locations within a reasonable geographic area can be considered as part of the relevant labor market. The test to determine which areas may be included is whether, under the totality of the circumstances, it would be reasonable for the claimant to seek work in that location. The factors

set forth by the Supreme Court were: “(1) availability of transportation, (2) duration of the commute, (3) length of the workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, and (5) economic feasibility of a person in the claimant's position working in that location.” Giboo, 746 N.W.2d at 374. Consideration may also be given to whether or not employees in the claimant's hub area regularly seek employment in the prospective geographic area. Because the trial court had not employed this test to determine whether or not the Omaha/Council Bluffs area should be included in the relevant labor market, the Supreme Court remanded for a determination on that issue.

The Supreme Court also determined that the trial court incorrectly applied the rebuttable presumption of correctness to the agreed-on counselor's opinion. Plaintiff presented testimony from her own expert that an improper labor market was used. The agreed-on counselor used only the Omaha/Council Bluffs labor market in assessing loss of earning. Additionally, the agreed-on counselor did not adjust his opinion on percent loss of access to employment upon finding that plaintiff was permanently restricted to a 6-hour-workday. Because of the errors in the agreed-on counselor's report, it was error for the trial court to rely on the opinion and reject the testimony of the plaintiff's vocational expert.

Finally, the trial court did provide a reasoned decision under Workers' Comp. Ct. R. of Proc. 11A (2006), because the trial judge made conclusions of law and findings of fact and provided the bases for those determinations. The trial court did consider testimony from plaintiff's vocational expert, but rejected the expert's opinion. Thus, the decision provided a basis for meaningful appellate review.

4. Hofferber v. City of Hastings, Nebraska, et. al., 275 Neb. 503, 747 N.W.2d 389 (2008)

EXCLUSIVE REMEDY

SUMMARY JUDGMENT

The Supreme Court affirmed the decision of the district court granting summary judgment in favor of City of Hastings and Kramer, but reversed and remanded the summary judgment in favor of Kleinjan.

Plaintiff was employed for Hastings Utilities and was injured while attempting to read water meters located in an underground pit. The meters served the Kleinjan and Kramer residences but were located entirely on the Kleinjan property. After receiving workers' compensation benefits from Hastings Utilities, plaintiff then brought negligence claims against Kramer and Kleinjan, and against the City of Hastings under the Political Subdivisions Tort Claims Act. Neb. Rev. Stat. §13-901 et seq. The district court found that Hastings Utilities was a component or department of the City of Hastings and determined that plaintiff's negligence claim was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act and the exemption in the Political Subdivisions Tort Claims Act for workers' compensation claims. The district court also granted summary judgment in favor of Kramer and Kleinjan.

The Supreme Court began by stating that pursuant to §§48-111, 48-112, and 48-148, the Nebraska Workers' Compensation Act is an employee's exclusive remedy against his or her employer for a work related injury. Bennett v. Saint Elizabeth Health Sys., 273 Neb. 300, 729 N.W.2d 80 (2007). The Court then stated that since the City of Hastings is a political subdivision, the Political Subdivisions Tort Claims Act is pertinent, but does not apply to employee's claims against a political subdivision covered under the Nebraska Workers' Compensation Act.

Plaintiff argued that Hastings Utilities and the City of Hastings should be treated as separate entities analogous to a parent and subsidiary corporation, and that the exclusivity provisions of the Nebraska Workers' Compensation Act should not bar a negligence suit against a parent corporation when the original workers' compensation claim was against a subsidiary even if they share the same policy.

Without deciding whether a parent corporation would share the exclusive remedy provisions of the Nebraska Workers' Compensation Act with its subsidiary, the Supreme Court determined that the relationship of the City of Hastings and Hastings Utilities is not that of a parent corporation and its subsidiary. The Court concluded that Hastings Utilities and the City of Hastings are not separate entities. Hastings Utilities is an agency or department of the City of Hastings. It is functionally integrated in city government. Its employees are employees of the City and subject to the same rules and regulations as other employees of the City. It utilizes the City's personnel department. Its budget and rates are subject to the Hastings City Council. Finally, it is insured under the City's workers' compensation policy. The fact that Hastings Utilities is separately audited is a requirement of state law and does not indicate separate corporate entities. Therefore, the Court held that the district court did not err in determining that plaintiff's claim against the City of Hastings was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act and the exemption in the Political Subdivisions Tort Claims Act.

In regard to the tort claims brought against Kramer and Kleinjan, the Court affirmed the summary judgment in favor of Kramer as she owed no duty to plaintiff because the meter pit was not located on her property and she did not exercise any control over it. However, the Court reversed the summary judgment in favor of Kleinjan as the pit was on her property and she did not make a prima facie showing sufficient to entitle her to summary judgment.

5. Lowe v. Drivers Mgmt., Inc., 274 Neb. 732, 743 N.W.2d 82 (2007)

MODIFICATION

BURDEN OF PROOF

FAILURE TO PARTICIPATE IN VOCATIONAL REHABILITATION

The Supreme Court remanded the case to the review panel to affirm the trial court's award of permanent total disability benefits with a reduction for plaintiff's refusal to participate in a vocational rehabilitation.

In 2004, the trial court entered an initial award ordering defendant to pay permanent partial disability benefits and vocational rehabilitation job placement benefits. Neither party disputed that plaintiff failed to participate in the vocational rehabilitation plan. In 2005 plaintiff filed an application to modify the initial award claiming permanent total disability (PTD) due to increasing pain and medical evidence of increased disc herniation in his spine. The trial judge awarded plaintiff PTD benefits, partially reduced for the time period between the award and the modification hearing pursuant to §48-162.01(7) because plaintiff unreasonably failed to participate in the vocational rehabilitation plan. The review panel subsequently affirmed the award of PTD benefits, but reversed the reduction of benefits.

Defendant argued that the review panel erred in affirming the trial court's award of PTD benefits because the medical evidence did not support an award of PTD. The Supreme Court found that although there were conflicting medical reports, there was sufficient evidence for the trial court to find that there was a substantial change for the worse in plaintiff's condition. When there is conflicting medical testimony, an appellate court will not substitute its judgment for that of the trial court, and the trial judge is entitled to accept the opinion of one expert over another. Worline v. ABB/Alstom Power Int. CE Servs., 272 Neb. 797, 725 N.W.2d 148 (2006).

Defendant also argued that even if plaintiff were now permanently and totally disabled, plaintiff's benefits should be reduced for the period after the modification proceedings because he failed to participate in vocational rehabilitation services which worsened his situation. The Court noted that pursuant to §48-162.01(7), the two-part test for the suspension, reduction or limitation of benefits is met if (1) the employee refuses to undertake or fails to cooperate with a court-ordered physical, medical or vocational rehabilitation plan and (2) the refusal was without reasonable cause. The Supreme Court stated that, similar to a §48-120(2)(c) reduction in benefits for unreasonable refusal of medical or surgical treatment, the employer has the burden of proving the §48-162.01(7) two-part test has been met. Here, defendant offered no evidence that plaintiff had no reasonable cause to refuse to participate in job placement services since the modification proceedings, and that if he had participated in job placement services, he would have been employed at the time of the modification hearing. Therefore, there was no further reduction of benefits for the time period after the modification proceedings. The Court affirmed the trial court's further award of PTD benefits and refused to reduce plaintiff's benefits for the period after the modification proceedings.

6. Money v. Tyrell Flowers and Continental Western Group, 275 Neb. 602, 748 N.W.2d 49 (2008)

LOSS OF EARNING POWER

RELEVANT LABOR MARKET

LAW-OF-THE-CASE DOCTRINE

PERMANENT TOTAL DISABILITY

ODD-LOT WORKER

The Supreme Court held that the trial court correctly determined the relevant labor market for calculation of plaintiff's loss of earning power and that plaintiff was permanently and totally disabled as an odd-lot worker.

In May 2000, plaintiff suffered a herniated disc in her neck when she tripped and fell while working for defendant in Lincoln, Nebraska. A physician determined that she could perform work at least at the light physical demand level, and that she had 28 percent permanent impairment to the body as a whole. Plaintiff then participated in a job placement plan. The vocational rehabilitation counselor stated that plaintiff was diligent and aggressive in her job search, but did not obtain a job. Plaintiff then moved to Table Rock, Nebraska where her husband's parents had purchased a house for them. Plaintiff briefly worked for a sewing factory in July 2004, but was soon terminated for absences related to her neck pain. In March 2005, her physician reported that plaintiff complained of constant headaches and intolerance to sitting for more than 90 minutes, but that she could work at least at the sedentary-light demand level.

The trial court found plaintiff was permanently and totally disabled. The judge determined that the relevant labor market should exclude Lincoln because plaintiff moved to Table Rock in good faith, and a commute to Lincoln from Table Rock would not be economically feasible. The judge concluded that plaintiff had made a good faith effort to find employment but failed.

The review panel reversed, finding that the relevant labor market should be Lincoln *and* Table Rock. Otherwise, plaintiff would be able to manipulate her loss of earning power by moving to an area with fewer job opportunities. On remand, the trial court concluded that plaintiff was permanently and totally disabled in both markets under the odd-lot doctrine. Because of her physical impairments combined with her intellectual deficiencies, the trial court found plaintiff would be hired only by very sympathetic employers. Defendant appealed again and the review panel affirmed.

The Supreme Court first recited its holding in Giboo v. Certified Transmission Rebuilders, 275 Neb. 369, 746 N.W.2d 362 (2008) that if a claimant moves to a new community in good faith, the new community will serve as the hub community from which to assess the loss of earning power. Here, the trial court found that plaintiff had a good faith economic motive to move to Table Rock. Therefore, the review panel incorrectly held that a court must assess loss of earning power based on both the Lincoln and Table Rock communities. Furthermore, the trial court properly excluded Lincoln from the relevant labor market. Under Giboo, the nonexclusive list of factors in determining whether to include surrounding communities in the relevant labor market are (1) availability of transportation, (2) duration of the commute, (3) length of workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, (5) economic feasibility of a person in the claimant's position working in that location, and (6) whether others who live in the claimant's hub community regularly seek employment in the prospective area. The Court noted that the court-appointed vocational rehabilitation counselor applied these factors in concluding that a reasonable offering of jobs

existed within a 15-40 mile range of plaintiff's residence. Thus, it was not clearly wrong for the trial court to determine that it was economically unreasonable for plaintiff to commute 75 miles to Lincoln.

Defendant also argued that because plaintiff did not appeal the review panel's first decision requiring a trial judge to consider both labor markets, that decision became the law of the case. As a result, defendant claimed neither the trial court nor the review panel correctly assessed plaintiff's loss of earning power based on both labor markets. In In re Application of City of Lincoln, 243 Neb. 458, 500 N.W.2d 183 (1993) the Court stated that "[a]n issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage." At the appellate level, however, the law-of-the-case doctrine "is not applied with the same rigor as res judicata or collateral estoppel." Money v. Tyrell Flowers and Continental Western Group, 275 Neb. 602, 748 N.W.2d 49 (2008). The Court recognized two extraordinary circumstances when the doctrine will not apply: 1) if considerations of substantial justice suggest a reexamination of the issue is warranted, *id.* at 614, 748 N.W.2d at 61.; 2) when the petitioner presents materially and substantially different facts, *id.*; and now 3) in a later appeal of the same action if a higher court has since issued a contrary decision. Here, the law-of-the-case doctrine did not apply because the holding in Giboo, which came after the initial trial court decision, was the controlling authority to determine the relevant labor market for assessing plaintiff's loss of earning power.

Finally, defendant argued that the trial court should have required plaintiff to undergo additional vocational rehabilitation and search for employment before determining she was permanently and totally disabled. The Court pointed out that total disability does not mean absolute helplessness, but rather that due to an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for work for any other kind of work which a person of his or her mentality and attainments could do. See, Fraendorfer v. Lindsay Mfg. Co., 263 Neb. 237, 639 N.W.2d 125 (2002). The Court agreed with the trial court's finding that plaintiff made reasonable good faith efforts to find employment but was unable to obtain employment. Plaintiff was an odd-lot worker because she "would only be hired by sympathetic employers" due to her significant physical impairments, reading and math deficiencies and intellectual limitations. Therefore, the Court affirmed the trial court's determination that plaintiff should receive permanent and total disability benefits.

7. **Murphy v. City of Grand Island, 274 Neb. 670, 742 N.W.2d 506 (2007)**

BURDEN OF PROOF

CONFLICTING MEDICAL EVIDENCE

The Supreme Court affirmed the trial court's dismissal of plaintiff's claim.

Plaintiff worked as a firefighter and EMT for defendant since 1982. In 1990 the employer implemented safety procedures that required emergency personnel to prepare incident reports when exposed to a patient's bodily fluids. Plaintiff submitted incident reports in 1990, 1991, and 1992 due to exposure to patient bodily fluids. Plaintiff tested positive for hepatitis C in 2002 and filed an action against the employer in 2004 claiming he contracted hepatitis C in the course of his employment.

The trial court found that plaintiff failed to establish that he was exposed to a patient infected with hepatitis C. There was no evidence that his skin was pierced, or that blood splashed onto a portion of his skin which was cut or otherwise presented an open entry point. The incident reports submitted by plaintiff indicated that his skin was intact, but that he was possibly exposed via his nose, eyes, or mouth. The trial court concluded that although plaintiff was engaged in an occupation which provided a risk for exposure, he was unable to provide any evidence that he came in contact with the blood or bodily fluids of an individual infected with hepatitis C. A further complication was that the plaintiff had risk factors outside his employment in which he was possibly exposed, including boxing, football, and a knee surgery. The review panel affirmed the dismissal of plaintiff's claim.

Plaintiff argued that his occupation placed him at greater risk of contracting hepatitis C, pointing to Neb. Rev. Stat. §71-514.01, which provides in part: "The Legislature hereby finds that health care providers are at risk of significant exposure to the blood and other body fluids of patients as a result of their work." Plaintiff argued that §71.514.01 implies that hepatitis C should be considered an occupational disease, that this changed the burden of proof placed upon him, and that he was not required to prove the exact date and time that he contracted hepatitis C. The Court stated that the problem was not that plaintiff failed to prove the date and time he contracted hepatitis C, but that he failed to prove it was more likely than not that he contracted hepatitis C during the scope and course of his employment with the City.

Plaintiff offered medical evidence which he believed established that he contracted hepatitis C as the result of his employment. The Court noted that one physician's opinion was based on the belief that plaintiff had no risk factors outside his employment, and the other medical opinion offered by plaintiff was a medical record based on a "lengthy discussion" with the plaintiff. In contrast, the employer offered medical evidence from a physician stating that he could not conclude with a reasonable degree of medical certainty that plaintiff acquired hepatitis C through his employment because the other risk factors could not be eliminated.

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. Worline v. ABB/Alstom Power Int. CE Servs., 272 Neb. 797, 725 N.W.2d 148 (2006). The Court found that it was within the discretion of the trial court to conclude that one medical opinion was more credible than others because some medical opinions were based upon faulty or incomplete information. The Court declined to substitute its judgment for that of the trial court in accepting defendant's expert opinion over that of plaintiff's experts.

The Court concluded that the trial court did not err in finding insufficient evidence of causation and affirmed the dismissal of plaintiff's claim.

8. Powell v. Estate Gardeners, Inc., 275 Neb. 287, 745 N.W.2d 917 (2008)

AVERAGE WEEKLY WAGE

The Supreme Court reversed and remanded the review panel's calculation of average weekly wage.

The plaintiff was hired as a landscaper crewmember at the rate of \$12.00 per hour. When hired, plaintiff understood that his hours would vary from day to day but that he could average 50 to 60 hours per week during busy periods. The plaintiff was injured on his first day of work after working for 11.25 hours.

The plaintiff claimed an average weekly wage of \$600.00. The trial court, without providing a precise basis for its calculation, found that plaintiff's average weekly wage was \$540.00 based on a work period of 45 hours per week. The review panel found that the plaintiff's average weekly wage was \$675.00 by multiplying the 11.25 hours that plaintiff worked in one day by the 5 days that it assumed plaintiff would normally work per week.

The Supreme Court stated that pursuant to §48-126, the analysis for determining the average weekly wage for nonseasonal, continuous employees paid by the hour begins by "using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer." For this analysis, a history of past earnings is required to calculate an average weekly wage. The Court found that one day is not a sufficient history to calculate an average weekly wage, and that the review panel erred in assuming that plaintiff would work 11.25 hours every day for a 5-day workweek.

The Court then stated that when an employee has an insufficient work history to calculate average weekly wage, the language of §48-126 provides that the average weekly wage should be based on what would *ordinarily* constitute the employee's workweek. The Court found that the plaintiff's work history was insufficient to determine what would ordinarily constitute a workweek. Looking to similar holdings in other states, the Court held that the average weekly wage should be estimated by considering other employees working similar jobs for similar employers for the 6-month period prior to the accident.

Finally, the Court held that the record was not sufficient to determine the ordinary workweek of plaintiff's fellow crewmembers for the preceding 6 months, so the case was remanded for further proceedings.

9. Risor v. Nebraska Boiler and Twin City Fire Insurance Co., 274 Neb. 906, 744 N.W.2d 693 (2008)

DUE PROCESS -- NOTICE TO INSURER

INTERVENTION

PRIVITY OF INSURANCE CARRIERS

The Supreme Court affirmed the review panel's holding denying Twin City's motion to intervene in a review proceeding.

Plaintiff filed a petition alleging bilateral hearing loss and a date of injury of June 25, 2002. Fireman's Fund entered an appearance for the employer for the coverage period of September 1, 1992 through June 1, 2002. The trial court awarded benefits to the plaintiff and found the date of injury to be October 19, 1993, the only time plaintiff missed work due to the injury.

After the award, it was discovered that Twin City, not Fireman's Fund, was the insurer in October 1993. Twin City subsequently filed a motion for leave to intervene with the review panel, claiming that procedural due process mandated intervention because it faced significant exposure under the Nebraska Workers' Compensation Act without having had the opportunity to be heard. The review panel denied the motion to intervene, noting that there was no statutory authority for such action and that the compensation court lacked equitable powers. Twin City appealed.

The Supreme Court first recited its prior holding that the insurer is a proper party defendant in a workers' compensation action, but that it is not a necessary party to the action. Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N.W.2d 564 (1953). Further, both the Act and the rules of the compensation court are silent on the issue of intervention. Twin City argued that post-award intervention by an insurer can be inferred from Neb. Rev. Stat. §48-168(1), because the compensation court is not bound by formal rules of procedure. The Court noted that it is a general principle that intervention is not authorized after trial. See Neb. Rev. Stat. §25-328. When post-trial intervention has been authorized in the district courts of Nebraska, it is in the exercise of the court's equity jurisdiction. State ex rel. City of Grand Island v. Tillman, 174, Neb. 23, 115 N.W.2d 796 (1962). But no Nebraska statute grants equity jurisdiction to the compensation court. Anthony v. Pre-Fab Transit Co., 239 Neb. 404, 476 N.W.2d 559 (1991). The court is a tribunal of limited jurisdiction and only has the authority as has been conferred on it by statute. Anthony v. Pre-Fab Transit Co., *supra*. In response to Twin City's request for liberal construction of the Act, the Court stated that the beneficent purposes of the Act do not concern themselves with an insurer's interests in intervention. In fact, there is no provision in the Act that even requires notification to the insurer that an action against its insured is pending. The Court was unconvinced by defendant's arguments for post-award intervention based on §48-168.

Twin City further argued that principles of procedural due process mandated its participation. As stated by the U.S. Supreme Court, "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 58 L. Ed. 2d. 552 (1979). Privity requires a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same. R.W. v. Schrein, 236 Neb. 708, 642 N.W.2d 505 (2002). Courts in other jurisdictions have found insurers to be in privity with their insureds and bound by a judgment against the insured, regardless of whether the insurer was notified of the underlying action. Crist v. Hunan Palace, Inc., 277 Kan. 706, 89 P.3d 573 (2004). In addition, Neb. Rev. Stat. §48-146(3) provides that each workers' compensation policy shall contain a clause providing that the insurer "shall in all things be bound by the awards, judgments, or decrees rendered against such insured." The

Court noted that the intent of this section is to bind insurers to judgments rendered against their insureds. Thomas v. Omega Re-Bar, Inc., 234 Neb. 449, 451 N.W.2d 396 (1990).

In the instant case, the Court found that the employer's interests, represented by attorneys provided by Fireman's Fund, were substantially the same as Twin City's. Therefore, the fact that Twin City was not notified and made a party to the proceedings was not a violation of procedural due process because the employer and Twin City were in privity with one another. The Court noted that Twin City would be free to represent the interests of its insured employer in the appeal of the award to the review panel, if it so chose.

In conclusion, the Court stated there was no statutory or constitutional authority for allowing intervention in the review.

10. Trosper v. Bag 'N Save, 273 Neb. 855, 734 N.W.2d 704 (2007)

PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT

RETALIATORY DEMOTION

The Supreme Court reversed the district court's dismissal of plaintiff's claim and remanded the case for further proceedings.

Plaintiff filed a complaint alleging that she suffered a work-related injury which required medical treatment while employed as a deli manager. Plaintiff claimed that when she reported her injury to the employer, she was demoted from deli manager to deli clerk and that her annual salary decreased. Plaintiff alleged that defendant acted in a retaliatory manner contrary to the Court's decision in Jackson v. Morris Communications Corp., 265 Neb. 423, 657 N.W.2d 634 (2003) because demotion, like termination, frustrates the public policy behind the Nebraska Workers' Compensation Act. Defendant argued that demotion did not implicate the same concerns as discharge. The district court sustained the employer's motion to dismiss for failing to state a claim upon which relief could be granted. The Supreme Court disagreed.

In Jackson, the Court reasoned that "a rule which allows fear of retaliation for the filing of a claim undermines [the important public policy of the Nebraska Workers' Compensation Act]" and that "the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal." Jackson v. Morris Communications Corp., *supra*. The Court stated that "an employee's right to be free from retaliatory demotion is married to the right to be free from discharge. Demotion, like termination, coercively affects an employee's exercise of his or her rights under the Nebraska Workers' Compensation Act." The intent of Jackson was to protect the public policy and beneficent purpose of the Nebraska Workers' Compensation Act. Although demotion is less harsh, it would still shrink an employee's right to pursue workers' compensation. Failing to recognize a claim for retaliatory demotion would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights. Therefore, the Court concluded that a cause of action for retaliatory demotion exists when an employer demotes an employee for filing a workers' compensation claim. The case was reversed and remanded with instructions that the plaintiff be given leave to amend the petition to the extent it lacked factual allegations.

In response to the questions posed by the dissent, the concurring opinion stated that the issue will always be whether the employer engaged in actions that violate public policy, but that those situations could be handled by incorporating the McDonnell Douglas burden-shifting analysis familiar from discrimination cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed 2d 668 (1973) and Riesen v. Irwin Indus. Tool Co., 272 Neb. 41, 717 N.W.2d 907 (2006).

The concurring opinion stated that the Legislature could act by passing an anti-retaliation statute. However, the very point of Jackson was that the Legislature *has declared* the public policy of this state by enacting the Nebraska Workers' Compensation Act. The Legislature enacted the Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury. That public purpose would be undermined if an employer could threaten a potential claimant with retaliation short of discharge, but substantial enough to deter filing a claim.

The dissent stated a willingness to extend the holding in Jackson to circumstances constituting a constructive discharge, but no further. The dissent expressed concern that an employer would have no way of knowing in advance what specific conduct is prohibited under the new common-law cause of action. The dissent asked if a transfer to a different position, perhaps at a reduced wage, in order to accommodate the worker's diminished physical abilities, would now be

deemed a retaliatory demotion. Would an employer be prevented from taking measures to address the unsatisfactory job performance of an employee who has a pending workers' compensation claim? The dissent argued that any restrictions on an employer's freedom to make decisions concerning the terms and conditions of ongoing at-will employment should be expressly imposed by the Nebraska Legislature.

Court of Appeals Cases (Designated for Permanent Publication):

1. Godsey v. Casey's General Stores, Inc., 15 Neb. App. 854, 738 N.W.2d 863 (2007)

TEMPORARY TOTAL DISABILITY

FUTURE MEDICAL CARE

The Court of Appeals affirmed the review panel's affirmance of the trial court's award of temporary total disability and future medical benefits.

The plaintiff injured her back in a motor vehicle accident while traveling for work. She missed time from work for medical treatment while she was still employed with the defendant. She was paid sick and vacation time for those periods. The trial court awarded periods of temporary total disability for the time she missed work but did not award credit for the sick and vacation time paid.

The plaintiff submitted medical opinions stating a breast reduction surgery was a medical necessity to reduce her back pain and avoid back surgery. There was also a medical opinion that a breast reduction surgery would not be useful. The plaintiff also submitted evidence from her mental health counselor that stated the plaintiff would not have sought mental health treatment without the work accident and resulting problems, even if the counseling sessions focused on underlying psychological issues. The defendant submitted a medical report that stated plaintiff's depression resulted from past sexual abuse and assault rather than the work accident. The trial court held that the plaintiff was entitled to future medical treatment including breast reduction surgery and counseling for depression that was reasonable and necessary as a result of the accident. The review panel affirmed the award of temporary total disability and future medical benefits.

Regarding the award of temporary disability, the Court of Appeals applied Anderson v. Cowger, 158 Neb. 772, 65 N.W.2d 51 (1954), to examine whether credit for the payment of sick and vacation time should have been given. Anderson provides that credit can be allowed for payment of wages in lieu of compensation, and there is a reasonable inference that payments are in lieu of compensation when the worker is paid even though not performing any work. Further, the Court of Appeals noted that in Brummer v. Vickers, Inc., 11 Neb. App. 691, 659 N.W.2d 838 (2003), it had previously stated that the determination of whether credit should be given focuses on the intent of the employer and the circumstances surrounding the payment. In Brummer there was no evidence of intent that payment was in lieu of compensation because severance payments were made to employees irrespective of any work injury. Finally, the Court of Appeals quoted 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §82.06[3] (2007), which states that a "type of payment for which credit is usually disallowed is any kind of sick pay or vacation pay of which it can be said that the claimant's entitlement to payment is based on past service rather than on the injury as such." Here, the payment for sick and vacation time did not preclude an award of temporary total disability, and the trial court could rely on the plaintiff's testimony to determine the periods of temporary total disability.

Regarding the award of future medical benefits, there was evidence in the record to support the award of future medical benefits including a breast reduction surgery and counseling services. It is the province of the trial court to resolve questions of conflicting medical evidence.

2. Heppler v. Omaha Cable, Inc., 16 Neb. App. 267, 743 N.W.2d 383 (2007)

ATTORNEY FEES

FINAL ORDERS

STATUTORY CONSTRUCTION

TEMPORARY TOTAL DISABILITY

The Court of Appeals affirmed the decision of the review panel that plaintiff was entitled to continuing payments of temporary total disability benefits beyond 300 weeks and attorney fees.

The trial court found that plaintiff was temporarily totally disabled and ordered defendant to pay a specified period of temporary disability benefits and to continue to pay such benefits so long as plaintiff remained temporarily total disabled. Defendant ceased paying temporary total disability benefits after making 300 weeks of payments. The plaintiff then filed a motion to compel payment of temporary total disability benefits and for attorney fees. The trial court overruled plaintiff's motion. The review panel reversed, ordering defendant to continue paying temporary total disability benefits and awarded attorney fees.

Defendant first argued that the review panel lacked jurisdiction because the trial court's order was not a final, appealable order. Merrill v. Griswold's, Inc., 270 Neb. 458, 703 N.W.2d 893 (2005). The Court of Appeals stated that a final order includes an order affecting a substantial right, and that the trial court's order affected a substantial right by eliminating plaintiff's claim for temporary total disability benefits beyond 300 weeks. Therefore the trial court's order was a final, appealable order.

Defendant then claimed that §48-121 provides for a maximum of 300 weeks of payments for temporary total disability benefits. The Court of Appeals began by stating that the only reference to 300 weeks is in §48-121(2) which addresses partial disability, and there is no similar limitation in §48-121(1) which governs total disability. The Court went on to state that for many years §48-121(1) mentioned 300 weeks, but such language was removed by the Legislature which shows intent to eliminate such a limitation upon temporary total disability benefits. Finally, the Court stated that it would not read such a limitation into §48-121(1). Therefore, the Court held that the 300-week limitation found in §48-121(2) does not apply to temporary total disability benefits awarded under §48-121(1), so plaintiff's entitlement to temporary total disability benefits was not limited to 300 weeks.

In regard to the award of attorney fees, defendant claimed that plaintiff did not obtain an increase in the amount of the award as is required for an award of attorney fees under §48-125(2). The Court found that the order plaintiff appealed effectively limited his temporary total disability benefits to 300 weeks, and that the review panel found that plaintiff was entitled to temporary total disability benefits beyond 300 weeks. Therefore, plaintiff obtained an increase of benefits on review and he was entitled to attorney fees.

3. **Holmes v. Chief Industries, Inc., 16 Neb. App. 589, 747 N.W.2d 24 (2008)**

MODIFICATION

STIPULATIONS

The Court of Appeals held there was no modification of the original award, and it reversed the review panel dismissal with directions to remand to the trial judge for further proceedings.

In 2000 the trial court issued an award of temporary total disability “for so long in the future as [plaintiff] shall remain temporarily totally disabled.” In 2003, the plaintiff’s attorney at the time of the original trial filed a motion for an attorney lien and indicated he no longer represented plaintiff. Hearing on that motion was held, but plaintiff did not attend and was not represented. The attorney represented that plaintiff was receiving permanent disability benefits at that time, and the trial judge awarded the attorney lien based on permanent disability benefits. In 2006, plaintiff filed a motion requesting additional temporary benefits, asserting that there was no modification and the original award of running temporary total benefits was still in force. The trial judge denied the motion, finding that a modification pursuant to §48-141 had been made based on the attorney lien hearing and order approving the lien. The review panel affirmed the finding that there was a modification.

The Court of Appeals noted that §48-141 provides that all amounts are final except that periodic payments under an agreement or award may be modified by agreement of the parties with approval of the court. Therefore, the Court of Appeals had to determine whether the order on the attorney lien approved an agreement by the parties that the running award of temporary total disability was terminated. In determining whether the order constituted approval of an agreement to cease temporary total disability benefits so as to modify the running award, the Court of Appeals distinguished this case from Davis v. Crete Carrier Corp., 15 Neb. App. 241, 725 N.W.2d 562 (2006). In Davis the Court of Appeals determined that a modification had taken place based on the stipulation of the parties to temporary disability benefits while the plaintiff was in a vocational rehabilitation program. That stipulation was approved by the compensation court. Termination of benefits when plaintiff no longer participated in vocational rehabilitation was acceptable because the original running temporary disability award was modified by court-approved stipulation. In Davis v. Crete Carrier Corp., 274 Neb. 362, 740 N.W.2d 598 (2007), the Supreme Court affirmed the judgment of the Court of Appeals but modified the reasoning.

However, in this case there was no evidence of any agreement between the parties that the running temporary total disability award had ended or would end at a certain time or pursuant to a certain event. First, the plaintiff’s former counsel lacked the authority to bind plaintiff to any agreement that running temporary total disability had or should have ceased. Second, even if former counsel could have bound the plaintiff to an agreement at that hearing, a representation that the plaintiff was currently receiving permanent disability benefits was not evidence of an agreement that the running temporary total award should end, as defendant claimed. The representation itself was a characterization of current benefits received. It was a statement of the fact that defendant might have unilaterally modified benefits. Pursuant to Davis and ITT Hartford v. Rodriguez, 249 Neb. 445, 543 N.W.2d 740 (1996), an employer cannot unilaterally change benefits. Because there was no agreement to modify the award, no modification had taken place at the attorney lien hearing in 2003.

4. McKay v. Hershey Food Corp., 16 Neb. App. 79, 740 N.W.2d 378 (2007)

MODIFICATION

NOTICE OF REQUEST FOR APPOINTMENT OF VOCATIONAL REHABILITATION COUNSELOR

FINAL ORDERS

The Court of Appeals upheld the review panel's affirmance of the trial court's order granting defendant's motion for summary judgment. Section 48-162.01(7) did not apply and plaintiff did not prove an increase in incapacity to support a modification of the award.

The compensation court awarded plaintiff certain benefits. The award did not address any claim for, or make an award of, vocational rehabilitation services. Some time after the award, the compensation court granted a request from the plaintiff for appointment of a vocational rehabilitation counselor. The compensation court subsequently granted defendant's motion to strike the appointment, finding that plaintiff failed to give notice to defendant or its insurer of the request for appointment as required by §48-162.01(3) and Rule 42,A of the Workers' Compensation Court Rules of Procedure. Since no vocational rehabilitation services were awarded, plaintiff was essentially requesting a modification of the award and was required to prove that there was an increase in his incapacity due solely to the injury pursuant to §48-141.

The review panel affirmed the compensation court's decision; however, before the review panel's decision was entered, plaintiff filed a petition to modify the original award, alleging increased incapacity and alleging "in the interest of justice the compensation court or judge thereof may also modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment" pursuant to §48-162.01(7). The trial court granted defendant's motion for summary judgment, finding that §48-162.01(7) was not applicable since vocational rehabilitation services were not awarded and the plaintiff did not provide any evidence of increased incapacity. The review panel affirmed and stated that in order to invoke §48-162.01(7), a prior award of vocational rehabilitation services must have been made.

As an initial matter, the Court of Appeals addressed whether the trial judge's original award was a final order. The award did not discuss vocational rehabilitation. The Court concluded that the award was intended to serve as a final order, thus, the trial judge's silence on vocational rehabilitation could be construed as a denial of these services. The Court of Appeals went on to uphold the trial court's decision and the review panel's affirmance in granting the defendant's motion for summary judgment. The Court of Appeals concluded that §48-162.01(7) is inapplicable since the original award of benefits did not award vocational rehabilitation services, and that the requirements for modification under §48-141 were not met since the plaintiff did not prove he suffered an increase in incapacity since the award.

5. McNamee v. Marriott Reservation Ctr., 16 Neb. App. 626, 747 N.W.2d 30 (2008)

APPELLATE REVIEW

EVIDENCE – BILL OF EXCEPTIONS

The Court of Appeals upheld the review panel's affirmance of the trial court's dismissal of plaintiff's petition with prejudice, finding that plaintiff did not suffer any compensable impairment or disability.

In her appeal to the compensation court review panel, plaintiff failed to request that the bill of exceptions be prepared as required by Neb. Worker's Comp. R. 13 and 14. Therefore, the review panel found that it could not review the bill of exceptions in deciding the employee's appeal. After reviewing the pleadings, absent the bill of exceptions, the review panel determined that the pleadings supported the trial court's dismissal of plaintiff's petition. On appeal to the Court of Appeals, plaintiff requested that the bill of exceptions be prepared. The question was whether the Court of Appeals could review the bill of exceptions given that the review panel did not have the bill of exceptions before it. The Court of Appeals concluded that it could not.

The Court noted that when it reviews a matter appealed from a county court to a district court, the Court of Appeals can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment. State v. Trampe, 12 Neb. App. 139, 668 N.W.2d 281 (2003), citing State v. Cardona, 10 Neb. App. 815, 639 N.W.2d 653 (2002). The Court stated, "We see no reason why this rule would not apply to the workers' compensation context in which an appellant must appeal from the trial court to the review panel and then to this court or the Nebraska Supreme Court." Here, since the bill of exceptions was not presented to the review panel, the Court of Appeals could not consider it. Otherwise, an appellant who had not complied with the rules governing preparation of the bill of exceptions in front of the review panel would be allowed, in effect, to bypass the review panel and go directly to the Court of Appeals for a full review.

The Court of Appeals affirmed the dismissal of plaintiff's case with prejudice after reviewing the pleadings, absent the bill of exceptions, finding that they were sufficient to support the review panel's decision.

6. Morales v. Swift Beef Company, 16 Neb. App. 90, 741 N.W.2d 433 (2007)

FINAL ORDERS

JURISDICTION

STIPULATIONS

The Court of Appeals affirmed the decision of the review panel that the March 2, 2006, award was not a final order and that defendant's application for review of that award was of no effect.

On March 2, 2006, the trial court entered an award (March award) which stated that a further hearing would be held to determine average weekly wage, period of temporary total disability, and attorney fees. On March 16, 2006, defendant filed an application for review of the March award which assigned 17 errors. On April 11, 2006, a hearing was held in the trial court where no additional evidence was received. On May 17, 2006, the trial court entered an order (May order) which addressed average weekly wage and ordered defendant to pay temporary total disability benefits. On May 30, 2006, defendant filed an application for review assigning as error the finding of temporary total disability benefits set forth in the May order. The review panel found that the March award was interlocutory, that the March 16, 2006 application for review was a nullity, and determined that the May 30, 2006 application for review was the only one properly before it. The review panel remanded the matter back to the trial judge concerning the award of temporary total disability benefits in the May order.

The Court of Appeals began by stating that when there are multiple issues before a court and the court decides some of the issues, while reserving an issue or issues for a later determination, a court's determination of less than all the issues is an interlocutory order and not a final order for the purpose of an appeal. Merrill v. Griswold's, Inc., 270 Neb. 458, 703 N.W.2d 893 (2005). Therefore, the Court of Appeals found that the March award was clearly an interlocutory order and not a final appealable order because it stated that there would be further hearing to determine certain issues. Defendant argued that the March award was a final order because the issues reserved for a later hearing were ripe for adjudication, and that the trial court's lack of a decision on those issues was tantamount to a finding that plaintiff did not meet her burden of proof on those issues. The Court of Appeals determined that any error in reserving the issues was harmless, and that the proper time for the defendant to challenge the propriety of reserving the issues was in the appeal of the May order, which was a final, appealable order.

The defendant next argued that the trial court lacked jurisdiction to hold the subsequent hearing and enter the May order following the March 16, 2006 application for review. The Court stated that the March award was not a final appealable order, so the defendant's application for review of a nonappealable order did not deprive the trial court of jurisdiction. Holste v. Burlington Northern RR. Co., 256 Neb. 713, 592 N.W.2d 894 (1999).

Lastly, the defendant claimed that the review panel erred in not addressing the 17 assignments of error from the March 16, 2006 application for review as the parties had stipulated to the consolidation of appeals. The Court stated that appellate review can only be conferred by statute and not by stipulation of the parties. State v. Murphy, 15 Neb. App. 398, 727 N.W.2d 730 (2007). The Court went on to state that pursuant to §§48-179 and 48-182, an application for review needs to be filed within 14 days of a final order of the compensation court. Since the March award was not a final order, the March 16, 2006 application for review was a nullity and was of no effect. Therefore, the May 30, 2006 application for review was the only one filed within 14 days of a final order and the only error contained in it was the only one properly before the review panel.