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

Fiscal Year 2010: July 1, 2009 to June 30, 2010

Supreme Court Cases:

1. Allen v. Immanuel Medical Center, 278 Neb. 41, 767 N.W.2d 502 (2009)

DISTRICT COURT JUDGMENTS

DORMANCY STATUTE

GARNISHMENT

JURISDICTION

STATUTORY CONSTRUCTION

The Supreme Court affirmed the decision of the district court dismissing the garnishment action brought against an employer because the judgment entered by the Workers' Compensation Court became dormant and could not be revived.

Plaintiff suffered a work-related injury to her back in 1985 while employed by defendant. On November 5, 1987, the Workers' Compensation Court entered an award on rehearing (Award) where defendant was ordered to pay a specified period of temporary disability benefits and to continue to pay such benefits so long as plaintiff remained temporarily total disabled. On December 10, 1987, plaintiff filed a certified copy of the Award with the district court. In February 1989, plaintiff returned to full-time employment and continued to work full-time until she retired in December 2006. The defendant paid indemnity benefits pursuant to the Award until April 25, 1991. Defendant never filed an application with the Workers' Compensation Court to modify the Award. On June 26, 2008, plaintiff refiled the Award with the district court and commenced garnishment proceedings against a bank, claiming that the bank held funds belonging to the defendant which were owed to the plaintiff based on the Award. The district court dismissed the garnishment action, stating the Award became dormant pursuant to §25-1515 and could no longer be revived. Plaintiff appealed.

The Supreme Court began by stating that §48-188 permits a party to file and enforce a Workers' Compensation Court award in the district court. After it is filed, it has the same force and effect as a district court judgment and in subsequent proceedings, it will be treated as though it were a district court judgment. The Court further explained that district court judgments are subject to §§25-2115 and 25-1420 which provide that a district court judgment shall become dormant if not executed on within five years after it is entered, and cease to operate unless an action to revive is "commenced within 10 years after such judgment became dormant."

Plaintiff argued that periodically payable workers' compensation awards can never become dormant because §48-161 provides the Workers' Compensation Court with exclusive jurisdiction over workers' compensation claims and that under §48-141, periodically payable workers' compensation court awards continue indefinitely unless modified by the Workers' Compensation Court.

The Supreme Court disagreed, noting that pursuant to the first sentence of §48-161, the Workers' Compensation Court has exclusive jurisdiction over disputed workers' compensation claims, and that the court exercised its exclusive jurisdiction to determine the plaintiff's

entitlement to benefits in its Award. The Court further indicated that the action before it was an action to enforce the Award and would fall within the second sentence of §48-161, which provides the Workers' Compensation Court with jurisdiction to "decide any issue ancillary to the resolution of the employee's right to workers' compensation benefits." The Workers' Compensation Court's jurisdiction to decide ancillary issues is not exclusive and does not prevent a district court from exercising its jurisdiction over such matters. Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 591 N.W.2d 524 (1999). In addition, the Court found that §48-188 clearly provides that a Workers' Compensation Court award can be filed in the district court and that when it is, it has the same force and effect of a district court judgment and all proceedings in relation thereto shall be the same as if it were a district court judgment.

Therefore, the Court held that if a workers' compensation award is filed in district court pursuant to §48-188, it is subject to all statutes that would affect its enforcement as a district court judgment, including §25-1515. Thus the dormancy provisions of §25-1515 applied to the Award which was filed in district court pursuant to §48-188.

The Court then determined when the five-year period after which a judgment becomes dormant under §25-1515 commenced. The Court found that the plain language of §48-188 gives the Award the legal effect of a district court judgment upon filing in the district court. Until that point, the Award was covered solely by the Workers' Compensation Court. Finally, the Court found that §48-188 subjects a workers' compensation award to the provisions of the execution and dormancy statutes only after it is filed in the district court. Therefore, the date an award is filed is the date used when computing when a judgment becomes dormant pursuant to §25-1515.

The Court held that under §25-1515, plaintiff's award became dormant in December 1992, five years after it was first filed in district court in December 1997. Because the judgment was not revived within 10 years after it became dormant, it could not be revived and the refiling of the award in 2008 was a nullity. The garnishment action was properly dismissed.

2. Weber v. Gas 'N Shop, Inc., 278 Neb. 49, 767 N.W.2d 746 (2009)

CONDITIONAL ORDER

DORMANCY STATUTE

FINAL ORDER

GARNISHMENT

STATUTORY CONSTRUCTION

The Supreme Court reversed and remanded the decision of the district court which had dismissed the garnishment action brought against an employer because the judgment entered by the Workers' Compensation Court was not dormant when garnishment proceedings commenced.

Plaintiff suffered a work-related injury to her right knee in March 1991. On September 22, 1993, the Workers' Compensation Court entered an award (Award) affirmed by the review panel on February 25, 1994, which ordered defendants to pay a specified period of temporary disability benefits and to continue to pay such benefits so long as plaintiff remained temporarily totally disabled. The Award also provided that plaintiff was entitled to statutory amounts for any residual disability after she reached maximum medical improvement (MMI).

Defendants received a letter from plaintiff's treating physician dated March 9, 1994, in which he indicated plaintiff reached MMI on January 18, 1994. The letter also provided plaintiff with a permanent disability rating to her right lower extremity. Defendants later received a second report from plaintiff's treating physician dated March 31, 1995, indicating that plaintiff continued to have problems with her right knee, but that she had reached MMI. He also provided plaintiff with a revised disability rating which was higher than the rating from his previous report. Defendants made payments of temporary total disability and permanent partial disability based on the reports provided by plaintiff's treating physician. The last payment was made in April 1995.

Neither plaintiff nor her attorney contacted the defendants at any time between the last payment in April 1995, and January 2008, when plaintiff's attorney advised defendants that plaintiff was claiming additional disability benefits, penalties, interest, and attorney's fees, pursuant to the Award. On May 16, 2008, plaintiff filed a certified copy of the Award with the district court. On June 10, 2008, she commenced a garnishment proceeding against a bank, claiming that the bank held funds belonging to the defendants which were owed to the plaintiff based on the Award. Defendants filed a motion to dismiss, asserting several defenses.

The district court granted defendants' motion to dismiss the garnishment proceeding. The court found that the Award became dormant pursuant to §25-1515 in April 2000, which was five years after the last payment of benefits, and that the Award had not been revived. The district court did not address any of defendants' other defenses. Plaintiff appealed and defendants cross-appealed.

The defendants first argued that the Award was void ab initio as a conditional judgment. The Supreme Court noted that a conditional judgment is an order purporting to be a final judgment which is dependant upon the occurrence of uncertain future events and is therefore void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be. See Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006); Garcia v. Platte Valley Constr. Co., 15 Neb. App. 357, 727 N.W.2d 698 (2007). The Court found that the

Award performed in praesenti because it required immediate payment of temporary total disability in a specific amount per week and was therefore not void as a conditional judgment.

Defendants then claimed that the Award was not sufficiently definite to be enforceable through garnishment. The Court found that the Award provided for temporary total disability in a definite amount per week, followed by statutory benefits for any residual disability after plaintiff reached MMI. Therefore, it was sufficiently definite to be enforceable.

The Court then examined whether the Award became dormant. In Allen v. Immanuel Med. Ctr., 278 Neb. 41, 767 N.W.2d 502 (2009), the Court held that the date on which a workers' compensation award is filed in the district court pursuant to §48-188 is the date used when computing when a judgment becomes dormant under §25-1515. Here, the Award was filed in the district court on May 16, 2008, and was therefore not dormant when the garnishment proceeding commenced less than a month later.

With regard to the alternative defenses claimed by defendants, the Court declined to rule on these. The district court did not reach a decision on the merits of the other defenses. The Court held that since there was no ruling on the alternate defenses that could be appealed, it would not decide such issues in the first instance. Therefore, the Supreme Court remanded the case to the district court with directions to consider whether the garnishment proceeding was barred by any of the alternate defenses asserted by the defendants.

3. Miller v. Regional West Medical Center and Continental Ins., 278 Neb. 676; 772 N.W.2d 872 (2009)

FINAL ORDER

STATUTORY CONSTRUCTION

The Court of Appeals affirmed the review panel's dismissal of plaintiff's application for review. The order of the compensation court was not a final, appealable order since it did not foreclose plaintiff's ability to file a petition pursuant to §48-173.

In 1995, plaintiff filed a petition in the compensation court alleging injuries to her upper back, head, and right shoulder. The court determined the injuries to her neck and head were compensable and awarded benefits including future medical treatment. In 2007, her treating physician recommended surgery on her right shoulder, with possible additional surgery on her neck if the shoulder surgery did not decrease her pain. On September 24, 2007, plaintiff filed a request for an independent medical examiner to determine whether the shoulder surgery and possible neck surgery should be done and whether the surgery(ies) would be associated with her workers' compensation injury. The single judge denied the request for an independent medical examination (IME) since the 1995 Award did not find the shoulder injury compensable. Plaintiff then filed an application for review which was dismissed on the basis that the IME denial was not a final, appealable order.

Pursuant to §§48-179 and 48-182, a party may appeal to a review panel only from a final order of the Workers' Compensation Court. Thompson v. Kiewit Constr. Co., 258 Neb. 323, 603 N.W.2d 368 (1999). Under §25-1902, a final order is (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Id.

Plaintiff argued that the compensation court order affected a substantial right, because it deprived her of the ability to obtain an IME, prejudicing her ability to file a petition for benefits for her shoulder pursuant to §48-173. Section 48-173 provides: "No petition may be filed with the compensation court *solely on the issue of reasonableness and necessity* of medical treatment unless a medical finding on such issue has been rendered by an independent medical examiner pursuant to section 48-134.01." (Emphasis supplied.)

Section 48-134.01(3) requires the compensation court to assign an independent medical examiner "to render medical findings in any dispute relating to the medical condition of a claimant and related issues, including, but not limited to . . . the reasonableness and necessity of any medical treatment previously provided, or to be provided, to the injured employee, *and any other medical questions which may pertain to causality and relatedness of the medical condition to the employment.*" (Emphasis supplied.)

The order of the single judge denying her request for an IME did not foreclose plaintiff's ability to file a petition pursuant to §48-173 seeking workers' compensation benefits for her shoulder surgery. Such a petition would not present *solely* the "issue of reasonableness and necessity of medical treatment," but also the issue of whether the proposed treatment was causally related to the injuries determined by the 1995 award. The requested IME was not a prerequisite to the filing of a petition under §48-173 seeking benefits for the proposed shoulder surgery, so the denial of the IME did not affect a substantial right. Therefore, the denial of the IME was not a final, appealable order and the review panel had no jurisdiction to review it.

4. Manchester v. Drivers Management, 278 Neb. 776; 775 N.W.2d 179 (2009)

SOCIAL SECURITY BENEFITS

WAITING-TIME PENALTIES

PSYCHOLOGICAL INJURY

Plaintiff had a history of mental illness and she was awarded Social Security benefits. She participated in vocational rehabilitation through the Social Security Administration and after finishing a truck driving program, was hired by the defendant. In 2006, plaintiff was in an accident, suffering injuries to her shoulder and recurrence of her mental illness. Plaintiff was terminated in February 2006 due to alleged negligence in the accident. Defendant discontinued temporary total disability (TTD) payments until plaintiff's shoulder surgery on August 18, 2006, claiming she could have worked light duty.

The trial court found that there was a causal link between the accident and plaintiff's psychological injuries. The trial court awarded TTD benefits for the time period after plaintiff's termination, 55 percent loss of earning capacity benefits, and waiting-time penalties and attorney fees for defendant's failure to pay TTD.

The review panel affirmed the court's decision that plaintiff was not prohibited from receiving benefits simply because she had previously been found totally disabled by the Social Security Administration. Citing Neneman v. Falstaff Brewing Corp., 237 Neb. 421, 466 N.W.2d 97 (1991), defendant claimed that plaintiff was not entitled to workers' compensation benefits because she had no earning power to lose. The Supreme Court concluded that the trial court was correct in finding that because plaintiff was in the labor force and working her way off Social Security disability, she had an earning power to lose, and that her receipt of Social Security benefits did not prevent her from recovering workers' compensation benefits. The Social Security Act anticipates the instance where an individual receives both Social Security and workers' compensation benefits, and provides for an offset from Social Security payments if an individual is receiving workers' compensation benefits. See 42 U.S.C. §424a (2006).

The Court next addressed whether the plaintiff's psychological condition was caused by the accident. It is well settled in Nebraska workers' compensation law 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 & Lee, Inc. 268 Neb. 752, 688 N.W. 752, 688 N.W. 2d 350 (2004). Further, a preexisting disease and an aggravation of that disease may combine to produce a compensable injury. Miller v. Goodyear Tire & Rubber Co., 239 Neb. 1014, 480 N.W.2d 162 (1992).

The medical evidence showed that in addition to her physical pain, the plaintiff had other stressors in her life, including her boyfriend and the litigation over her workers' compensation benefits. Defendant argued that the evidence showed plaintiff's psychological condition may have worsened after the accident, but that it was due to the pendency of her legal actions and other stressors, and was not causally related to the accident and physical injuries. In support, defendant cited Sweeney, where no causal link was established because the expert opinion stated that the employee's depression was triggered by his unhappiness with a court ruling. The Supreme Court was not persuaded. Here, there was sufficient evidence to support the conclusion that plaintiff's psychological conditions were caused or exacerbated by her accident. The causation opinion expressly stated that plaintiff's mental conditions were reactivated by the accident and were related to the physical pain. Therefore, the decision of the review panel was affirmed.

Regarding plaintiff's entitlement to TTD, the Court noted that whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. Kaufman v. Control Data, 237 Neb. 224, 465 N.W.2d 727 (1991). In response to defendant's claim that plaintiff could have worked light duty, the trial judge stated "[i]t is unreasonable to believe that a person who has a pending workers' compensation claim for a shoulder and neck injury would be able to find employment." Plaintiff was diagnosed with a shoulder strain, cervical strain, and lumbar strain, and the doctor stated that plaintiff could return to work with certain restrictions. However, plaintiff testified that she was totally disabled and unable to work from the date of the accident through the date of her shoulder surgery. A trial judge can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability. Luehring v. Tibbs Constr. Co., 235 Neb. 883, 457 N.W.2d 815 (1990). The Supreme Court determined that there was sufficient evidence to support the trial judge's finding that plaintiff was entitled to TTD benefits.

The trial court also awarded penalties and attorney fees for defendant's failure to pay TTD benefits between plaintiff's termination and the date of surgery. The trial court held that any termination of employment following an accident represented "conduct [that was] not acceptable" and triggered penalties against the employer. The review panel reversed, concluding that this statement was contrary to Guico v. Excel Corp., 260 Neb. 712, 619 N.W.2d 470 (2000), where the Supreme Court stated that the issue of whether to terminate an individual's employment for his or her behavior should be resolved on a case-by-case basis. The review panel determined that the award of penalties by the trial judge based solely on the termination of employment was premised on a misstatement of the law. Further, the review panel determined that there was a reasonable controversy as to plaintiff's right to benefits "owing to her actions leading to the subject accident."

Neb. Rev. Stat. §48-125 requires an employer to pay the 50 percent waiting-time penalty if no reasonable controversy existed regarding the employee's claim for benefits. In this case, the record showed that plaintiff was injured as a result of an accident and was unable to work. Although defendant suggested on appeal that plaintiff was willfully negligent, it did not allege or prove that the accident was the result of willful negligence. Ordinary negligence is not a defense to a workers' compensation action. See Neb. Rev. Stat. §48-102. The Supreme Court concluded that there was no reasonable controversy whether plaintiff was entitled to TTD benefits after her termination. Therefore, the review panel erred when it reversed the award of waiting-time penalties, interest, and attorney fees.

The Supreme Court reversed the review panel and ordered the reinstatement of the trial judge's award.

5. Russell v. Kerry, Inc., 278 Neb. 981, 775 N.W.2d 420 (2009)

APPEALS

JURISDICTION

INTEREST

The Supreme Court reversed the Court of Appeals on the question of jurisdiction, but affirmed the Court of Appeals on its affirmance of the review panel's interest calculation.

An award for benefits was entered in favor of the plaintiff. The plaintiff filed a motion for penalty and attorney fees after a late payment of benefits due under that award. The trial judge sustained that motion and assessed interest. The defendants appealed the enforcement order. Two days after the appeal, the plaintiff filed a second enforcement order. The order was overruled because the plaintiff failed to show she made reasonable efforts to resolve the issue with the defendants pursuant to Workers' Comp. Ct. R. of Proc. 3(B)(4). The plaintiff appealed that decision, and the review panel consolidated the appeals. The review panel affirmed the substance of the first enforcement order, it recalculated the awarded interest, and it held that the second order overruling the plaintiff's request for enforcement was void because the trial court lacked jurisdiction to hear the motion once the appeal of the first enforcement order was perfected to the review panel.

On the question of jurisdiction, the Supreme Court distinguished the orders in this case from the line of cases that generally hold that a trial court is divested of subject matter jurisdiction once an appeal has been perfected. In those cases, the order appealed was a final judgment, and the trial court was divested of jurisdiction over the content of those orders. The order at issue in this case was distinguishable as a post-judgment enforcement order rather than a final judgment. The court noted that issuing the enforcement order was within the trial court's authority under Neb. Rev. Stat. §48-125. The Supreme Court then analogized this type of post-judgment enforcement order to post-judgment contempt orders in other types of civil cases. Those orders, likewise, do not divest the trial court of jurisdiction to consider an act of contempt. The fact that the initial post-judgment enforcement order was under appeal did not divest the trial court of jurisdiction to hear and rule on a motion requesting a subsequent post-judgment enforcement order relating to other compliance issues. The Supreme Court reasoned that to hold that the trial court was divested of jurisdiction to determine enforcement orders in this context would allow a party to decide whether to comply with the order while the appeal was pending. Therefore, the trial court did have jurisdiction to enter orders enforcing obligations imposed in the final order, even while one of its enforcement orders was under appeal.

The Supreme Court also affirmed the Court of Appeals on the issue of interest calculation. The Court of Appeals held that the review panel was correct in reversing the trial court's calculation of interest. The trial court initially calculated interest on the total compensation due under the award for the entire period from the date of the injury. The review panel reversed this determination and held that interest should be calculated only on the amounts as they became due. The Court of Appeals affirmed, as did the Supreme Court on further review. The Supreme Court noted that while Neb. Rev. Stat. §§48-125(3) and 48-119 provide for interest and the commencement of computing benefits, the provisions do not specify whether interest is assessed on the entire amount from the first date compensation is payable or on the weekly amounts as they become due. The Court noted, however, that the §48-125(3) reference to §48-119 clarifies the start date for interest calculation. The Court reasoned that the purpose of assessing pre-award interest is not to penalize but to compensate the claimant. Thus to be consistent with that purpose, the interest should be calculated based on the amounts as they became due, not on the entire amount.

6. Midwest PMS & Federated Mut. Ins. Co. v. Olsen, 279 Neb. 492, 778 N.W.2d 727 (2010)

JURISDICTION

The Supreme Court reversed the review panel's affirmance of the trial court's order dismissing the case for lack of jurisdiction and remanded the case to the trial court to consider Federated's subrogation claim on the merits.

The employee suffered a work-related accident to his right shoulder in January 2004. The employer was insured by Federated Mutual Insurance Company (Federated). Federated paid indemnity and medical benefits for this injury. The employee filed a petition alleging an injury in April 2005 to his left shoulder and an aggravation of his right shoulder injury. At that time, the employer was insured by Nationwide Agribusiness Insurance Company (Nationwide). Both Federated and Nationwide answered the employee's petition. The employee, employer, and Nationwide submitted a settlement to the court that was approved in September 2008. In October 2008, Federated filed a petition against the employee and Nationwide requesting reimbursement from Nationwide for indemnity and medical benefits it paid on the theory that if the subsequent injury was a new injury, Nationwide should have paid those benefits. The trial court and the review panel both determined the compensation court did not have jurisdiction to decide the dispute between Federated and Nationwide.

The Supreme Court first recounted the history of Neb. Rev. Stat. §48-161, which now provides that the compensation court "shall have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits." In Thomas v. Omega Re-Bar, Inc., 234 Neb. 449, 451 N.W.2d 396 (1990), the Supreme Court held that the compensation court did not have jurisdiction to resolve a coverage dispute between carriers. In 1990, the Legislature responded by amending §48-161. In this case, the Supreme Court noted that the legislative history of that amendment indicated the primary basis for expanding the compensation court's jurisdiction to ancillary issues was to avoid delaying a claimant's compensation in order to have a coverage dispute resolved in a different court. After the amendment, the Supreme Court decided Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 591 N.W.2d 524 (1999), holding that the compensation court had jurisdiction to determine insurance coverage disputes. However, Schiweitzer was not dispositive of this case because unlike in Schweitzer, in this case the employee's claim for benefits had been settled. Therefore, the question was whether the employee's resolution of his claim removed jurisdiction over the question of insurance coverage.

The Supreme Court held that the compensation court had jurisdiction over Federated's subrogation action despite the fact that the employee's claim was settled. The Court noted that while the primary purpose for the amendment granting ancillary jurisdiction was to ensure that a coverage dispute would not delay timely payment of benefits to the claimant, the fact that the claimant has already received his benefits does not change the ancillary nature of the matter; the compensation court has jurisdiction under the language of §48-161 over those ancillary matters. In other words, if an issue falls within the grant of ancillary jurisdiction, there is jurisdiction to determine the issue, regardless of the status of the employee's claim for benefits.

The next question was whether the claim stated by Federated was within the grant of ancillary jurisdiction. The Court reasoned that Federated was making a subrogation claim because it claimed that it paid various benefits that should have been paid by Nationwide. The Court noted that Federated's "right to recover from Nationwide is dependent upon Olsen's injury and his alleged right to recover for that injury from Nationwide instead of Federated." Midwest PMS & Federated Mut. Ins. Co. v. Olsen, 279 Neb. 492, 498, 778 N.W.2d 727, 732-733 (2010). The Court stated that this claim might arguably fall within the compensation court's primary jurisdiction, but it at least was ancillary to the compensation court's jurisdiction over the employee's settlement with the employer. Thus, the trial court had jurisdiction to hear

Federated’s subrogation claim. The case was remanded to the trial court to hear Federated’s subrogation claim on its merits.

7. Herrington v. P.R. Ventures, 279 Neb. 754; 781 N.W.2d 196 (2010)

TIME PERIODS – HOW COMPUTED

WAITING-TIME PENALTY

The Supreme Court affirmed the order of the review panel denying waiting-time penalties, attorney fees, and interest.

After plaintiff filed a petition, the parties agreed to a lump sum settlement. On December 4, 2008, the Workers' Compensation Court entered an order approving the settlement. Defendant mailed the lump sum payment on January 5, 2009, and it was received by plaintiff on January 6, 2009.

Plaintiff filed a motion for waiting-time penalties, attorney fees, and interest, claiming that payment was sent outside the 30-day time period specified by Neb. Rev. Stat. §48-125. Defendant argued that payment was sent timely pursuant to Neb. Rev. Stat. §48-191, which provides, "Notwithstanding any more general or special law respecting the subject matter hereof, whenever the last day of the period within which a party to an action may file any paper or pleading with the Nebraska Workers' Compensation Court, *or take any other action with respect to a claim for compensation*, falls on a Saturday, a Sunday, any day on which the compensation court is closed by order of the Chief Justice of the Supreme Court, or any day declared by statutory enactment or proclamation of the Governor to be a holiday, the next following day, which is not a Saturday, a Sunday, a day on which the compensation court is closed by order of the Chief Justice of the Supreme Court, or a day declared by such enactment or proclamation to be a holiday, shall be deemed to be the last day for filing any such paper or pleading or taking any such other action with respect to a claim for compensation." (Emphasis added.)

The trial court found that Neb. Rev. Stat. §48-191 only applied to interactions between parties and the court, and did not apply to interactions between the parties. The Supreme Court disagreed, stating that the statute was not ambiguous and that the language "any other action with respect to a claim for compensation" was broad enough to include transactions between a party and the court, and transactions between the parties. The Supreme Court went on to find that the mailing of a settlement check to the intended recipient is an "action with respect to a claim for compensation" such that the time for mailing must be determined pursuant to Neb. Rev. Stat. §48-191.

The Supreme Court rejected defendant's argument that Neb. Rev. Stat. §48-125 and §48-191 are inconsistent. The former provides a penalty for payments made more than 30 days after entry of a judgment; the latter simply directs how this time period is computed. Therefore, payment in this case was timely.

Court of Appeals Cases (Designated for Permanent Publication):

1. Visoso v. Cargill Meat Solutions, 18 Neb. App. 202; 778 N.W.2d 504 (2009)

STATUTORY CONSTRUCTION

UNDOCUMENTED WORKERS

VOCATIONAL REHABILITATION

The Court of Appeals upheld the review panel's affirmance of the trial court's award of temporary total disability, medical, and mileage reimbursement benefits. The Court also upheld the review panel's reversal of the trial court's decision that plaintiff was not entitled to vocational rehabilitation benefits.

During plaintiff's employment with defendant and at the time of trial, plaintiff was an undocumented worker. Plaintiff revealed his illegal status on August 21, 2007 when his deposition was taken in this case, and defendant terminated plaintiff in October 2007.

The Workers' Compensation Court found that plaintiff suffered injuries to his cervical spine on May 9, 2006 when a slab of meat fell on his head, neck and shoulders. The trial court determined that plaintiff had not reached maximum medical improvement (MMI) and it awarded benefits including temporary total disability from the date of plaintiff's spine surgery, October 4, 2007, for so long into the future as he remained temporarily totally disabled; past medical expenses and mileage reimbursement; and future medical expenses necessary for treatment of plaintiff's spine injury. The judge determined that plaintiff would not be entitled to vocational rehabilitation benefits upon reaching MMI since he was an illegal, undocumented worker. The review panel affirmed the trial court's award of benefits, but reversed the finding that plaintiff could not receive vocational rehabilitation benefits upon reaching MMI.

On appeal, defendant argued that plaintiff was not entitled to temporary total disability benefits or vocational rehabilitation benefits since he could not work due to his undocumented worker status. Section 48-115(2) of the Workers' Compensation Act includes "aliens" in its definition of "employee" or "worker." The Supreme Court determined that a liberal construction of the Act and §48-115(2) includes illegal "aliens," so plaintiff was covered by the Act. Additionally, the Court noted that if the Nebraska Legislature wanted to exclude illegal aliens, it could have specifically excluded them, but it has not so far.

The Court held that plaintiff was entitled to temporary total disability benefits since there was no evidence that he was given a medical release to return to work and one of the causes of his inability to work was his work injury. Defendant argued that it should not be required to pay certain medical expenses since the records included treatment not related to the work injury. The Court ordered defendant to pay the awarded medical expenses since each medical record included evaluation, treatment or follow-up from plaintiff's work injury. The Court also affirmed the award of mileage reimbursement since the trial judge's decision was not clearly wrong based on the evidence. Finally, the Court agreed with the review panel's decision that plaintiff's entitlement to vocational rehabilitation benefits could not be decided until he reached maximum medical improvement. The purpose of vocational rehabilitation is to restore an eligible and willing injured worker to employment. Ortiz v. Cement Products, 270 Neb. 787, 708 N.W.2d 610 (2005). Ortiz was not entitled to vocational rehabilitation benefits because he testified that he intended to remain in the United States where he was not eligible to be lawfully employed. Here, there was no evidence that plaintiff intended to remain an unauthorized worker in the United States. So, the Court agreed with the review panel's holding: "The time to rule on [plaintiff's] entitlement to vocational rehabilitation services is after [he] reaches maximum medical recovery, with his impairments and restrictions known, with his then current immigration status known,

and with a contemporaneous finding made about whether or not he plans to return to his native country." Green v. Drivers Mgmt., Inc., 263 Neb. 197, 639 N.W.2d 94 (2002). The trial court's finding that plaintiff would not be entitled to vocational rehabilitation was premature. Thus, the court did not need to reach the question of whether illegal alien status prevents an award of vocational rehabilitation because such status prohibits working in this country.

2. Daugherty v. County of Douglas, 18 Neb. App. 228, 778 N.W.2d 515 (2010)

MODIFICATION

CREDIT FOR WAGES PAID

WAITING-TIME PENALTIES

The Court of Appeals affirmed the review panel's affirmance of the trial court decision except it reversed the trial court's assessment of a waiting-time penalty.

The plaintiff was injured in May of 2002. In December 2004, the compensation court awarded him benefits, stating that he was entitled to temporary total disability benefits "through the date of the hearing and for so long thereafter as [Daugherty] shall remain temporarily totally disabled." Daugherty v. County of Douglas, 18 Neb. App. 228, 230, 778 N.W.2d 515, 518 (2010). In February 2005, the plaintiff's physician provided an opinion that he was at maximum medical improvement and was able to return to work without restrictions, which he did on February 8, 2005. At that point, the employer began paying the plaintiff his wages and ceased paying workers' compensation benefits. In December 2005, the plaintiff had another surgery necessitated by the work injury and was off work for a period of time. The employer paid workers' compensation benefits for the period he was off work. When plaintiff returned to work following surgery, the employer resumed wage payments and again ceased paying workers' compensation benefits. The plaintiff again stopped working as a result of the work injury in January 2007 and remained off work. The plaintiff filed a further petition in August 2006 for payment of medical expenses. In its award in June 2007, the trial court noted that the discontinuation of payment of workers' compensation benefits while the plaintiff was working was unilateral and may not be permissible. The employer filed a modification action in August 2007, requesting the court find that the plaintiff was no longer temporarily totally disabled while he was working. The trial court held that there was a decrease of incapacity when the plaintiff reached maximum medical improvement and returned to work. The trial court modified its award retroactively only to the date the defendant's modification action was filed in August 2007, ordering payment of workers' compensation benefits for the periods before that date where the defendant stopped workers' compensation benefits and paid the plaintiff wages as he returned to work. The trial judge also assessed a 50 percent waiting-time penalty on those benefits. The defendant appealed to the review panel, which affirmed.

The first issue was whether a Neb. Rev. Stat. §48-141 modification was required to terminate benefits. The language of the award provided that plaintiff was entitled to temporary disability benefits "for so long . . . as [Daugherty] shall remain temporarily totally disabled." Id. The defendant argued that when the plaintiff returned to work, he was no longer temporarily totally disabled. The Court of Appeals noted that even if that was the case, under Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998), an employer cannot unilaterally modify the award, and compensation court action was required to determine the end date. Therefore, modification under Neb. Rev. Stat. §48-141 was required. The Court of Appeals further reasoned that even if the plaintiff's return to work and receipt of his regular wage constituted an agreement by the parties to modify, there was no evidence that agreement to terminate was approved by the court as required by §48-141. The Court of Appeals noted that this decision does result in a "windfall" to the plaintiff, and may be unfair, but it is a matter for the Legislature to resolve.

The next issue was the trial court's modification of the award retroactively only to the date the modification was filed. The defendant argued for modification retroactively before the date the modification was filed. Under Starks, supra, the award cannot be modified retroactively beyond the date the application for modification was filed, and the trial court was correct in modifying only to the date the application was filed.

The defendant also requested credit for the wages paid when the plaintiff returned to work. The Court of Appeals noted that the defendant's argument for credit was based in equity, and the compensation court has no equity jurisdiction.

Finally, the Court of Appeals reversed the trial court's assessment of a 50 percent waiting-time penalty. Neb. Rev. Stat. §48-125 allows assessment of a penalty when the employer fails to pay compensation and there is no reasonable controversy that the benefits are owed. In this case, there was a reasonable controversy because the specific facts of this case, where an employee returns to work and receives his regular wage, had not previously been addressed.