

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

Fiscal Year 2011: July 1, 2010 to June 30, 2011

Supreme Court Cases:

1. Burnham v. The Pacesetter Corporation and Liberty Mutual Group, 280 Neb. 707; 789 N.W.2d 913 (2010)

JURISDICTION

JUDGMENT ENFORCEMENT

CONTEMPT POWERS

The Workers' Compensation Court denied plaintiff's motion to enforce his award and his motion to compel defendant to comply with court orders. The Supreme Court upheld the review panel's dismissal of plaintiff's motions, reasoning the Workers' Compensation Court is not a court of general jurisdiction pursuant to §25-1072; therefore, it does not have the jurisdiction to enforce the collection of its award, nor does it have the jurisdiction to issue contempt citations. Section 48-188 (Cum. Supp. 2008) provided plaintiff with a sufficient remedy wherein he could seek enforcement of the award through the district court.

In 2006, the Workers' Compensation Court found that plaintiff suffered 65 percent loss of earning capacity. In 2007, the Court of Appeals subsequently affirmed the award and the imposition of a waiting-time penalty and attorney fees. On May 15, 2009, the district court garnished \$28,191.90 from defendant. On February 10, 2009, plaintiff filed a motion with the Workers' Compensation Court to clarify the original award and to enforce the 2006 award. On December 8, 2009, plaintiff filed a motion to compel defendant to comply with the award and to find defendants in violation of the Workers' Compensation Court's order. The Workers' Compensation Court denied both motions, finding that it did not have the statutory authority to enforce collection of its own awards and that plaintiff had a sufficient remedy in the district court. The worker's compensation review panel affirmed those decisions.

Plaintiff appealed the review panel decision, alleging that the Supreme Court's decisions in Russell v. Kerry Inc., 278 Neb. 981, 775 N.W.2d 420 (2009) and Midwest PMS v. Olsen, 279 Neb. 492, 778 N.W.2d 727 (2010) allow the compensation court to enforce its own decisions. Plaintiff also alleged that the Workers' Compensation Court has contempt powers pursuant to the decision in Smeal Fire Apparatus Co. v. Kreikemeier, 279 Neb. 661, 782 N.W.2d 848 (2010). Plaintiff acknowledged receiving payment of \$28,191.90 for the garnishment, but alleged that defendant still owed more than \$90,000.00 for waiting-time penalties which plaintiff did not include as part of the motion for garnishment. Defendant argued that any award must be enforced by the district court. The Supreme Court agreed that plaintiff's remedy must be pursued in the district court, as the compensation court does not have authority to enforce the collection of its award, nor does it have the authority to issue contempt citations.

The cases cited by plaintiff were distinguishable from the present case. In Russell, the Court held the compensation court could impose a penalty for refusing to pay an award; however, two separate penalties were issued in that case—a waiting time penalty for failing to pay medical expenses and later a penalty for ceasing to pay weekly benefits. Here, plaintiff essentially asked the compensation court to penalize defendants a second time for the initial failure to pay the original award, but the court had no statutory authority to issue a second penalty.

In Midwest PMS, the Court held that §48-161 (Reissue 2004) granted the compensation court ancillary jurisdiction to decide a dispute between two insurance companies, since that issue involved facts usually decided by the compensation court. Plaintiff alleged that the Workers' Compensation Court also had ancillary jurisdiction to enforce its own awards. In Smeal, the Court held that any court of general jurisdiction has inherent power to remedy violations of its orders, which includes finding a party in contempt.

The Supreme Court concluded, however, that the compensation court is not a court of general jurisdiction, and has no statutory authority to enforce its own awards or issue contempt citations. A statutorily created court such as the compensation court is a court of limited jurisdiction and only has authority conferred upon it by statute. Enforcement and contempt powers are equitable matters, and no statute grants equity jurisdiction to the compensation court. Additionally, plaintiff had a sufficient remedy under §48-188 (Cum. Supp. 2008) and could file his award with the district court with the same force and effect as a judgment of the district court. Plaintiff gave no compelling reason why he could not continue to pursue his claim in the district court.

2. **Straub v. City of Scottsbluff, 280 Neb. 163, 784 N.W.2d 886 (2010).**

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

DUAL PURPOSE RULE

LOSS OF EARNING CAPACITY

EVIDENCE

The Supreme Court affirmed the trial court's finding of a compensable injury and award of indemnity benefits.

The plaintiff was employed as a sergeant with the Scottsbluff Police Department. He was conducting a routine traffic stop when he was struck by another vehicle. A DVD recording of the accident showed that the plaintiff was struck in the hip by the side mirror of a passing car. This accident resulted in a fractured left iliac wing and low back complaints. An MRI was ordered for diagnosis and treatment of those injuries. The plaintiff was then involved in a subsequent motor-vehicle accident while on his way to the hospital for the MRI after leaving his children at the babysitter's house. He was not on duty that day. He experienced immediate pain in his chest, back, and neck and developed shoulder pain later. The trial court held that both accidents were compensable, awarded temporary total disability, and awarded a 35 percent loss of earning power.

The Supreme Court first held that an "injury that occurs en route to a required medical appointment that is related to a compensable injury is also compensable, as long as the chosen route is reasonable and practical." 280 Neb. 163, 169, 784 N.W.2d 886, 890-891. The Court followed the reasoning in the Kansas case of Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963). The Court noted that, like in Kansas, the Nebraska Workers' Compensation Act provides that an employee may lose benefits if he or she does not undergo medical treatment, and the Court has previously allowed compensation for travel to necessary medical treatment.

The Court further held that the dual purpose rule set forth in Jacobs v. Consolidated Tel. Co., 237 Neb. 772, 467 N.W.2d 864 (1991) and Kraus v. Jones Automotive, Inc., 3 Neb. App. 577, 529 N.W.2d 108 (1995) should apply to such travel to and from medical appointments. In other words, seeking medical treatment for a workers' compensation injury provides the business purpose required by the dual purpose rule. Therefore, when an individual is injured while making a trip to obtain necessary medical treatment, even if the trip also involved some personal errands, the injury is within the course and scope of employment "as long as the route taken is reasonable and practical." Straub, 280 Neb. at 170, 784 N.W.2d at 891. In this case, the plaintiff completed the personal errand of leaving his children at the babysitter's house and had resumed the business errand of driving to his medical appointment.

The employer also argued that it was error for the trial court to find the plaintiff sustained loss of earning capacity because the plaintiff returned to work with the employer at an increased wage. The trial court reviewed both vocational opinions and orthopedic reports and was not clearly wrong in awarding a loss of earning capacity. The Supreme Court further noted that it previously stated in Davis v. Goodyear Tire & Rubber Co., 269 Neb. 683, 688 696 N.W.2d 142, 147 (2005): "The fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity."

The employer also argued that a DVD recording of the initial accident in evidence did not support a finding that the plaintiff injured his left hip, and the plaintiff was not a credible witness because he made statements contradicting the events depicted in the DVD. The Supreme Court

noted that it found no such contradictory statements in the record. The DVD showed a vehicle sideswiping the plaintiff during a traffic stop, after which the plaintiff limped away. This evidence was reviewed by the trial court, and it was not clear error to determine the plaintiff injured his left hip in the first accident based on all of the records before it, including the DVD.

3. **Tapia-Reyes v. Excel Corporation, 281 Neb. 15, 793 N.W.2d 319 (2011)**

MULTIPLE APPEALS TO REVIEW PANEL

ATTORNEY-CLIENT AGENCY RELATIONSHIP

INTERPRETERS

The Supreme Court reversed and remanded to the review panel for further hearing.

Plaintiff injured his back in 2000 and defendant paid the medical expenses, indemnity benefits, and placed him in a job within his physical restrictions. In 2008, plaintiff was fired for the alleged sexual harassment of a coworker and later that year filed a petition.

The principal issue before the trial court was vocational rehabilitation and whether the plaintiff was fired for cause. With the aid of an interpreter, plaintiff testified that he unintentionally touched his coworker when he felt an epileptic seizure coming on. Plaintiff also testified that in 2004 he was disciplined for yelling at his coworkers and that he once said "hurry up, huevona." The interpreter attempted to explain the word "huevona." Plaintiff's attorney objected and asked that the translator's interpretation be stricken. The trial judge stated that he would accept defining the word and that he would disregard any editorial comments. The judge awarded medical and indemnity benefits, but denied vocational rehabilitation, finding that the plaintiff could have continued employment with defendant but for his employment misconduct.

Both the plaintiff and his attorney filed Applications for Review. Defendant moved to dismiss the attorney's appeal, claiming plaintiff no longer wished to be represented and it was unfair for defendant to have to respond to two appeals. Plaintiff's attorney then filed a motion to consolidate and later filed a motion to withdraw. The review panel granted the motion to consolidate. Plaintiff's attorney then filed a motion to amend the appeal to include allegations relating to the interpreter's conduct. The review panel granted the motion to amend, and after all those matters were settled granted counsel's motion to withdraw. The review panel concluded that the interpreter's comments were prejudicial and remanded for a hearing before a new judge.

Defendant argued that the Workers' Compensation Act does not authorize the filing of multiple appeals and that the Workers' Compensation Court lacked authority to consolidate the appeals. The Supreme Court stated that both appeals were filed within the 14-day statutory period and agreed with the review panel that there was no harm to defendant because it was timely made aware of the alleged errors.

Defendant also claimed that because the plaintiff wished to proceed pro se, his attorney lacked the authority to file his appeal and subsequent motions. The Supreme Court disagreed. Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act. Deutsche Bank Nat. Trust. Co. V. Siegel, 279 Neb. 174, 777 N.W.2d 259 (2010). When plaintiff hired his attorney, they established such an agency relationship. Young v. Midwest Fam. Mut. Ins. Co., 276 Neb. 206, 753 N.W.2d 778 (2008). In this case, the attorney's motion to withdraw was still pending when the attorney made the filings in issue. Furthermore, plaintiff had confirmed his attorney's agency by indicating to the review panel that he wished the attorney's application for review to apply and help define the basis for his appeal. The Supreme Court affirmed the review panel's decision allowing plaintiff's to amend and consolidate the alleged errors in the applications for review.

Defendant next argued that the review panel erred in finding that the interpreter added to and explained witness testimony. The Supreme Court cited, among other authorities, the Nebraska

Code of Professional Responsibility for Interpreters, which states: "Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and *without explanation*." Neb. Ct. R. §6-701 Appendix 1, Canon 1. Notwithstanding the language of Canon 1, the Supreme Court found that the failure to strictly adhere to the Nebraska Code of Professional Responsibility for Interpreters does not of itself create reversible error and concluded that any missteps by the interpreter did not deny plaintiff his constitutional or statutory rights. Matters concerning interpreters' conduct during judicial proceedings are left to the sound discretion of the court. State v. Topete, 221 Neb. 771, 380 N.W. 2d 635 (1986).

The Supreme Court agreed with the trial court that the interpreter was clearly attempting to provide an explanation of the word "huevona," which did not appear to have a direct equivalent in the English language. To the extent that the interpreter's explanation involved any unnecessary editorializing, the trial judge specifically stated that he would disregard the editorial comment. Therefore, it was error for the review panel to reverse for a new trial because of the quality of the interpretation.

4. Weber v. Gas 'N Shop, Inc., 280 Neb. 296, 786 N.W.2d 671 (2010)

GARNISHMENT

MODIFICATION

STATUTORY CONSTRUCTION

STATUTE OF LIMITATIONS

The Supreme Court affirmed the order of the district court dismissing the garnishment action brought against defendants, although for reasons other than those utilized by the district court.

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 made payments of temporary total disability and permanent partial disability based on reports provided by plaintiff's treating physician. The last disability payment was made in April 1995. Defendants also paid various medical bills between 1993 and 2008.

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 and on June 10, 2008, 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 by finding that pursuant to §25-1515, the Award became dormant in April 2000. In Weber v. Gas 'N Shop, Inc., 278 Neb. 49, 767 N.W.2d 746 (2009) (Weber I), the Supreme Court reversed and remanded the decision of the district court concluding that the Award was not a conditional judgment and was not dormant. In Weber I, the Court did not address the remaining defenses of the defendants as the district court had not ruled on them. The Court remanded the cause to the district court to rule on the remaining defenses.

On remand, the district court found that defendants should have sought modification of the Award pursuant to §48-141 before converting from temporary to permanent benefits, but nevertheless granted defendants' motion and dismissed plaintiff's action concluding that the garnishment proceeding was barred by the two-year statute of limitations in §48-137. The district court reasoned that since the defendants did not make any payments between July 9, 1997, and December 17, 1999, a period greater than two years, plaintiff's garnishment action filed on May 16, 2008, was barred by the statute of limitations in §48-137. Plaintiff appealed and defendants cross-appealed.

Plaintiff argued that the district court erred in finding that the two-year statute of limitations in §48-137 barred a garnishment action filed more than two years after the last payment of compensation where the compensation was paid pursuant to an award from the compensation court. The Supreme Court began its analysis by looking at §48-137 which provides that a claim for workers' compensation is barred unless a petition is filed before the expiration of two years from the date of the last payment of compensation. The Court next noted that the district court's

reasoning was contrary to Footte v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001), where the Court found that the two-year limitation in §48-137 was not applicable and did not bar a claim for medical benefits asserted more than two years after the last payment was made where the payment was paid pursuant to an award entered in response to a worker's timely filed petition. Therefore, since the last payment in the present case was made pursuant to the Award entered in response to the timely filed petition of plaintiff, the Supreme Court found that the district court erred when it concluded that plaintiff's garnishment action was barred by the two-year limitation in §48-137.

Defendants also argued that the district court erred in finding that defendants were required to seek modification of the Award pursuant to §48-141 before converting from temporary to permanent benefits and erred in failing to grant their motion to dismiss on the ground they had complied with all the terms of the Award.

Section 48-141 provides that the amount of any award payable periodically may be modified by agreement of the parties with the approval of the compensation court. The Supreme Court found that the amount of the Award as understood under §48-141 did not change when temporary payments were converted to permanent payments so no modification was necessary. Rather, the change from temporary to permanent benefits was required and outlined by the Award, where defendants were directed to pay temporary benefits, and upon MMI and receipt of a permanent disability rating, defendants were directed to determine and pay the statutory permanent benefits owed.

The Supreme Court noted that its interpretation is consistent with Davis v. Crete Carrier Corp., 274 Neb. 362, 740 N.W.2d 598, and distinguishable from Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998), and Hagelstein v. Swift-Eckrich, 261 Neb. 305, 622 N.W.2d 663 (2001), which were relied on by the district court. In Starks and Hagelstein, there was a unilateral termination of benefits by an employer without court direction or first seeking modification, which is a practice disapproved by the Court. But in Davis, as in the present case, and unlike Starks and Hagelstein, the compensation court directed the cessation of temporary benefits and the conversion to permanent benefits upon a specific event, and provided that a dissatisfied party could seek further clarification from the compensation court.

Therefore, the Supreme Court held that given the language of the Award, defendants' conversion of temporary benefits into permanent benefits upon MMI and receipt of the permanent disability rating was a performance of the obligations imposed by the Award rather than a modification of the Award. Thus, no modification proceeding was required under §48-141. If plaintiff had objected, which she failed to do, she was entitled to dispute the conversion by filing a further petition in compensation court.

The Court further held that since defendants had complied with the Award by paying all amounts directed to be paid, and that defendants were not required to seek modification under §48-141 for converting temporary to permanent benefits, the bank did not hold funds of defendants to which plaintiff was entitled. Therefore, the Court affirmed the order dismissing plaintiff's garnishment action with prejudice, although on different grounds than the district court.

NOTE: The Court of Appeals heard no workers' compensation cases in Fiscal Year 2011.