

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

Fiscal Year 2012: July 1, 2011 to June 30, 2012

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

### **1. Bassinger v. Nebraska Heart Hospital, 282 Neb. 835, 806 N.W.2d 395 (2011)**

#### JURISDICTION

#### MISREPRESENTATION DEFENSE

The Workers' Compensation Court dismissed plaintiff's petition for benefits because plaintiff misrepresented her prior injuries on a pre-employment questionnaire. The review panel reversed and remanded the case to the trial court to determine whether a direct causal relationship existed between plaintiff's misrepresentation and her later injury. The Supreme Court reversed the judgment of the review panel finding that the compensation court has no equity jurisdiction and thus cannot apply remedies of rescission and estoppel that are not statutorily authorized.

In 2000, plaintiff was working as a certified nurse aide and suffered a work-related low back strain from which she fully recovered. In 2001, plaintiff injured her low back while working at BryanLGH Medical Center, was assigned no permanent impairment, but was restricted to light-duty work. Plaintiff agreed to a \$5,000.00 lump-sum settlement for the 2001 injury. In 2006, plaintiff began working for defendant. Defendant's pre-employment questionnaire asked for information on work-related injuries, and plaintiff did not report the 2001 injury. In the pre-employment physical, defendant's nurse reported that plaintiff could perform the physical tests without pain. Plaintiff was hired by defendant, and in 2008 plaintiff injured her back while lifting a patient. She testified that the pain was different from the pain she had in 2001. She did light-duty work until she was discharged in July 2008 because she could not work during the day, which was the only time light-duty work was available.

Defendant claimed the review panel erred in interpreting Hilt Truck Lines, Inc. v. Jones, 204 Neb. 115, 281 N.W.2d 399 (1979) to require a direct causal relationship between plaintiff's misrepresentation and her work injury. In her cross-appeal, plaintiff argued that the review panel exceeded its authority in permitting an employer to deny benefits based on an affirmative misrepresentation defense since that defense, which was adopted by the Supreme Court in Hilt, is a limitation on benefits not authorized by the Nebraska Workers' Compensation Act (i.e., an equitable remedy of rescission and estoppel).

The Court agreed with plaintiff and held that Hilt created a limitation on workers' compensation benefits that the Act does not authorize; therefore, the Court held that its prior decision in Hilt was clearly erroneous. Defendant contended that plaintiff waived her argument that the Hilt decision was erroneous since she did not raise it to the review panel. The Court found defendant's argument without merit because the lower court's decision was consistent with the doctrine of stare decisis which compels lower courts to follow higher court decisions. Therefore, plaintiff could not be required to ask a lower court not to follow a controlling decision from a higher court which she claimed was incorrectly decided. Defendant also contended that § 48-102 creates an affirmative defense for injuries caused by an employee's willful negligence, and misrepresentation constitutes willful negligence. The Court concluded that the willful negligence defense under § 48-102 applies to employees, not applicants, and plaintiff was an applicant when she completed the pre-employment questionnaire.

The Court concluded that the Workers' Compensation Court does not have equity jurisdiction, so it cannot apply remedies of rescission and estoppel that are not statutorily authorized. Therefore, the Court's adoption of the equitable misrepresentation defense in Hilt was clearly erroneous. The Court overruled Hilt and reversed the judgment of the review panel, directing the review panel to remand the case to the trial court for further proceedings to determine whether plaintiff was entitled to benefits without regard to defendant's misrepresentation defense.

## 2. Hofferber v. Hastings Utilities and EMC Insurance, 282 Neb. 215, 803 N.W.2d 1 (2011)

AUTHORITY TO TERMINATE BENEFITS

CONTEMPT AUTHORITY

JURISDICTION

VENUE

The judgment of the review panel remanding the cause to the trial court was affirmed.

In 2000, plaintiff was injured in Adams County and in 2003 the parties stipulated that the injuries were compensable and that plaintiff was entitled to benefits. The cause was dismissed without prejudice. Defendant paid for plaintiff's medical treatment but in 2005 became concerned about plaintiff's periodic difficulty in keeping medical appointments. Defendant requested a medical release for records substantiating plaintiff's reasons for not keeping appointments and stopped plaintiff's weekly benefit payments until the signed release was provided.

In 2006 plaintiff filed a pro se petition alleging he was entitled to past and future benefits. Plaintiff told defendant's counsel that he would not answer discovery requests or submit to a deposition and left profane messages with defendant's counsel and medical case manager. Defendant filed a motion to compel plaintiff to comply with discovery requests and avail himself of medical treatment. The trial court directed plaintiff to comply with discovery requests and medical treatment. A few weeks later defendant filed a motion to dismiss, alleging plaintiff failed to respond to discovery requests. Plaintiff did not appear at the 2008 hearing despite several attempts by the court and counsel to reach him. The trial court declined to dismiss the case but ordered plaintiff to stop abusive communications and to take steps to enroll in the Mayo Clinic Pain Program. Defendant was ordered to continue paying indemnity benefits. Twelve days later defendant filed a motion to show cause due to plaintiff's violation of the court's order. Out of security concerns, the trial court transferred venue to Omaha and scheduled the hearing at the Douglas County Courthouse. Notice of hearing was served on plaintiff, but he failed to appear. The trial court found that plaintiff violated the court's order by sending abusive e-mails and unreasonably refusing to avail himself of medical treatment. In a March 28, 2008 order, the trial judge determined that the remedy for plaintiff's contempt and refusal to cooperate was termination of benefits and dismissal of the petition.

In 2009, a county judge appointed a guardian and conservator (guardian) for the plaintiff, having found that he was an incapacitated person. Thereafter, the guardian filed a further petition seeking reinstatement of benefits. Defendant moved to dismiss, claiming that the March 28, 2008, order was final. Plaintiff argued that the order was void because the hearing was held in Douglas County, rather than the "county in which the accident occurred" as required by §48-177. Plaintiff also argued that the order did not state the dismissal was with prejudice, and finally that the Act only permits *suspension* of benefits as a sanction, not *termination* of benefits. The trial court vacated the March 28<sup>th</sup> order, agreeing that venue was improper. The court reasoned that because plaintiff did not appear, it could not be said that he waived an objection to venue. Therefore, the motion to show cause filed by defendant remained pending for disposition. On appeal, the review panel found that the trial court erred in finding venue was improper. The review panel held that §48-177 only applies to a trial on the merits, not every hearing the court might be required to hold in every case. The panel further found that the trial court did not have authority under the Act to terminate future benefits and that the trial court could not dismiss a claim with prejudice as punishment for contemptuous behavior.

Both parties appealed. Plaintiff argued that pursuant to §48-177, Douglas County was an improper venue and therefore the court lacked jurisdiction to rule on defendant's motion to

dismiss. The Supreme Court disagreed, stating that the issue raised by plaintiff was about venue, not jurisdiction. Jurisdiction is the inherent power or authority to decide a case. Venue is the place of trial of an action – the site where the power to adjudicate is to be exercised. Venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law. In re Interest of Adams, 230 Neb. 109, 430 N.W.2d 295 (1988).

In this case, no objection was made to the Douglas County venue, nor was any appeal taken from the ruling on the order. If §48-177 related to jurisdiction, plaintiff might be able to attack the order as void. Hunt v. Trackwell, 262 Neb. 688, 635 N.W.2d 106 (2001). But if §48-177 is simply a venue statute, then the order was not void, and not subject to attack on that basis. Lewin v. Lewin, 174 Neb. 596, 119 N.W.2d 96 (1962).

The Supreme Court determined that §48-177 is a venue statute. In In re Interest of Adams, the Court had addressed a similar argument in the context of a statute which provided that a petition for the commitment of a mentally ill dangerous person should be filed with the clerk of the district court where the person is found, except that a district judge of that court could authorize the petition to be filed in another judicial district if there was good cause to do so. The statute could not be jurisdictional, because if it was, then the procedure permitting the cause to be transferred to another district would be tantamount to conferring jurisdiction on another tribunal which lacked it. In re Interest of Adams, supra note 8.

The Court found that the same reasoning applied here. Section 48-177 permits a workers' compensation claim to be tried in another county if the facilities are inadequate in the county of the accident or by the stipulation of the parties. And litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. Honda Cars of Bellevue v. American Honda Motor Co., 261 Neb. 923, 628 N.W.2d 661 (2001). Section §48-177, therefore, cannot be jurisdictional; it simply specifies the venue for hearing the cause, which is an objection that can be waived. McCall v. Hamilton County Farmers Telephone Ass'n, 135 Neb. 70, 280 N.W. 254 (1938).

The Court explained that it was not addressing the merits of plaintiff's claim that venue was improper, but whether plaintiff preserved that claim. Plaintiff had notice of the Douglas County hearing, but did not object to its venue. The Supreme Court stated that it did not need to determine if plaintiff's failure to appear or participate was a "waiver" of the issue, because no appeal was taken from the resulting order. Therefore, the only relevant question was whether the order was void for lack of jurisdiction. It was not. Because the compensation court was not deprived of jurisdiction by the venue, and no appeal was taken, the order was a final adjudication not subject to plaintiff's collateral attack. Further, given that §48-177 is a venue statute which relates to procedure and not jurisdiction, the fact that the cause was tried in a county other than that declared by §48-177 does not go to jurisdiction so as to invalidate the judgment; the court had jurisdiction over the matter and the power to render a judgment binding on the parties. Lewin, supra note 13.

Therefore, the Court found that the trial court erred in concluding the March 28, 2008, order was "a nullity." It may have been entered in error, but it was entered by a court with jurisdiction to enter it, and no appeal was taken. Nor did the court have the authority to vacate its own judgment, see Dougherty v. Swift-Eckrich, 251 Neb. 333, 557 N.W.2d 31 (1996), although the Supreme Court noted that trial judges of the Workers' Compensation Court recently had been given the authority to substantively modify or change their rulings within 14 days of entry, 2011 Neb. Laws, L.B. 151, §11. The Court agreed with the review panel's ultimate conclusion that the trial court erred in vacating the March 28 order.

Regarding plaintiff's argument that the compensation court did not have authority to terminate benefits and dismiss his petition with prejudice, the Supreme Court stated that the answer depended on the basis for terminating benefits.

The trial court did not find noncompliance with discovery in its March 28 order, but the Supreme Court examined the court's authority in that regard for purposes of illustration. The compensation court has the same authority to enforce compliance with reasonable discovery as any trial court in Nebraska, including dismissing a petition. Behrens v. Blunk, 280 Neb. 984, 792 N.W.2d 159 (2010). Pursuant to the court's rulemaking authority, it has adopted the Nebraska Rules of Discovery in Civil Cases, which permit the court to sanction noncompliance with a discovery order by, among other things, dismissing the action or rendering a default judgment. See §48-163(1), Workers' Comp. Ct. R. of Proc. 4 (2009), Neb. Ct. R. Disc. §6-337(b)(2)(C). So while the Workers' Compensation Court could dismiss a petition based upon discovery violations, no such violations were found in this case.

In contrast, the compensation court's authority to deal with a worker's failure to cooperate with medical treatment or vocational rehabilitation is constrained. Defendant relied on §48-162.01(7) for the proposition that the court has authority to terminate benefits. Section 48-162.01(7) states that if an injured employee, without reasonable cause, "refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the . . . Act."

The Supreme Court first noted that §48-162.01(7) does not expressly provide the compensation court with authority to permanently terminate benefits. Rather, the Court suggested that the statute be read together with similar language in 48-120(2)(c). Both §§ 48-120(2)(c) and 48-162.01(7) are intended to be remedial, not punitive. The Court opined that these provisions are intended not to punish a worker for being uncooperative, but simply to make sure that the consequences of a worker's failure to cooperate are not unfairly borne by an employer. Section 48-162.01(7) can only be read to authorize the complete termination of a claimant's right to benefits under the Act if evidence is presented to support a finding that had the employee availed himself or herself of the benefits offered, the employee would no longer be disabled. The statute cannot be used solely to punish or coerce an injured worker. There must be evidence to support a finding that the worker's disability would have been reduced had the worker cooperated with medical treatment or vocational rehabilitation. In this case, no evidence was presented that would have supported such a finding, nor was it even argued that plaintiff's disability would have been reduced had he participated in medical treatment.

Therefore, the Supreme Court agreed with the review panel that the trial court's order did not dismiss plaintiff's petition with prejudice based on his failure to obtain medical treatment and that even if it had, the dismissal would have been beyond the court's authority.

Regarding the trial judge's finding of contempt, plaintiff relied on Burnham v. Pacesetter Corp., 280 Neb. 707, 789 N.W.2d 913 (2010) for the proposition that the compensation court does not have such authority. In Burnham, the Supreme Court held that the court did not have inherent authority to remedy violations of its orders, including finding a party in contempt, and that the Act did not vest the court with authority to issue contempt orders. Burnham, note 32. However, §25-2121 was not discussed in Burnham. That section states "every court of record shall have power to punish by fine and imprisonment . . . persons guilty of contemptuous conduct." And the compensation court is a court of record. Bituminous Casualty Corp. v. Deyle, 234 Neb. 537, 549, 451 N.W.2d 910, 918 (1990). However, the Supreme Court noted that it would be more accurate to read Burnham as addressing the compensation court's authority to enter orders in aid of execution, rather than general contempt citations under §25-2121. While a court of general jurisdiction may also sanction a contemnor by dismissing an action, that power is derived from a court's inherent authority to impose sanctions in addition to what is listed in §25-2121. And the compensation court does not have inherent contempt authority. Thus, even if §

25-2121 empowers the compensation court to punish contempt, the court could do so only by fine or imprisonment, not dismissal of a petition.

In summary, the Supreme Court found no merit to plaintiff's argument that the trial court lacked jurisdiction to enter the March 28, 2008 order due to improper venue, and no merit to defendant's arguments that the March 28 order effectively dismissed plaintiff's claim for benefits with prejudice. Therefore, the Supreme Court affirmed the judgment of the review panel remanding the cause to the trial court for further proceedings.

### 3. **Howsden v. Roper's Real Estate Company, 282 Neb. 666, 805 N.W.2d 640 (2011)**

#### DUAL EMPLOYER DOCTRINES

#### EXCLUSIVE REMEDY

#### THIRD-PARTY CLAIM

The Supreme Court reversed the district court's decision that plaintiff's third-party claim against defendant was barred by the exclusive remedy provisions of the Workers' Compensation Act.

Plaintiff worked for Roper & Sons, Inc., a funeral home, and was injured on property leased to Roper & Sons and owned by Roper's Real Estate Company, Inc. Both companies were operated and owned by the same shareholders, but were separate legal entities. Plaintiff filed a complaint in district court against defendant, Roper's Real Estate, alleging that defendant's negligence caused her injuries. Defendant alleged that plaintiff's exclusive remedy was under the Act, since Roper & Sons, Inc. and Roper's Real Estate Co. should be considered the same entity. The district court granted defendant's motion for summary judgment on the exclusive remedy issue.

The Court disagreed with defendant's contention that it and Roper & Sons should be considered the same entity and the exclusive remedy of the Workers' Compensation Act should apply, rather than allowing plaintiff to sue defendant as a third party. The Court found that the "dual capacity" doctrine (employer may become liable in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer) was discredited in Bennett v. Saint Elizabeth Health Sys., 273 Neb. 300, 729 N.W.2d 80 (2007). Under the narrower "dual persona" doctrine, an employer may only be sued as a third party if it possesses a second persona so completely independent from and unrelated to its status as employer that it should be recognized as a separate legal person. The Court found neither doctrine applicable since those doctrines apply only when there is one employer, and here defendant was actually a legally separate entity from plaintiff's employer. Additionally, courts have uniformly denied defendants the opportunity to pierce their own corporate veil in order to avoid liability.

The Court agreed with plaintiff's allegation that the district court erred in finding Millard v. Hyplains Dressed Beef, 237 907, 468 N.W.2d 124 (1991) was controlling. In Millard, the Court held that an employee's third-party claim may be barred by the exclusive remedy rule when plaintiff is working for two employers simultaneously at the time of injury. The Court found no basis in the record to conclude that plaintiff was employed by both Roper & Sons and defendant. The Millard dual-employer case was not pertinent since Roper & Sons and defendant were legally separate entities and plaintiff was hired and controlled exclusively by Roper & Sons.

Finally, defendant attempted to make landlord-tenant arguments as well; however, the Court found that those arguments were not raised previously and should not be considered.

The Court concluded that plaintiff's third-party tort claim against defendant was not barred by the exclusive remedy provisions of the Act and remanded the cause to the district court for further proceedings.

#### 4. Lovelace v. City of Lincoln, 283 Neb. 12, 809 N.W.2d 505 (2012)

PERMANENT TOTAL DISABILITY

STATUTORY INTERPRETATION

WAITING-TIME PENALTY

The Supreme Court affirmed the decision of the review panel, finding that plaintiff was not entitled to permanent total disability benefits for a specified time period when plaintiff was working, and that plaintiff was entitled to permanent total disability benefits from a specified date onward.

Plaintiff suffered a work-related injury to her left knee and back on March 21, 2006. Plaintiff continued to work for defendant until June 22, 2006, when she had surgery on her left knee. Plaintiff returned to work for defendant on October 2, 2006, and continued working with restrictions until November 6, 2007, when she injured her right knee. On December 19, 2007, plaintiff had another surgery on her left knee and did not return to work.

The trial court found that plaintiff was temporarily totally disabled and entitled to benefits from June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently totally disabled. In a subsequent order nunc pro tunc, the court further found that pursuant to Hobza v. Seedorff Masonry, Inc., 259 Neb. 671, 611 N.W.2d 828 (2000), defendant should pay plaintiff penalties and interest for failing to catch up permanent total disability benefits for the period of March 22, 2006, through June 22, 2006.

The review panel reversed the trial court, finding that Hobza was not applicable and that no permanent total disability benefits were to be paid prior to June 22, 2006, because plaintiff worked full-time between the accident date of March 21, 2006, through June 22, 2006. The review panel affirmed the decision that plaintiff was permanently totally disabled.

The Supreme Court began by looking at the period of time between October 2, 2006, and December 18, 2007, when plaintiff was working either part-time or full-time with restrictions. The Court noted that plaintiff made no claims for indemnity benefits and the trial court made no findings for that period of time. The Court then found that plaintiff was not entitled to permanent total disability benefits between October 2, 2006, and December 18, 2007, as she was working either full-time or part-time and receiving temporary partial disability payments. See Kam v. IBP, Inc., 12 Neb App. 855, 686 N.W.2d 631 (2004), affirmed 269 Neb. 622 694 N.W.2d 658 (2005).

The Court then examined whether Hobza was applicable. The Court noted that in Hobza, it held that under §48-119, benefits were to be paid from the date of injury. However, subsequent to the decision in Hobza, the Legislature specifically changed §48-119 to provide that compensation begins from the date of disability rather than the date of injury. The Court found that Hobza was not applicable and affirmed the decision of the review panel that plaintiff was not entitled to permanent total disability benefits for the time period between March 22, 2006, through June 22, 2006, when she was working full-time. The Court further held that plaintiff was entitled to permanent total disability benefits from December 19, 2007, onward.

## 5. **Mueller v. Lincoln Public Schools, 282 Neb. 25, 803 N.W.2d 408 (2011)**

### AVERAGE WEEKLY WAGE

The Supreme Court reversed and remanded the trial court's calculation of average weekly wage.

Plaintiff suffered a work injury on February 2, 2007, while employed by an elementary school. Plaintiff's employment contract provided that she would be paid monthly for 12 months of the year for work performed during the 9-month school year. Plaintiff was considered a full-time employee working 37 1/2 hours per week. The parties stipulated that plaintiff's hourly wage was \$15.27. The principal issue before the trial court was whether the average weekly wage should be calculated over a 9-month period or a full calendar year.

Defendant claimed that plaintiff's average weekly wage for temporary total disability purposes was \$411.49 based on what she had actually been paid over the 6 months before her injury. Defendant also claimed that plaintiff's average weekly wage for permanent disability purposes was \$458.10 based on annualizing her hourly income and dividing that by 52 weeks.

The trial court, reasoning that the average weekly wage should be calculated based on what plaintiff earned during the 6 months prior to her injury rather than what she was paid, found that plaintiff's average weekly wage for temporary total disability purposes was \$572.62 ( $\$15.27/\text{hour} \times 37 \frac{1}{2} \text{ hours/week}$ ). The trial court further found that plaintiff's average weekly wage for permanent disability purposes was \$610.80 ( $\$15.27 \times 40 \text{ hours/week}$ ). The review panel affirmed.

The Supreme Court began by noting that pursuant to §48-126, the average weekly wage for a continuous employee paid by the hour is "his or her average weekly income for the period of time ordinarily constituting his or her week's work, and 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." One exception to this is that pursuant to §48-121(4), the average weekly wage for an employee paid by the hour for permanent disability purposes is calculated based on "a workweek of a minimum of forty hours."

The Court explained that it had previously provided general rules for determining the average weekly wage for temporary and permanent benefits, but noted that these formulas are not inflexible and the language "ordinarily constituting his or her week's work" in §48-126 precludes an automatic mathematical calculation based on the last 6 months of work. Powell v. Estate Gardeners, 275 Neb. 287, 745 N.W.2d 917 (2008). The Court then stated that the goal in determining an employee's average weekly wage is to produce an honest approximation of the average weekly wage, and in past cases, the emphasis had been on not distorting an employee's average weekly wage.

The Court further explained that the problem with this case was that it was unclear from the record precisely how plaintiff was compensated and specifically how her monthly paycheck was derived from her hourly wage. The parties assumed that because plaintiff had an hourly wage, her wage rate was fixed by the hour within the meaning of §48-121(4) and §48-126. However, if plaintiff was an hourly employee, her paycheck each month would depend on the number of hours she worked that month. This was clearly not the case as plaintiff was paid during the summer months when she did not work at all. Therefore, the Court found that plaintiff did not fit within the definition of an hourly employee as it is usually understood.

The Court then concluded that the trial court's decision was not an honest approximation of plaintiff's average weekly wage and that it had the effect of distorting plaintiff's average weekly wage well beyond what she was actually earning at the time of injury by not accounting for the

circumstances of her employment. Thus, for temporary disability purposes, the trial court erred in not calculating plaintiff's average weekly wage based upon her actual weekly income, and for permanent disability purposes, the trial court erred in not accounting for plaintiff being paid monthly for 12 months of the year for work performed during the 9-month school year. The Supreme Court remanded the case to the trial court for further proceedings and perhaps greater clarity on how plaintiff's actual take home pay was calculated.

**6. Pearson v. Archer-Daniels-Midland Milling Company, 282 Neb. 400, 803 N.W.2d 489 (2011)**

FEE SCHEDULE AND REIMBURSEMENT TO THIRD-PARTY PAYORS

FUTURE MEDICAL BENEFITS

The trial court's decision was affirmed in part but reversed in part and remanded for further proceedings.

Plaintiff was struck by a forklift while at work in 2006. In 2008, the trial court found the plaintiff suffered an injury to his right knee and back, and awarded temporary and permanent benefits and future medical benefits. There was no appeal from this award. In 2009, plaintiff underwent a total knee replacement and received several spinal injections for his low back injury. Plaintiff was also assigned a 37 percent impairment rating for his knee. After defendant refused to pay the medical bills, plaintiff moved to compel payment and also asked that the award be modified to reflect the 37 percent impairment rating.

The trial court entered a further award denying the motion to compel payment for the knee replacement and declining to modify the award to reflect impairment. It also ordered defendant to pay for the spinal injections pursuant to the applicable fee schedule. The review panel affirmed.

The first issue addressed by the Supreme Court was whether the trial court's original award for future medical expenses included knee replacement surgery for the plaintiff. In this case, the same judge entered both the original award and further award. In the further award he found that the original award implicitly rejected knee replacement because the issue had been presented and the plaintiff was found to be at MMI with no permanent disability. The Supreme Court disagreed and cited its previous finding that "neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance." Neujahr v. Neujahr, 223 Neb. 722, 393 N.W.2d 47 (1986). What the decree, as it becomes final, means as a matter of law as determined from the four corners of the decree is what is relevant. Id. In this case, the trial judge's belief about what he "impliedly rejected" could not change the fact that the award did not reject it. The trial judge's award noted that plaintiff's physician said that knee replacement would be "indicated" and held that plaintiff was entitled to "any future medical treatment . . . which falls under the provisions of §48-120." Given the award of future medical treatment and the absence of language denying knee replacement, the Court found that the original award could not be read as denying knee replacement. If plaintiff's knee replacement was due to his compensable injury, then defendant should be liable. Therefore, the trial court's determination that its original award denied knee replacement was reversed and remanded for a factual determination as to whether the knee replacement fell under the provisions of §48-120.

In the further award, the trial court ordered defendant to pay for certain medical bills. Plaintiff argued that since the bills had already been paid by the health carrier, that carrier should be reimbursed for the full amount it paid without application of the fee schedule. The trial court disagreed and concluded that §48-120(1)(e) plainly requires the use of the fee schedule and that it does not conflict with the reimbursement provisions in §48-120(8).

Section §48-120(1)(e) provides that "the provider or supplier of such services shall not collect or attempt to collect . . . any amount in excess of (i) the fee established by the compensation court for any such service . . ." Section 48-120(8) provides that "the compensation court shall order the employer to make payment directly to the supplier of any services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services . . ."

The Supreme Court found that subsections (1)(e) and (8) of §48-120 are not inconsistent because §48-120(1)(e) does not mention third parties while §48-120(8) does. Further, it is unnecessary to prohibit a third party from charging more than the fee schedule under §48-120(1)(e) because the third party is not the one providing or supplying services and thus is not charging for services at all.

Plaintiff argued that a third party might pay more than the fee schedule initially and if reimbursed only according to the fee schedule, might not be reimbursed for the full amount paid. The Supreme Court found that possibility mitigated by the prohibition in §48-120(1)(e) against providers or suppliers charging more than the fee schedule allows. Therefore, the trial court did not err in applying the fee schedule to any reimbursement to a third party.

**7. Pittman v. Western Engineering Co., and Evert Falkena, 283 Neb. 913; 813 N.W.2d 487 (2012)**

**EXCLUSIVE REMEDY**

The Supreme Court concluded that plaintiff's action was barred by the exclusivity provisions of the Workers' Compensation Act. The Court affirmed the district court's order which granted summary judgment in favor of the defendants and dismissed the plaintiff's petition.

Plaintiff's spouse, Robin, died in a work-related accident while working for defendant, Western Engineering Company, Inc. (Western). Wheels of a truck came loose and struck and killed Robin. The other defendant, co-employee Evert Falkena, worked for Western and maintained the truck. Plaintiff also was an employee of Western. Plaintiff accepted burial expenses and weekly workers' compensation payments as Robin's surviving spouse and dependent. Later, the compensation court approved an Application for Lump Sum Settlement and Release (Settlement and Release) filed by plaintiff and Western to pay plaintiff \$400,000 in exchange for Western's discharge of all further liability on account of Robin's September 8, 2009 accident and injuries. Plaintiff subsequently sued defendants for negligence in district court alleging bystander negligent infliction of emotional distress based upon his shock upon arrival at the scene of the accident where he saw Robin's body. The district court determined that plaintiff's cause of action was barred by the exclusivity provisions in the Workers' Compensation Act (Act) and by the Settlement and Release, and dismissed the complaint with prejudice.

On appeal, plaintiff asserted that since his claim was limited to emotional injuries which are not covered by the Act, the exclusivity provisions did not bar his tort suit. He contended that his claim for bystander negligent infliction of emotional distress was not derivative of Robin's injuries. Defendants claimed that plaintiff's acceptance of workers' compensation benefits and his agreement to settle and release defendants' liability barred any subsequent lawsuits arising from Robin's accident.

The Court determined that Neb. Rev. Stat. §§ 48-111 and 48-148, the "exclusivity" provisions of the Act, barred plaintiff's claim. Pursuant to § 48-148, when plaintiff accepted payment of workers' compensation benefits, he released Western from further claims or demands at law arising from Robin's injury. In looking at the plain language of the statute, along with case law from various other states, the Court concluded that plaintiff's tort action was a "claim or demand at law" and it arose from Robin's injury because had Robin's injury and death not occurred, plaintiff's negligence claim would not have arisen. The Court acknowledged that plaintiff was an employee of Western, too, and in certain circumstances could have sued the employer in district court if the suit was not covered by the Act. In this case, however, plaintiff's status as "surviving spouse," who had accepted compensation under the Act, barred him from pursuing his negligence case in district court. Thus, his status as employee had no bearing on the outcome.

Plaintiff's claim was also barred as to fellow employee Falkena pursuant to § 48-111. Section 48-111 extends employer immunity to employees, meaning that where the employer is immune from suit, in the absence of willful conduct, the employee is similarly immune.

The Court affirmed the district court's dismissal of plaintiff's complaint based on the determination that plaintiff's claims against the defendants were barred by the exclusivity provisions of the Act.

## **8. Sellers v. Reefer Systems, Inc., 283 Neb. 760, 811 N.W.2d 293 (2012)**

### FUTURE MEDICAL BENEFITS

#### REASONABLE AND NECESSARY MEDICAL CARE

The Supreme Court affirmed the review panel's finding that the plaintiff was entitled to future medical care.

Plaintiff injured his left knee in 2007 while working for the employer and received medical treatment, including surgery. The trial court awarded temporary and permanent benefits, and also found that plaintiff was entitled to future medical care. Defendant appealed, arguing that there was no evidence in the record of sufficient specificity to support the award of future medical care. The review panel rejected that argument, finding that the doctor's use of the word "probable" met the standard that future medical care was needed to a reasonable degree of medical probability. But because the doctor used the word "possible" in regard to future knee replacement surgery, the review panel modified the trial court's award to exclude knee replacement at that time.

Plaintiff appealed, arguing that the modification improperly limited the Award's scope to include only medical care which was probably necessary at the time of trial and foreclosing compensability for knee replacement even if recommended by a doctor in the future.

Before an order of future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease. Foote v. O'Neill Packing, 262 Neb. 467, 473, 632 N.W.2d 313, 319-20 (2001). The Supreme Court found that this requirement was met in the instant case by the doctor's opinion stating plaintiff would probably require future medical care. And once it has been determined that the need for future medical care is probable, the employer is liable for future medical care shown to be reasonably necessary under §48-120, even if the necessity for a specific procedure did not exist at the time of the award. Pearson v. Archer-Daniels-Midland Milling Co., 282 Neb. 400, 803 N.W.2d 489 (2011).

The modification by the review panel did not foreclose plaintiff from establishing at a later date that knee replacement was reasonable and necessary. Nor did it foreclose defendant from challenging any future claim. Section §48-120(6) provides both parties with a mechanism for resolving any contested medical issue, which the court could resolve by exercising its continuing jurisdiction over medical benefits.

The judgment of the review panel was affirmed.

**9. Spitz, As Surviving Spouse of Roger McCannon and as Next Friend of Danielle E. Spitz-McCannon v. T.O. Haas Tire Co., 283 Neb. 811, 815 N.W.2d 524 (2012).**

COMMON-LAW MARRIAGE

DEATH BENEFITS

EVIDENCE

SURVIVING SPOUSE

The Supreme Court affirmed the trial court's decision dismissing Spitz' claim for workers' compensation death benefits as a surviving spouse, finding that Spitz was not McCannon's common-law spouse.

McCannon and Spitz lived together in Colorado between 1991 or 1992 and 1999 with the exception of 7-8 months in 1993 and the last half of 1995. They moved to Nebraska in 1999 and continued to live together. They were never married. On July 15, 2006, McCannon died in a work-related accident while working for defendant. Spitz claimed to be the common-law wife of McCannon, and filed a claim in the Nebraska Workers' Compensation Court for workers' compensation death benefits as a surviving spouse.

Since McCannon and Spitz were never married and a couple cannot create a common-law marriage in Nebraska, Spitz was required to show that a common-law marriage existed under Colorado law before 1999, when they moved to Nebraska. The trial court, relying on the Colorado case of People v. Lucero, 747 P.2d 660 (1987), dismissed Spitz' claim that she was McCannon's surviving spouse, finding that she failed to meet her burden to prove the existence of a common-law marriage. The trial court cited a number of objective facts showing that Spitz and McCannon held themselves out as single rather than married. The review panel affirmed and Spitz appealed.

The Supreme Court began by examining Lucero, which explained the requirements for establishing a common-law marriage under Colorado law. In Lucero, the Colorado Supreme Court explained that "a common law marriage is established by showing mutual consent or agreement of the parties to be husband and wife, followed by mutual and open assumption of a marital relationship." They further explained that such mutual consent or agreement must be manifested by conduct in the form of mutual public acknowledgment of the marital relationship that gives evidence of the mutual understanding of the parties that they are married. The court in Lucero then stated that evidence which openly manifests the intent of the parties that they are married is proof of their mutual understanding. Evidence which most clearly shows a mutual understanding is cohabitation and a general understanding and reputation in the community that they hold themselves out as husband and wife. Other examples of evidence which can be considered include maintenance of joint banking and credit accounts, the purchase and joint ownership of property, the use of the man's surname by the woman and by children born of the parties, and the filing of joint tax returns.

The Supreme Court then turned to whether the evidence before the trial court was sufficient to show the parties' intent to be married. The Court found that although Spitz and McCannon cohabitated for many years and had a committed relationship, the assumption or belief that they were married based solely on their cohabitation and committed relationship was insufficient under Lucero. Therefore, the trial court was not clearly wrong in finding that the vast majority of the objective evidence showed that Spitz and McCannon did not intend to create a common law marriage and did not conduct affairs as though a common-law marriage existed. Spitz and McCannon never used the other's surname in any contracts or other documents, never filed

joint tax returns, titled their vehicles in their individual names, and Spitz presented no documents showing she and McCannon had signed as husband and wife.

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

### **1. Parks v. Marsden Bldg Maintenance, 19 Neb. App. 762, 811 N.W.2d 306 (2012)**

#### ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The Court of Appeals upheld the review panel's affirmance of the trial court's award of workers' compensation benefits to plaintiff, finding that, based on the facts of the case, plaintiff's injury arose out of and in the course of his employment with defendant.

Plaintiff was employed by defendant as a janitorial supervisor. He generally worked from 4:00 p.m. to 12:00 a.m. at the Dex building and the Omaha Public Power District building, both in Omaha. Access cards were necessary for plaintiff to gain access to the Dex building. On the date of injury, March 11, 2009, plaintiff picked up cleaning rags at the defendant's office, then traveled to the Dex building. He clocked in at 4:00 p.m., realized he left his identification badge and access card at home, and left the building to return home to retrieve those items. On his way back to the Dex building, plaintiff was involved in a serious motor vehicle accident and sustained numerous injuries.

At trial, plaintiff testified that he knew he was not supposed to leave the Dex building for personal reasons, but he was never given any instructions on what to do if he forgot his access card. He had gone home to retrieve his access card several times in his five years working for defendant, and he was never disciplined. A manager for defendant testified that the company handbook required employees to clock in and out and a supervisor's approval was required before leaving a client's premises. Plaintiff's former supervisor testified that plaintiff's schedule was 5:00 p.m. to 10:00 at the Dex building and he did not have permission to clock in early or pick up supplies from defendant's office prior to his shift.

On appeal, defendant argued that plaintiff's actions were a substantial deviation from his employment and therefore the accident did not arise out of and in the course of employment.

Pursuant to § 48-101 of the Workers' Compensation Act, an employee is entitled to benefits when his or her injury arises out of and in the course of his or her employment if the employee was not willfully negligent at the time of the injury. The test for whether an employee's conduct which is not a direct performance of his or her work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable, independent hazard. Misek v. CNG Financial, 265 Neb. 837, 660 N.W.2d 495 (2003). The Court found that plaintiff deviated from the policy of clocking out and getting permission when leaving the building, but the deviation was not substantial and was reasonably incident to his employment with defendant; therefore, plaintiff's injury arose out of his employment. The Court also found that the injury was "in the course of" his employment. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. Id. The trial court looked to a 1962 Louisiana appellate case in which a truck driver left work to retrieve his driver's license and was injured in an automobile accident. That court held the injuries compensable because the trip was naturally related to the employee's duties and was necessary for him to drive his truck. Similarly, in this case plaintiff testified that he had left the Dex building several times in his five years of employment to go home to retrieve the access card, which card was necessary to fulfill his work duties at the Dex building. Based on the facts of the case, the Court found that the trial court was not clearly wrong in determining that the plaintiff's injury arose in the course of his employment.

The Court concluded that plaintiff's injury arose out of and in the course of his employment with defendant and affirmed the trial court's order and award.

**2. Sterner v. American Family Insurance Company, 19 Neb. App. 349, 806 N.W.2d 128 (2011)**

SUBROGATION

DISTRIBUTION OF SETTLEMENT PROCEEDS

STATUTORY CONSTRUCTION

The Court of Appeals reversed and remanded the decision of the district court, holding that the district court did not make a fair and equitable division of third-party settlement proceeds.

Plaintiff suffered a work-related accident on February 6, 2008, when he was attacked by a homeowner's pit bull. Plaintiff claimed injuries to both shoulders. There was no dispute over the left shoulder injury and defendant voluntarily paid all workers' compensation benefits for that injury. Because of the dispute over the plaintiff's right shoulder injury, plaintiff filed suit against defendant in the Workers' Compensation Court. The trial court found the left shoulder injury compensable, that all allowable benefits had been paid, and denied benefits for the right shoulder injury finding it was not work-related.

Plaintiff pursued a third-party tort claim against the homeowner, which was settled with the consent of defendant for \$80,000.00. Defendant filed an action in the district court for a fair and equitable distribution of the settlement proceeds pursuant to §48-118.04, claiming to have paid plaintiff \$35,313.00 in workers' compensation benefits.

The district court found that defendant was entitled to \$0.00 in subrogation from the third-party settlement reasoning that: 1) \$26,666.66 in attorney fees and \$1,395.92 in costs were due to plaintiff's counsel for representation in the third-party case and that defendant was not entitled to any subrogation interest in these fees and costs, 2) plaintiff had unreimbursed wages of \$19,012.05 from which defendant was not entitled to any subrogation interest, and 3) the remaining portion of the third-party settlement of approximately \$32,900.00 from which defendant was claiming a subrogation interest was an amount for which plaintiff "must be compensated for the severe and permanent physical and emotional injuries that he suffered as a result of this injury, which sum is far less than the overall value of his claim."

The Court of Appeals began by noting that §48-118.04 provides that where an employer has paid workers' compensation benefits and has a subrogation interest in any third-party recovery, the district court is directed to make a "fair and equitable distribution" of the third-party settlement proceeds. In Turco v. Schuning, 271 Neb. 770, 716 N.W.2d 415 (2006), the Supreme Court noted that while §48-118.04 does not provide a particular formula for determining a fair and equitable distribution of a third-party settlement, the district court erred in requiring that the worker be "made whole" before the employer was entitled to any subrogation interest in the third-party settlement. The Supreme Court distinguished between statutory subrogation and equitable subrogation, and found that §48-118.04 is a statutory provision. Thus, equitable principles did not apply, and under §48-118.04 the district court was required to make a fair and equitable distribution of proceeds based on the facts of the case.

The Court of Appeals further noted that in Burns v. Nielsen, 273 Neb. 724, 732 N.W.2d 640 (2007), the Supreme Court provided additional guidance on what is a fair and equitable distribution pursuant to §48-118.04. In Burns, the Court found that fair and equitable as used in §48-118.04 is not intended to permit subrogation to be subject to equitable defenses (e.g., unclean hands, estoppel), and that the district court erred in using equitable defenses to bar the employer from recovering its subrogation interest. Rather, the Supreme Court held that §48-118.04 simply requires the district court to make a "reasonable division of proceeds of the third-party settlement among the parties."

In the instant case, the Court of Appeals concluded that the district court used a discredited “made whole” rationale, even if it did not intend to, and thereby erred in using such analysis as the starting point for determining the distribution of the third-party settlement.

The Court of Appeals further concluded that the district court erred in excluding plaintiff’s lost wages so as to reduce the amount of the third-party settlement available for division (from \$80,000 to \$60,687.95) as this decision was not supported by any authority and was counter to the express holding in Jameson v. Liquid Controls, 260 Neb. 489, 618 N.W.2d 637 (2000).

The Court of Appeals then found that pursuant to §48-118.04, attorney’s fees and costs can be deducted from the amount of the third-party settlement available for division, but that the district court erred in deducting \$26,666.66 in attorney’s fees based on a contingency fee agreement not in evidence rather than deducting \$22,802.66 in fees as stipulated by the parties.

Since the district court erred in using a “made whole” analysis as a starting point for making a division of the third-party settlement and erred in determining the amount available for distribution which should have been \$55,801.42 (\$80,000.00 minus \$22,802.66 in attorney’s fees and \$1,395.92 in costs) rather than approximately \$32,900.00 as the district court found, the Court of Appeals reversed and remanded the decision of the district court holding that it did not make a fair and equitable division of the third-party settlement proceeds.

### 3. Unger v. Olsen's Agricultural Laboratory, Inc., 19 Neb. 459, 809 N.W.2d 813 (2012)

FINAL, APPEALABLE ORDER

EMPLOYEE NOTICE OF INJURY

The Court of Appeals affirmed the order of the review panel remanding the matter to the trial court for a determination of the viability of the lack of notice defense.

Plaintiff worked for defendant as a laborer testing soil samples and claimed she contracted a lung condition from exposure to substances in her work. The trial court found that plaintiff's occupational disease was compensable, that she was permanently and totally disabled, and awarded benefits. The trial court also found that defendant failed to affirmatively plead that plaintiff did not give adequate notice pursuant to §48-133. On appeal, the review panel concluded that the lack of notice defense was properly before the trial court and should have been addressed. It was remanded to the trial court for a determination of the viability of the lack of notice defense.

The first issue before the Court of Appeals was whether the review panel order was final and appealable. An order is final and appealable if a substantial right is affected and the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. Hull v. Aetna Ins. Co., 247 Neb. 718, 529 N.W.2d 788 (1995). In the present case, plaintiff received an award of benefits and defendant was precluded from asserting its lack of notice defense. As a result of the order on remand, plaintiff faced a defense which was earlier resolved in her favor on an erroneous procedural basis by the trial court. Because there now existed the potential deprivation of plaintiff's award, the Court of Appeals concluded that the review panel's order affected a substantial right and therefore constituted a final, appealable order.

The Court of Appeals next agreed with the review panel that the trial court was clearly wrong in failing to address the notice issue. Section §48-133 requires that an employee give the employer notice of an injury as soon as practicable after the injury. If the employee fails to give notice, he or she may be barred from asserting the claim. Williamson v. Werner Enters., 12 Neb. App. 642, 682 N.W.2d 723 (2004). Defendant argued that it was error to remand back to the trial court for a determination of whether notice was given because there was no factual dispute and therefore the issue was a question of law. The Court acknowledged its previous finding that where the facts are undisputed, or if disputed, the factual finding of the trial court was not clearly erroneous, the question of whether §48-133 bars the claim is a question of law upon which the appellate court must make a determination independent of that of the trial court. Snowden v. Helget Gas Products, 15 Neb. App. 33, 721 N.W.2d 362 (2006); Williamson v. Werner Enters., supra. However, in those cases the appellate court was asked to review a determination made by the trial court regarding notice. In the present case, the trial court did not make a determination for an appellate court to review. The Court also noted that the phrase "as soon as practicable" depends on the particular facts and circumstances of the case. Williamson v. Werner Enters., 12 Neb. App. 642, 682 N.W.2d 723 (2004). In the instant case this clearly was a question that should have been determined by the trial court based upon the particular facts and circumstances.

The Court of Appeals affirmed the order of remand solely for a determination, on the existing evidentiary record, of whether the defense of lack of timely notice of injury was viable.