

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

Fiscal Year 2013: July 1, 2012 to June 30, 2013

Supreme Court Cases:

1. Becerra v. United Parcel Service, 284 Neb. 414; 822 N.W.2d 327 (2012)

AVERAGE WEEKLY WAGE

FINAL ORDER

JURISDICTION

VOCATIONAL REHABILITATION

The Supreme Court affirmed the trial court's award of formal vocational training.

Plaintiff sustained a work-related injury while employed part-time and as a result, sustained a 15 percent loss of earning capacity and was given permanent work restrictions. At the time of the injury he was also attending college. Plaintiff met with a vocational rehabilitation counselor to discuss vocational options, but the counselor could not develop a plan due to a disagreement regarding the average weekly wage to be used for purposes of the plan.

The parties stipulated that plaintiff had an average weekly wage of \$217.86 for temporary benefits and \$504.00 for purposes of permanent benefits. At trial the issue was whether a vocational plan should be developed based on the temporary or permanent average weekly wage. The trial court found that plaintiff's restrictions were permanent and therefore the wage rate should be based on the permanent rate of \$504.00. Based on that rate, the court determined plaintiff was entitled to a vocational rehabilitation plan of formal retraining.

On appeal, plaintiff argued that the Supreme Court did not have jurisdiction because the trial court decided some, but not all of the issues before it, i.e., it did not determine the type and length of the retraining program. The Supreme Court first noted that pursuant to Neb. Rev. Stat. §25-1902, the three types of final orders an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. Big John's Billiards v. State, 283 Neb. 496, 811 N.W.2d 205 (2012). Workers' compensation cases are special proceedings. StoreVisions v. Omaha Tribe of Neb., 281 Neb. 238, 795 N.W.2d 271 (2011). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal was taken. Big John's Billiards, *supra*. In the instant case, the Court held that the trial judge's award of vocational rehabilitation in the form of formal training eliminated UPS' claim that Becerra was not entitled to vocational rehabilitation. Thus, the order fell under the second category of final orders in §25-1902 and was final and appealable.

The Court went on to note that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. Wagner v. Wagner, 275 Neb. 693, 749 N.W.2d 137 (2008). In this case, however, the Supreme Court stated that the petition identified "rehabilitation" as an issue in dispute and the trial court

determined that plaintiff was entitled to vocational rehabilitation in the form of formal training. The trial court did not expressly reserve anything for later determination, and the Supreme Court found no authority requiring that an award of vocational rehabilitation specify the length and type of retraining program.

Regarding the issue of average weekly wage, the trial court found that the correct wage to use in formulating a plan of vocational rehabilitation was the permanent injury wage rate under Neb. Rev. Stat. §48-121. Defendant argued that §48-121(4) is a schedule of compensation and is not applicable to the determination of what is suitable and gainful employment under §48-162.01.

The Supreme Court first explained that as to hourly employees, §48-121(4) alters the computation of the average weekly wage under §48-126 only to the extent that it requires that a minimum of 40 hours per week be utilized in making the computation, which results in part-time hourly employees with permanent disabilities being treated as though they had worked a 40-hour workweek. Ramsey v. State, 259 Neb. 176, 182, 609 N.W.2d 18, 22 (2000). Statutory language is given its plain and ordinary meaning. Rosberg v. Vap, 284 Neb. 104, 815 N.W.2d 867 (2012). Because plaintiff in this case was an hourly employee who suffered a permanent disability, the compensation court correctly calculated his average weekly wage based on a 40-hour workweek under §48-121(4).

Having decided the appropriate average weekly wage, the next issue addressed by the Supreme Court was determining the correct vocational priority that would result in gainful employment.

Neb. Rev. Stat. §48-162.01(3) contains the priorities for use in developing a vocational rehabilitation plan, and a higher priority cannot be selected unless all lower priorities have been determined to be unlikely to result in suitable employment for the injured employee. The parties stipulated that defendant did not offer plaintiff a position after the injury. This stipulation eliminated the three lower priorities, leaving a job with a new employer or a period of retraining leading to employment in another career field as vocational options. At trial, the vocational counselor testified that the appropriate vocational priority would be retraining based on the average weekly wage of \$504.00, and the priority would be job placement based on the wage of \$217.86.

The Supreme Court noted it had previously held that accepting a minimum wage job does not automatically restore a claimant to suitable employment where the previous employment was at a significantly higher wage. The statutory goal is to return the worker to comparable employment. Yager v. Bellco Midwest, 236 Neb. 888, 464 N.W.2d 335 (1991). Plaintiff was only working part-time while attending school, but there was no barrier to him working 40 hours per week and no indication that he wished to remain a part-time employee in the future.

A job placement plan returning plaintiff to a 40-hour workweek at \$217.86 would mean placement in a job paying less than minimum wage and far less than the hourly wage plaintiff was earning at the time of injury. The Supreme Court held that that such employment would not restore plaintiff to suitable employment. Therefore, the Court agreed that the trial court properly calculated the average weekly wage for vocational purposes at the permanent rate under §48-121(4) and affirmed the court's award of a vocational plan consisting of formal training.

2. Clark v. Alegent Health Nebraska, 285 Neb. 60, 825 N.W.2d 195 (2013)

CHOICE OF PHYSICIAN

The Supreme Court reversed the trial court's decision denying payment for certain medical bills and remanded the case for further proceedings.

Plaintiff was attacked by a patient at her place of employment in April 2010, sustaining injuries to her head, neck, and shoulder. On the Workers' Compensation Court Form 50, plaintiff designated Dr. Nystrom as her treating physician and began treatment with him. Plaintiff received treatment from several other physicians also, some by referral from Dr. Nystrom and some who were not referred by Dr. Nystrom.

In March 2010, six weeks prior to the accident, plaintiff had cervical surgery for a non-work-related medical condition. In September 2010, plaintiff went to the emergency room due to shoulder pain related to a work incident three years earlier – not the April 2010 injury at issue in this case. In 2011, plaintiff had decompression surgery similar to the prior unrelated surgery. At trial the main issue was the compensability of the 2011 surgery and in its closing argument, defendant argued for the first time that some medical benefits fell outside the chain of referral from plaintiff's primary treating physician. The trial court found that plaintiff's pre-existing condition was aggravated by her work injury in April 2010 and that the 2011 surgery was reasonable and necessary. The trial court awarded payment of medical expenses from Dr. Nystrom and those physicians referred by him. The court denied payment to the physicians who were not referred by Dr. Nystrom and also found that the emergency room treatment in September 2010 was not related to plaintiff's injury.

On appeal, plaintiff argued that defendant denied compensability under §48-120(2)(a) and Rule 50(A)(6), thus entitling plaintiff to choose her treating physicians and avoid the chain of referral under §48-120(2)(e) and (f).

The Supreme Court first noted that Rule 50(A)(6) of the Workers' Compensation Court Rules of Procedure provides: "The employee may choose a physician if compensability is denied and the employer will pay for medical, surgical, or hospital services later found to be compensable." Section 48-120(2)(a) provides, in accord, "If compensability is denied by the [employer,] the employee has the right to select a physician and . . . the employer is liable for medical . . . services subsequently found to be compensable."

In this case, defendant was notified of the injury and paid for plaintiff's April 2010 emergency room visit. Plaintiff filled out the Form 50, indicating that Dr. Nystrom would be her treating physician. Therefore, defendant had knowledge of the injury and was aware that medical treatment may be necessary. Plaintiff treated with Dr. Nystrom and missed work after the injury. Plaintiff attempted to contact the person identified by defendant to make arrangements to receive workers' compensation benefits for her absence. Plaintiff testified she received no response from defendant and defendant made no arrangements to pay for medical care.

Based on these facts, the Supreme Court found that defendant did not uphold its duty to supply medical treatment that is prompt and in compliance with the statutory prescription on choice of doctors. Thus, defendant denied compensability for plaintiff's injury. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999). Further, plaintiff contacted defendant almost a year later again concerning payment of a surgery to be performed by Dr. Nystrom. Defendant denied compensability for this medical expense after reviewing a report from one of its own physicians, never changing its position on plaintiff's case.

Because defendant effectively denied compensability for plaintiff's injury, plaintiff had a right to select her own physicians for treatment. Under §48-120(2)(a) and Rule 50(A)(6), plaintiff was

entitled to choose her treating physicians and surgeons and avoid the chain of referral under §48-120(2)(e) and (f) after her April 27, 2010, treatment with Dr. Nystrom. Furthermore, as plaintiff's injury was later deemed compensable by the trial court under §48-120(2)(a) and Rule 50(A)(6), defendant was liable for all medical treatment of plaintiff's compensable injury, not only by Dr. Nystrom, but also the other physicians with whom plaintiff chose to treat.

The Supreme Court reversed and remanded the cause, finding that the trial court erred in requiring chain-of-referral proof for all medical treatment and in finding that the September 2010 emergency room visit was not related to the April 2010 work injury.

3. Holdsworth v. Greenwood Farmers Cooperative, 286 Neb. 49, 835 N.W.2d 30 (2013)

RELEASE OF LIABILITY

STATUTORY INTERPRETATION

WAITING-TIME PENALTIES AND ATTORNEY FEES

The Supreme Court reversed the decision of the compensation court granting plaintiff waiting-time penalties and attorney fees, holding that the penalty provisions of §48-125 do not apply to settlements reached under §48-139(3).

Plaintiff suffered a work injury on March 19, 2004, and filed a petition in November 2011. Plaintiff entered into a lump sum settlement with defendant using settlement procedures adopted by the Legislature in 2009 and set out in §49-139(3). Section 48-139(3) does not require Workers' Compensation Court approval of settlements, but only requires the filing of a release. The release was filed on January 11, 2012. Although not required by statute, the parties filed a joint stipulation and motion to dismiss, and on January 12, 2012, the compensation court issued an order dismissing plaintiff's petition with prejudice. Payment of the settlement amount was made more than 30 days after the release was filed. Plaintiff filed a motion in the compensation court to obtain a waiting-time penalty and attorney fees pursuant to §48-125. The compensation court granted plaintiff's motion for waiting-time penalties and attorney fees, finding defendant was bound by the penalty provisions of §48-125.

Defendant appealed, claiming that the compensation court lacked jurisdiction to consider plaintiff's motion because the release waived his right to have the motion heard. Defendant also claimed that the penalty provisions of §48-125 are not applicable to settlements made pursuant to §48-139(3).

The Supreme Court began by noting that jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. School District No. 49 v. Kriedler, 165 Neb. 761, 87 N.W.2d 429 (1958). Therefore, parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, and jurisdiction can neither be acquired nor lost as a result of an agreement of the parties. The Supreme Court held that the compensation court had continuing jurisdiction to enforce the award of compensation benefits and that the parties could not deprive the court of its jurisdiction by private agreement. Thus, the release did not deprive the court of jurisdiction to enforce the award of compensation benefits.

The Supreme Court next addressed whether the penalty provisions of §48-125 apply to settlements reached under §48-139(3). The Court noted that §48-139(3) imposes specific requirements in order to settle with a release. Included is the requirement that the release include a statement that the worker waives "all rights under the Workers' Compensation Act" and waives "[t]he right to ask a judge of the compensation court to decide the parties' rights and obligations."

The Court found no ambiguity in this language and read it as a full waiver of any and all rights given to workers in the Workers' Compensation Act (Act), including the right to penalties under §48-125, and the right to ask the compensation court to decide the parties' rights and obligations. The statute does not qualify or limit the rights given up and highlights its expansiveness by providing all rights are being waived, "including, but not limited to" certain specified rights. The Supreme Court held that because a worker who enters into a settlement under §48-139(3) files a release which waives all rights under the Act, including the right to penalties under §48-125, the penalty provisions of §48-125 do not apply to settlements reached under §48-139(3).

The Court next addressed the partial dissent's argument that the waiver required by §48-139(3) is limited by the main paragraph in that subsection and extends only to liabilities considered to be "on account of the injury." The dissent interpreted the release statements required by §48-139(3) (a) through (d) as implicitly incorporating this limitation. However, the Court found that this interpretation reads words into §48-139 that are not there, and that if the Legislature meant to limit the language in the release in such a way, it would have qualified the release to state that the worker waives only those rights "on account of the injury." The Court further noted this interpretation ignores the plain meaning of "all" and makes it meaningless, and that the phrase "including, but not limited to" is included in §48-139(3) and could not be reconciled with the interpretation by the dissent.

4. Hynes v. Good Samaritan Hosp., 285 Neb. 985, 830 N.W.2d 499 (2013)

APPELLATE REVIEW

EVIDENCE — BILL OF EXCEPTIONS

The Supreme Court vacated the trial court's award and remanded the case for a new trial. The complete bill of exceptions could not be prepared due to a technical malfunction, so the Court could not conduct a meaningful appellate review.

At trial, plaintiff was awarded benefits and defendant appealed. In preparation of the bill of exceptions on appeal, it was discovered that the testimony of several of defendant's witnesses could not be transcribed due to a malfunction of the court reporter's equipment. On appeal, defendant argued that the incomplete record required remand for a new trial, while plaintiff contended the record was sufficient for the Court to affirm the trial court's award.

The Supreme Court stated that generally, the appellant must present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. InterCall, Inc. v. Egenera, Inc., 284 Neb. 801, 824 N.W.2d 12 (2012). However, when a record is deficient through no fault of the appellant, the Court will remand for a new trial if the deficiency in the record prevents meaningful appellate review of the assignments of error. See, Richmond v. Case, 264 Neb. 319, 647 N.W.2d 90 (2002). Generally, meaningful appellate review requires a record that elucidates the factors contributing to the lower court's decision. J.B. Contracting Servs. v. Universal Surety Co., 261 Neb. 586, 624 N.W.2d 13 (2001).

The Court determined that the incompleteness of the record clearly prevented meaningful appellate review. All testimony from defendant's witnesses was unavailable, so the Court was unable to review both sides of the evidence. The trial court's judgment was vacated and the case was remanded for a new trial.

5. Moyera v. Quality Pork International, 284 Neb. 963, 825 N.W.2d 409 (2013)

LOSS OF EARNING CAPACITY

PERMANENT TOTAL DISABILITY

PROXIMATE CAUSE

SCHEDULED MEMBER V. WHOLE BODY INJURIES

UNDOCUMENTED WORKERS

The Supreme Court affirmed the decision of the trial court that plaintiff was permanently totally disabled.

In August 2008, plaintiff, an undocumented worker, suffered a work injury to his right foot resulting in several fractures to the bones across the top of his foot. Plaintiff also developed complex regional pain syndrome, a nerve disorder, to the right foot. The pain further resulted in moderate gait derangement which caused pain in his hips and back, and required him to walk with a crutch and then a cane.

Plaintiff's treating physician opined that plaintiff's work injury resulted in the nerve injury, that he reached maximum medical improvement (MMI) on August 6, 2010, that he sustained a 20 percent body as a whole impairment, and was restricted to sedentary work. The agreed-upon vocational rehabilitation counselor found that due to plaintiff's restrictions and inability to speak English, he had experienced a 100 percent loss of earning capacity. Defendant's physical therapist performed a functional capacity evaluation and found that plaintiff could do medium work. Defendant's physician concluded that plaintiff had ongoing pain in his foot from his fractures, that he no longer had symptoms from his nerve disorder, that he had a 3 percent impairment to the right foot, and that his gait derangement should not be considered in combination with more specific impairment ratings for making a whole body impairment determination. Using these counter-opinions, the vocational rehabilitation counselor did not change her opinion that plaintiff would need to learn English to qualify for jobs that would be physically appropriate for his impairment and not require prolonged standing or walking.

At trial, plaintiff testified his foot would swell, he could no longer walk very far for very long, and that when he supported himself on his foot for more than 15 minutes, he felt pain traveling from his foot to his back.

The trial judge, relying on the opinions of the treating physician and the vocational rehabilitation counselor, found that plaintiff sustained a permanent total loss of earning power. He rejected defendant's argument that plaintiff was not entitled to benefits for loss of earning capacity because of his illegal residency status, finding that the definition of employee in the Workers' Compensation Act (Act) includes "aliens" and does not distinguish between legal and illegal aliens. The review panel affirmed and defendant appealed.

Defendant, relying on Ortiz v. Cement Products, 270 Neb. 787, 708 N.W.2d 610 (2005), contended that plaintiff was not entitled to permanent disability benefits because he was an undocumented worker. Defendant further contended that although an undocumented worker is entitled to medical benefits and temporary total disability (TTD) benefits, pursuant to Visoso v. Cargill Meat Solutions, 18 Neb. App. 202, 778 N.W.2d 504 (2009), temporary total disability benefits are different from permanent benefits, i.e., temporary benefits are limited to an employee's healing time, while permanent benefits depend on an employee's ability to obtain lawful employment in the United States. Lastly, Defendant contended that plaintiff, just like the employee in Ortiz, had no plans to return to his home country or become a legal resident of the

United States. Therefore, plaintiff had no loss of earning capacity to lose as he had no legal right to be employed in United States.

The Supreme Court began by finding that the Act covers undocumented workers. The Court noted that §48-115(2) defines workers who are covered by the Act and specifically includes “aliens.” Further, §48-106(1) sets forth the employers covered by the Act while §48-106(2) excludes specified employees from coverage under the Act. Undocumented workers are not excluded. The Supreme Court agreed with the Court of Appeals in Visoso that the ordinary meaning of “aliens” is broad enough to include both legal and illegal aliens with or without work authorization. If the Legislature intended to exclude illegal aliens from the definition of covered employees, it could have easily done so by including a modifier, which it did not do. Therefore, the Supreme Court concluded that the Act applies to undocumented workers under contract of hire with a covered employer in the State of Nebraska.

The Supreme Court next analyzed defendant’s reliance on Ortiz to bar permanent disability benefits for undocumented workers. In Ortiz, the Supreme Court held that undocumented workers are not entitled to vocational rehabilitation benefits, stating that the purpose of vocational rehabilitation is to restore an injured employee to suitable gainful employment, and in order to effectuate this purpose, the worker must be eligible and willing to return to some form of employment. Ortiz planned to remain in the United States where he could not be lawfully employed. Therefore, the Court found that awarding vocational rehabilitation would be contrary to the purpose of returning him to suitable employment.

In the instant case, however, the Court found that Ortiz was distinguishable. It explained that if an injured worker is ineligible for the four lower priorities in §48-162.01(3) because the employee cannot be legally placed with the same employer or a new employer, then a workers’ compensation judge cannot order retraining for a new career. The Court further found that under §48-162.01(3), when an undocumented worker could have been placed with an employer but for his or her legal status, it is irrelevant whether the worker plans to stay in the United States or return to his home country. In either circumstance, whether staying or leaving, the worker’s illegal work status precludes him or her from satisfying the lower work priorities, so the employee is ineligible for retraining.

The Court went on to state that unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before the trial court can award permanent disability benefits. The terms “temporary” and “permanent” refer to duration of disability, while “total” and “partial” refer to the degree or extent of the diminished employability or loss of earning capacity. See Rodriguez v. Hirschbach Motor Lines, 270 Neb. 757, 707 N.W.2d 232 (2005). Both before and after MMI, an award of total disability benefits depends on a determination that the employee cannot perform the work for which he or she was trained or accustomed to performing. And both before and after reaching MMI, an employee’s disability for compensation under §48-121(1) and (2) is determined by employee’s diminution of employability or impairment of earning power or capacity.

The Court found that because the finding of total disability depends on the same inquiry, regardless of whether the disability is temporary or permanent in nature, the difference between TTD and permanent total disability benefits is not a valid reason to distinguish Visoso (in which the undocumented worker was awarded TTD benefits). Therefore, the Court held that an employee’s illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity.

The Supreme Court next addressed whether plaintiff’s scheduled member injury had resulted in a whole body impairment and loss of earning power to support the trial court’s finding that plaintiff was permanently totally disabled.

The Court began by reviewing previous relevant cases and recognizing that a tension exists between cases permitting whole body benefits to rest on whether a scheduled member injury has caused the whole body impairment, and cases denying whole body benefits unless a scheduled member injury resulted in some unusual or extraordinary condition in other parts of the body. The Court then noted that the modern trend in these cases has been for courts to hold that employees are not limited to benefits for a scheduled member injury when the effects of that injury have extended to other parts of the body in a manner that impairs the employee's ability to work. See 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §87.02 (2011). The Supreme Court found that when an employee reaches MMI, and permanent impairment is assessed, a proximate cause inquiry should be used to determine whether an employee's scheduled member injury has resulted in a whole body impairment and loss of earning power.

A proximate cause is a cause that produces a result in a natural and continuous sequence of events and without which the result would not have occurred. Manchester v. Drivers Management, 278 Neb. 776, 775 N.W.2d 179 (2009). Thus, if a scheduled member injury results in whole body impairment in a natural and continuous sequence of events, and it impairs the employee's ability to work, and the whole body impairment would not have occurred but for the work-related injury, then the employee is entitled to disability benefits for the whole body impairment and loss of earning power.

The Court then found that since evidence supported the trial judge's conclusion that plaintiff's gait derangement caused pain in his hips and back, that his disability was not limited to the foot, and that his back pain contributed to his inability to stand and walk for more than short periods, the trial judge's finding of permanent total disability was not clearly wrong.

6. Pearson v. Archer-Daniels-Midland Milling Company, 285 Neb. 568, 828 N.W.2d 154 (2013)

EVIDENCE

FUTURE MEDICAL BENEFITS

MODIFICATION

REASONABLE AND NECESSARY MEDICAL CARE

The Supreme Court upheld the review panel's affirmance of the trial court's decision that plaintiff's total knee replacement surgery was not compensable under §48-120.

Plaintiff suffered an injury on October 27, 2006. In August 2008, the trial court found that plaintiff suffered an injury to the right knee and back, awarded temporary total disability benefits, and ordered defendant to pay outstanding medical expenses. When addressing permanent disability benefits, the court noted that plaintiff suffered a right knee injury in 2001 and had a similar diagnosis and similar complaints both prior to and after the work injury. The court then found a causal link between plaintiff's right knee complaints and the work injury and that plaintiff had reached maximum medical improvement. Nonetheless, the court concluded that the aggravation or exacerbation of plaintiff's pre-existing condition was not established as permanent in nature, and did not identify any permanent impairment or restrictions resulting from the right knee injury. The court then awarded permanent disability benefits for the back injury only, and despite finding no permanent injury to the right knee, ordered defendant to provide such future medical treatment for the right knee that fell under §48-120.

Plaintiff had further difficulties with the right knee and eventually had total right knee replacement surgery. After surgery, plaintiff filed an application for modification of the original award alleging that the surgery resulted in an increase in disability since the award. After a hearing, the trial judge denied plaintiff's request for compensation for his right knee replacement and for indemnity benefits, finding that although not expressly denied, the original award implicitly denied entitlement to the right knee replacement because the issue had been presented at the original trial. The review panel affirmed.

The Supreme Court reversed the denial of the total knee replacement and remanded the cause for a factual determination as to whether the total knee replacement fell within provisions of §48-120. Pearson v. Archer-Daniels-Midland Milling Co., 282 Neb. 400, 803 N.W.2d 489 (2011). The Court rejected the conclusion that the right knee replacement was implicitly denied by original award, holding that there was no basis at the time of the original trial for the trial court to rule one way or another on the issue, and that a work injury need not result in permanent disability in order for medical treatment to be awarded. Id. On remand, relying on the opinions of two doctors and rejecting that of a third, the trial court found that the right knee replacement did not fall under the provisions of §48-120 and was not the responsibility of defendant. The trial court concluded that plaintiff did not sustain a permanent impairment to the right knee as a result of the work injury, that his knee injury was a temporary exacerbation of a preexisting condition, and that the right knee replacement was not persuasively the result of the work injury, but the result of his preexisting degenerative knee condition. The review panel affirmed.

Plaintiff appealed, arguing that the decision of the trial judge was not supported by the medical evidence and was inconsistent with the original award. The Supreme Court began by noting that §48-120(1)(a) states that medical services are compensable if they 1) are reasonable, 2) are required by the work injury, and 3) "will relieve pain or promote and hasten employee's restoration to health and employment." The Court then noted that of these three factors, the only dispute was whether the knee replacement surgery was required by the work-related injury, and

more specifically, whether there was sufficient competent evidence to conclude that the knee surgery was not required by the work-related injury.

The Supreme Court found that there was competent evidence to support the trial court's decision that the knee replacement was not persuasively established to be the product of the work injury, but was prompted by plaintiff's pre-existing degenerative knee condition. One physician's opinion directly supported the conclusion that the right knee replacement was necessitated by plaintiff's pre-existing condition and not by the work injury. There was also evidence that plaintiff had identical symptoms of arthritis in both knees, which allowed the trial judge to infer that the bilateral symptoms persisting long after the accident and before surgery were caused by the arthritis and not the work injury affecting one knee. Therefore, the Court concluded that the surgery did not fall within §48-120 and was not compensable because it was not a result of the work injury.

In so finding, the Supreme Court declined the request of the plaintiff to reweigh the evidence, noting that the factual findings of the trial judge are given deference and an appellate court is precluded from substituting its facts for those of the trial court. The trial judge is the sole judge of credibility of witnesses and is entitled to accept one expert opinion over another. Low v. Drivers Mgmt., 274 Neb. 732, 743 N.W.2d 82 (2007).

The Supreme Court next addressed plaintiff's claim that the trial judge's denial of knee replacement surgery was contrary to the original award of future medical care. The Court began by noting that its holding in the previous appeal in this case was that the original award should be enforced according to its terms awarding future medical treatment that fell under the provisions of §48-120. Thus, defendant should pay for the knee replacement only if it was due to plaintiff's compensable injury. The Court held that the conclusion of the trial court that plaintiff's total knee replacement was not required by the work-related injury and consequently was not compensable under §48-120 was completely consistent with the original award as interpreted by the Court.

7. **Smith v. Chrisman Trucking, Inc., 285 Neb. 826, 829 N.W.2d 717 (2013)**

SCHEDULED MEMBER V. LOSS OF EARNING POWER

STATUTORY INTERPRETATION

SUBSTANTIVE V. PROCEDURAL AMENDMENT

The Supreme Court affirmed the decision of the compensation court granting defendant's motion for summary judgment.

On October 23, 2007, plaintiff suffered a work injury which resulted in a crush injury to the left heel, a right shoulder injury, and fractured right ribs. Plaintiff was assigned 1 percent permanent impairment to the left lower extremity, 11 percent permanent impairment to the right upper extremity, and no additional impairment due to the fractured ribs. Defendant compensated plaintiff for these permanent impairment ratings pursuant to the schedule for scheduled member injuries set forth in §48-121(3). A vocational rehabilitation opinion provided that plaintiff's loss of earning capacity for his member injuries was 30 percent. On February 28, 2012, plaintiff filed an action against defendant claiming entitlement to benefits based on his loss of earning capacity pursuant to an amendment to §48-121(3). On July 30, 2012, the Workers' Compensation Court granted defendant's motion for summary judgment denying plaintiff benefits for his loss of earning capacity. The trial judge concluded that the amendment to §48-121(3) was substantive rather than procedural, and created a right which did not previously exist. Since plaintiff's injury occurred prior to the operative date of the amendment to §48-121(3), the amendment did not apply to plaintiff's claim. Plaintiff appealed.

The Supreme Court began by noting that §48-121(3) generally provides the manner by which a worker is compensated for the loss or loss of use of a scheduled member, but the amendment to §48-121(3) at issue in this case provides that at the compensation court's discretion, an injured worker can recover benefits based on a loss of earning capacity for loss or loss of use of more than one member if such loss results in at least a 30 percent loss of earning capacity.

The Supreme Court next addressed the operative date of the amendment to §48-121(3). The Court began by noting that generally, passed legislation becomes effective three calendar months after the Legislature adjourns, Neb. Const. art. III, §27, unless the Legislature evidences otherwise. Further, an act operates only prospectively and not retrospectively unless there is clear legislative intent that it should operate retrospectively, and statutes covering substantive matters at the time of a transaction govern, not later enacted statutes.

In Young v. Dodge Cty. Bd. of Supervisors, 242 Neb. 1, 493 N.W.2d 160 (1992), the Supreme Court observed that statutory language which expressly provided an operative date evidenced legislative intent that the amendment should apply to the type of transactions at issue prospectively and not retrospectively, and therefore the amended statute did not apply to the transaction that occurred prior to amendment.

The Supreme Court then found that although the text of the particular section at issue in this case did not expressly identify an operative date, there was no dispute that the operative date of the amendment to §48-121(3) was January 1, 2008, as §6 of the amendment specified the date it became operative. The Supreme Court further found that the Legislature expressed no intent that the amendment should apply retroactively, and the Court declined to do so.

The Supreme Court then analyzed whether the amendment to §48-121(3) was applicable to plaintiff's claim. The Court noted that the critical question was whether the amendment was substantive or procedural (procedural ordinarily applicable to pending cases, while substantive is not). See, In re Interest of Karlie D., 283 Neb. 581, 811 N.W.2d 214 (2012); Kratochvil v.

Motor Club Ins. Assn., 255 Neb. 977, 588 N.W.2d 565 (1999). A substantive right creates a right or remedy that did not previously exist, and but for creation, there is no right to recover, while a procedural amendment simply changes the method by which a right is exercised. See In re Interest of Karlie D.; Harris v. Omaha Housing Auth., 269 Neb. 981, 698 N.W.2d 58 (2005).

The Supreme Court found that before the amendment, workers could not receive compensation for loss of earning capacity for scheduled member injuries. Since the amendment, workers could now receive compensation for loss of earning capacity at the discretion of the court where there is a loss or loss of use of more than one member and such loss results in at least a 30 percent loss of earning capacity.

The Supreme Court held that since the amendment to §48-121(3) was substantive rather than procedural as it created a new remedy that did not previously exist, it applied prospectively rather than retrospectively. Therefore, since plaintiff's injury occurred prior to the operative date of the amendment, the amendment was inapplicable to plaintiff's action, and the compensation court did not err when it reached its conclusion.

8. Estate of Teague v. Crossroads Coop. Ass'n, 286 Neb. 1, 834 N.W.2d 236 (Neb. 2013)

EXCLUSIVE REMEDY

CONSTITUTIONALITY OF THE ACT

The Supreme Court affirmed the district court's dismissal of the plaintiff's complaint.

Plaintiff was asked by his supervisor to enter a grain bin and shovel grain in order to facilitate removal of grain from the bin. Plaintiff died of asphyxiation after being engulfed in grain.

In violation of Occupational Safety and Health Administration (OSHA) regulations, a supervisor sent plaintiff into the bin without a lifeline or any other equipment that could prevent engulfment past plaintiff's waist, the employer lacked adequate equipment for a rescue operation if engulfment were to occur, and the employer kept the auger running in the bin in order to facilitate extraction of the grain. In further violation of OSHA regulations mandating that a supervisor maintain communication with an employee in a grain bin at all times, the supervisor stepped momentarily away from his observation of plaintiff in the bin. OSHA assessed civil penalties against the employer and the employer pleaded guilty to the criminal charge of willfully violating OSHA regulations by knowingly permitting an employee to enter a grain bin in violation of safety standards.

The personal representative of plaintiff's estate brought an action in the district court against the employer for wrongful death and assault and battery, and for a declaratory judgment that either the Act did not apply or, alternatively, that it is unconstitutional on its face and as applied. The district court granted defendant's motion to dismiss for failure to state a claim.

On appeal, the Estate claimed that because it alleged intentional tortious conduct, the death was not an "accident" under the exclusive jurisdiction of the compensation court. Alternatively, plaintiff argued that the Workers' Compensation Act (Act) is unconstitutional.

The Supreme Court began with a review of case law. The Act is an employee's exclusive remedy against an employer for an accidental injury arising out of and in the course of employment. Ihm v. Crawford & Co., 254 Neb. 818, 580 N.W.2d 115 (1998). The employer, by having liability imposed by the Act without fault, receives in return relief from tort actions. P.A.M. v. Quad L. Assocs., 221 Neb. 642, 380 N.W.2d 243 (1986). Thus, for an employee to prevail against a motion to dismiss a tort action against his or her employer, the employee must allege sufficient facts that, if true, would demonstrate the Act does not apply. Zawaideh v. Nebraska Dept. of Health & Human Servs., 280 Neb. 997, 792 N.W.2d 484 (2011).

The Court observed that Nebraska courts have long held there is no intentional tort exception to the Act. The primary object of the Act is "to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, regardless of the fault of the employer." Abbott v. Gould, Inc., 232 Neb. 907, 443 N.W.2d 591 (1989).

The Court went on to note that it is the "almost unanimous rule" that any intentional conduct exception to the workers' compensation exclusivity rule cannot be "stretched to include accidental injuries caused by the gross, wanton, wil[l]ful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §103.03 at 103-7 (2011). In the Court's view, plaintiff's complaint could be saved only if Nebraska were to adopt not just an intentional conduct exception, but one with a broader definition of intentional. Noting that only about a dozen jurisdictions have taken this approach, the Court stated that introduction of such

a test would interject complexities, costs, delays, and uncertainties into the compensation process. Delay, cost, and uncertainty are contrary to the underlying purposes of the Act. The Act was intended by the Legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities. Gill v. Hrupek, 184 Neb. 436, 168 N.W.2d 377 (1969).

Furthermore, regardless of the egregiousness of the employer's actions in this case, the question was what court had jurisdiction over the employee's claim. The Workers' Compensation Court is a statutorily created court designed to have jurisdiction over all injuries falling within the scope of the Act and the Legislature has determined what acts fall within the Workers' Compensation Court's exclusive jurisdiction. The Court noted that the definition of "accident" under the Act has remained substantially unchanged since the enactment of §48-151 in 1913 and the Legislature has had innumerable occasions to express a contrary intent. Johnsen v. Benson Food Center, 143 Neb. 421, 9 N.W.2d 749 (1943). In summary, the Court found that plaintiff's injury was an "accident" under the Act.

Plaintiff also argued that the Act creates an unconstitutional distinction between intentional tort victims who are employees and intentional tort victims who are not employees, i.e., when the injury is caused by the employee's willful negligence, the exclusivity of the Act does not apply; when the injury is caused by the employer's willful negligence, the exclusivity of the Act does apply. According to the plaintiff, such classifications or disparate treatment violate the equal protection, due process, and special legislation provisions of the U.S. and Nebraska Constitutions. The Supreme Court disagreed, stating that the categorizations crafted by the plaintiff are not the ones the Legislature had in mind.

The Legislature made a rational distinction between intentional tort victims who are employees and intentional tort victims who are not employees. Workers' compensation law reflects a policy choice that employers bear the costs of employees' work-related injuries because employers are in the best position to avoid the risk of loss by improving workplace safety. Moyera v. Quality Pork Internat., 284 Neb. 963, 825 N.W.2d 409 (2013). Such policy does not support the idea that employers should bear the cost of injuries incurred outside of employment. The Act is simply not designed to govern the rights of nonemployees. As such, employees and nonemployees, whether victims of intentional torts or of simple negligence, are not similarly situated. Therefore the Legislature did not act arbitrarily or unreasonably in treating these distinct categories differently and plaintiff failed to sustain its burden of establishing the unconstitutionality of the Act under the equal protection, due process, or special legislation provisions of the U.S. and Nebraska Constitutions. State ex rel. Bruning v. Gale, 284 Neb. 257, 817 N.W.2d 768 (2012).

The Supreme Court affirmed the district court's dismissal of plaintiff's complaint and held that plaintiff must seek compensation from defendant in the Workers' Compensation Court.

9. VanKirk v. Cent. Cmty. College, 285 Neb. 231, 826 N.W.2d 277 (2013)

ATTORNEY FEES FOR DELINQUENT MEDICAL PAYMENTS

WAITING-TIME PENALTY AND MEDICAL BILLS

The Supreme Court affirmed the decision of the compensation court denying waiting-time penalties and attorney fees.

In 2010, plaintiff inhaled fumes from a mixture of chlorine and toilet bowl cleaner during the course and scope of her employment and developed a severe cough and shortness of breath. The trial court awarded benefits, including medical bills, and referred to an exhibit which listed the medical expenses due each provider and the amount paid by plaintiff. The court stated: "The Court has carefully reviewed [the exhibit] and finds that the [College] ought to pay said outstanding charges. To the extent that [VanKirk] has paid any of these costs herself, she ought to be reimbursed as her interests appear. The fee schedule audit submitted by the [College] is to be applied."

Defendant paid the medical providers within 30 days of the court's order and sent letters to the medical providers stating that they should reimburse plaintiff for the amount she had paid for her treatment. The letters advised the providers that they were not entitled to charge or collect more than the amount provided on the fee schedule. However, the College did not reimburse plaintiff within 30 days of the court's order.

Plaintiff then sought a waiting-time penalty, attorney fees, and interest pursuant to Neb. Rev. Stat. §48-125 contending that the order required the College to pay \$13,449.18 directly to her in order to make her whole for payments she had previously made to health care providers. Defendant argued it had complied with the court's order by paying the medical providers within 30 days and that the providers were then responsible for reimbursing plaintiff for any amounts she paid.

The trial court overruled plaintiff's motion, finding that the evidence established that defendant paid the medical providers within 30 days and that plaintiff had been or was going to be reimbursed for any medical expenses she personally paid.

The Supreme Court noted it had previously held that §48-125 does not authorize a waiting-time penalty for an employer's delinquent payments of medical expenses. Bituminous Casualty Corp. v. Deyle, 234 Neb. 537, 451 N.W.2d 910 (1990). The term "compensation" as used in the statute includes "periodic disability or indemnity benefits payable on account of the employee's work-related injury or death." Id. Because medical expenses are not paid "periodically" in the same manner as wages, "compensation" does not include medical expenses which the compensation court orders an employer to pay. Id.

Plaintiff argued that Bituminous did not preclude her claim because §48-125 was amended after that decision was made by the Supreme Court. However, the Supreme Court noted the amended statute had been considered in later cases. In Bronzynski v. Model Electric, 14 Neb. App. 355, 707 N.W.2d 46 (2005), the Court of Appeals concluded that §48-125 does not authorize a waiting-time penalty for delinquent payment of medical expenses because such expenses do not constitute compensation within the meaning of the statute. The Court of Appeals stated that it was "apparent that a 50-percent waiting-time penalty cannot be awarded on the basis of an award of delinquent medical payments; a waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of 'medical payments.'" Id.

In this case, the Supreme Court agreed with the holding of Bronzynski, and reaffirmed the holding in Bituminous that §48-125 does not authorize an award of a waiting-time penalty when an employer is delinquent in paying medical expenses. The Court stated that it is solely the province of the Legislature to decide whether a waiting-time penalty should apply to delinquent payments of medical expenses and to date it has not taken such action.

The Court next addressed plaintiff's claim for attorney fees. Neb. Rev. Stat. §48-125(2)(a) allows an award of attorney fees if the employer is delinquent in paying medical expenses. Plaintiff contended that based on §48-120(8), defendant was required to reimburse her for the payments she had made, and not simply pay the fee schedule amount to the providers and leave it to them to reimburse her the full amount she had paid them.

The Supreme Court disagreed, stating that §48-120(8) does not require an employer to directly reimburse an injured worker for medical expenses he or she has paid prior to the entry of an award by the court. Although §48-120(8) authorizes the compensation court to order an employer to make "reimbursement to anyone who has made any payment to the supplier for services provided in this section," it also provides that "[n]o such . . . payor may be made or become a party to any action before the compensation court." Because the injured worker was a party to the case, the Court interpreted the term "payor" as used in §48-120(8) to be limited to third-party payors, such as health insurance carriers. In the instant case, there was no issue involving a third-party payor. Thus, defendant fully and timely complied with the award by paying the scheduled fee amount to the medical providers within 30 days.

The Court noted further that upon receipt of payment from an employer, a supplier or provider of services becomes obligated to reimburse an employee any amounts he or she has previously paid. Pearson v. Archer-daniels-Midland Milling Co., 282 Neb 410, 803 N.W.2d 496 (2011).

That was what occurred in this case. Although the reimbursements were not completed within 30 days of the award, defendant was not subject to liability for attorney fees. Defendant's payments to the medical providers were made within the 30-day period. At that point, reimbursement of payments made by plaintiff was the responsibility of the providers, and any delay was not chargeable to defendant.

Regarding plaintiff's claim for interest, the Court cited §48-125(3) which provides for an assessment of interest "[w]hen an attorney's fee is allowed pursuant to this section" Because plaintiff was not entitled to attorney fees, she was not entitled to an award of interest.

The Supreme Court concluded that the compensation court did not err in overruling plaintiff's motion for a waiting-time penalty, attorney fees, and interest pursuant to §48-125 and affirmed the judgment of the compensation court.

10. Visoso v. Cargill Meat Solutions, 285 Neb. 272, 826 N.W.2d 845 (2013)

LOSS OF EARNING CAPACITY

MODIFICATION

RELEVANT LABOR MARKET

UNDOCUMENTED WORKERS

The Supreme Court affirmed the decision of the trial court that temporary total disability benefits should cease, but reversed the decision denying plaintiff's claim for permanent benefits and remanded the case to let the plaintiff try to prove loss of earning capacity using the location where the injury occurred as the hub community.

On May 9, 2006, plaintiff, an undocumented worker, suffered a work injury to his neck. The trial judge found plaintiff's injury compensable and awarded him a running award of temporary total disability benefits and future medical benefits, which was affirmed by the Court of Appeals. On March 8, 2011, defendant petitioned for modification of the award claiming plaintiff had reached maximum medical improvement (MMI). In July of 2011, plaintiff relocated to Chichihualco, Mexico.

Following a hearing on plaintiff's motion for labor market research, citing Giboo v. Certified Transmission Rebuilders, 275 Neb. 369, 746 N.W.2d 362 (2008), the trial court determined that the community around Chilpancingo, the largest city near Chichihualco, was the hub community for the purpose of determining plaintiff's loss of earning capacity.

The appointed vocational rehabilitation counselor prepared a loss of earning capacity analysis and provided three opinions. Two involved the Schuyler/Columbus/Fremont area, the community where the injury occurred. In the third analysis, the counselor attempted to perform an analysis for the Chilpancingo area, but due to insufficient information, she did not feel capable of providing a loss of earning capacity within a degree of vocational certainty. Plaintiff separately retained a vocational rehabilitation counselor who provided a loss of earning capacity opinion for the Schuyler area, and an opinion based on plaintiff's move to Mexico. That counselor concluded that regardless of his location, plaintiff was permanently totally disabled.

In its order, the trial judge concluded that plaintiff reached MMI, was no longer temporarily totally disabled, and had experienced a material and substantial decrease of physical incapacity. The trial judge also concluded that since the appointed counselor was unable to provide a credible report on plaintiff's loss of earning capacity using the Chichihualco area as a hub community, the evidence was insufficient to quantify plaintiff's loss of earning capacity to award permanent disability; therefore, defendant had no further liability to plaintiff. Plaintiff appealed.

The Supreme Court began by addressing who had the burden of proof on defendant's motion to terminate temporary total disability, and what was sufficient proof that plaintiff's temporary total disability should cease. The Court noted that the party seeking modification, in this case the defendant, had the burden to prove the allegations in its petition to modify the running award of temporary total disability benefits. The Supreme Court found that defendant was not required to address permanent disability, and only needed to establish that plaintiff reached MMI to satisfy its burden of proof that plaintiff's temporary total disability should cease. The Court then found that since defendant alleged and plaintiff admitted he reached MMI, defendant established that plaintiff reached MMI and satisfied its burden of proof that temporary total disability benefits should cease.

The Supreme Court next analyzed whether plaintiff was entitled to permanent disability benefits. The Court noted that after reaching MMI, plaintiff had the burden of proving an injury caused permanent impairment of his body as a whole and that this impairment resulted in a loss of earning capacity.

The Supreme Court began by noting that the Workers' Compensation Act (Act) applies to undocumented employees working for a covered employer in Nebraska and that such employees are entitled to permanent benefits for work-related injuries. Moyera v. Quality Pork International, 284 Neb. 963, 825 N.W.2d 409 (2013).

The Supreme Court next examined which hub community should be used as a basis to determine plaintiff's loss of earning capacity to award permanent disability benefits — the place where his injury occurred or the place that he currently resided. The Court noted that plaintiff relocated to Mexico, his country of origin, while his case was pending, and that if a claimant in good faith relocates to a new community, the new community may serve as the hub community to assess loss of earning capacity. See Giboo, Money v. Tyrrell Flowers, 275 Neb. 602, 748 N.W.2d 49 (2008). In Money and Giboo, the Court did not address whether the place the injury occurred could be used as the hub community if no reliable data was available for the new community, and did not conclude that the new community was the only location allowed to show a loss of earning capacity.

The Supreme Court held that for purposes of assessing loss of earning capacity, when an undocumented worker in good faith returns to his or her country of origin, the compensation court should initially determine which location is the proper hub community. If the undocumented worker has relocated to the worker's country of origin for legitimate purposes, and there is sufficient data for the country of origin to assess loss of earning capacity, then the community of origin may serve as the hub community. If there is no reliable data available in the worker's country of origin to assess loss of earning capacity, then the location where the injury occurred can serve as the hub community.

The Supreme Court concluded that since plaintiff was unable to present competent evidence regarding loss of earning capacity because there was no credible evidence to assess such loss in his country of origin, the trial court should have allowed plaintiff the opportunity to use data from the location where the injury occurred. The Court further noted there was credible evidence from which plaintiff's loss of earning capacity could be derived for the place the injury occurred. The Court remanded the case to the trial court to allow plaintiff to attempt to establish loss of earning capacity using Schuyler as the hub community.

11. Walentine, O'Toole, McQuillan & Gordon, L.L.P. v. Midwest Neurosurgery, P.C., 285 Neb. 80, 825 N.W.2d 425 (2013)

COMMON FUND DOCTRINE

ATTORNEY FEES

MEDICAL EXPENSES

The Supreme Court affirmed the district court's decision that plaintiff's claim for attorney's fees was barred by Neb. Rev. Stat. §48-125(2)(a) and that the common fund doctrine was inapplicable.

Plaintiff represented an injured worker in a workers' compensation action against the worker's employer. The worker was awarded compensation, including reimbursement for medical expenses incurred by the worker as a result of his work-related injury. Pursuant to the award, the worker's employer paid defendant for services rendered to the worker. Plaintiff filed a complaint in district court against the defendant medical provider, asserting that plaintiff was entitled to an attorney fee under the common fund doctrine. Defendant filed a motion to dismiss the complaint asserting that it was barred by Neb. Rev. Stat. §48-125(2)(a) which provides: "...Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers." The district court granted defendant's motion to dismiss.

On appeal, plaintiff claimed it was entitled to attorney fees under the common fund doctrine. The common fund doctrine provides: "An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund." Kindred v. City of Omaha Emp. Ret. Sys., 252 Neb. 658, 662, 564 N.W.2d 592, 595 (1997). Plaintiff argued that because of its representation of the injured worker before the Workers' Compensation Court, an award was obtained which allowed defendant to recover amounts owed by the worker. Defendant argued that the common fund doctrine was inapplicable and that pursuant to §48-125(2)(a), plaintiff was not entitled to take a fee from the amount owed to defendant under the award.

Plaintiff claimed §48-125(2)(a) did not apply since the action was brought in district court rather than the compensation court. Additionally, plaintiff pointed to Kaiman v. Mercy Midlands Medical & Dental Plan, 1 Neb. App. 148, 491 N.W.2d 356 (1992), wherein the Court of Appeals concluded that the common fund doctrine was applicable to situations such as the present case. However, the Court noted that it had disapproved the decision in Kaiman since that case was decided prior to the enactment of the last sentence of §48-125(2)(a) which prohibits attorneys from taking a fee from amounts ordered to be paid for medical services or from charging medical providers a fee.

The Court agreed that pursuant to the plain language of §48-125(2)(a), plaintiff was not entitled to a fee from the amounts awarded for medical expenses and the common fund doctrine was inapplicable. Plaintiff could not circumvent §48-125(2)(a) by filing a claim in district court rather than the compensation court, and the result was not unfair since the statute also provides that a reasonable attorney's fee shall be allowed the employee by the compensation court.

12. **Zwiener v. Becton Dickinson-East, 285 Neb. 735, 829 N.W.2d 113 (2013)**

TEMPORARY TOTAL DISABILITY

ATTORNEY FEE

The Supreme Court affirmed the trial court's award of temporary total disability benefits, as plaintiff was entitled to benefits even though defendant could have accommodated plaintiff after his surgery if he was still employed by defendant. The cause was remanded for proper calculation of the attorney fee in connection with untimely paid medical bills.

Plaintiff suffered a work-related shoulder injury on August 20, 2009, treated conservatively, and was advised he could work without restrictions but surgery may be a possibility. On March 12, 2010, plaintiff resigned his employment with defendant and began working for a new employer as a driver. On May 10, 2010, plaintiff had surgery on his shoulder and was released to work May 12, 2010 with the restriction of not using his right arm. His employer could not accommodate the restriction, so plaintiff did not return to work until July 8, 2010. Defendant paid for the surgery, but denied payment of temporary total disability benefits during the recovery period for the surgery. Defendant claimed they could have accommodated plaintiff's restrictions had he still been employed by defendant. Plaintiff had a second surgery January 9, 2012. Plaintiff's attorney wrote to defendant asking whether defendant would allow plaintiff to work light duty during the post-surgery recovery period, but defendant did not respond and denied temporary disability benefits for the recovery period.

At hearing, the parties agreed that defendant paid \$8,275.37 in permanent partial disability benefits after plaintiff's first surgery. The court awarded payment of medical expenses, attorney fees, waiting-time penalties, and temporary total disability benefits for the time periods plaintiff could not work due to post-surgery restrictions. The court determined that an employee may still be entitled to temporary benefits even though he or she is no longer employed by the employer responsible for the injury, even if that employer could have accommodated the employee with light-duty work.

On appeal, defendant assigned that the trial court erred in awarding temporary benefits, waiting-time penalties, and attorney fees, in failing to give defendant credit for permanent disability benefits paid, and in allowing hearsay evidence. Plaintiff cross-appealed and asserted the trial court erred in failing to find that medical bills paid to OrthoWest were untimely paid.

In determining whether plaintiff should have been paid temporary benefits after surgery, the Court looked to its holding in Guico v. Excel Corp., 260 Neb. 712, 619 N.W.2d 470 (2000). When determining the extent of liability, "the fact of termination or the reason for it is irrelevant." Regardless of the reason plaintiff's employment with defendant ended, the purpose of the Workers' Compensation Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease. Additionally, plaintiff had an at-will employment relationship with defendant, so defendant could not bind plaintiff to remain employed in order to be eligible for workers' compensation benefits. Therefore, the Court affirmed the award of temporary total disability benefits incurred during the time plaintiff was convalescing from the surgeries necessitated by his work-related injury.

Since the parties stipulated that the permanent disability benefits already paid by defendant should be credited against the award, the trial court erred in awarding waiting-time penalties and improperly calculating the attorney fee award. The Court reversed the award of waiting-time penalties and directed the trial court to determine whether the OrthoWest bills were untimely paid pursuant to Neb. Rev. Stat. §48-125 and to calculate only the attorney fees attributable to the pursuit of untimely paid medical bills. Pursuant to the Court's decision in Harmon v. Irby

Constr. Co., 258 Neb. 420, 604 N.W.2d 813 (1999), the attorney fee should be based on the amount of the unpaid bill in relation to the amount of the award.

The Court affirmed the award of temporary total disability benefits and reversed the award of waiting-time penalties and the amount of the attorney fee. The Court found no merit in defendant's evidentiary hearsay objections. The cause was remanded for a redetermination of whether the OrthoWest bills were untimely paid and if so, a redetermination of the attorney fees that should have been awarded in connection with untimely paid medical bills only.

Court of Appeals Cases (Designated for Permanent Publication):

1. Cervantes v. Omaha Steel Castings Co., 20 Neb. App. 695, 831 N.W.2d 709 (2013)

STIPULATIONS

JUDICIAL ADMISSIONS

The Court of Appeals reversed the trial court's rejection of a stipulation and remanded the case for further proceedings.

Plaintiff injured his right shoulder in 2006 and later claimed a left shoulder injury from the same accident. A pretrial conference was held in 2012 and the parties stipulated to several facts, which were reproduced in the court's pretrial order. The order stated that plaintiff "suffered injury by accident to his left arm and right arm, arising out of and in the scope of his employment."

At trial the parties presented evidence to address whether the injuries rendered plaintiff permanently and totally disabled and whether plaintiff was entitled to vocational rehabilitation services. The parties did not address whether the injuries arose out of a single accident because that issue had already been stipulated to.

The trial court found that the medical evidence contradicted the stipulation that plaintiff sustained bilateral shoulder injuries and rejected that stipulation. The trial court determined that plaintiff was not permanently and totally disabled under Neb. Rev. Stat. §48-121(3) (Reissue 2010). The court also found that plaintiff was entitled to vocational rehabilitation services between 2008 – 2011, but not further vocational services.

On appeal, plaintiff argued the trial judge erred in rejecting the parties' stipulation that plaintiff sustained multiple scheduled member injuries in the work-related accident. The Court of Appeals first noted prior holdings that stipulations voluntarily entered into by the parties, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Shipler v. General Motors Corp., 271 Neb. 194, 710 N.W.2d 807 (2006). Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances. Id.

In this case, the Court of Appeals found that the stipulations, voluntarily made by the parties, who were represented by counsel, were not respected and enforced by the trial court, and there was no evidence that the court's decision was motivated by a finding that the stipulations were contrary to good morals or public policy. Instead, the court chose to invalidate the stipulations after independently evaluating the evidence and determining the evidence contradicted the stipulations. Citing Shipler, *supra*, the Court of Appeals stated that courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.

The Court of Appeals noted further that throughout the case, neither party disputed that plaintiff's injuries to both shoulders arose out of the same incident. The petition stated that plaintiff sustained "bilateral upper extremity injuries," and defendant's answer admitted that "he suffered an injury to both of his shoulders as a result of an accident arising out of and in the course of his employment by . . . [defendant]." The parties' pretrial stipulation was in line with these statements, and the parties' presentation of evidence at trial was as well. The court's decision to reject the stipulation after trial prejudiced the parties, especially plaintiff, as he would have had the opportunity to present evidence of the injury to both shoulders at trial had it been a disputed issue.

In addition, the Court stated that stipulations cannot be contradicted by evidence tending to show the facts to be other than as stipulated. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N.W.2d 768 (1958). An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues." City of Ashland v. Ashland Salvage, 271 Neb. 362, 369, 711 N.W.2d 861, 868 (2006).

Defendant's answer admitted plaintiff suffered injuries to both shoulders as part of a single, work-related accident. The answer was unequivocal, deliberate, and clear regarding how the injuries occurred, and there was no evidence that the admission was made inadvertently or by mistake. The Court of Appeals found that defendant's statement of how the injuries occurred was a judicial admission and was further evidence that the court incorrectly rejected the parties' stipulation.

The Court concluded that the decision of the trial court was clearly wrong in rejecting the stipulation of the parties regarding the nature of plaintiff's injuries, and reversed and remanded for further proceedings. The compensation court was directed to determine whether, in light of the parties' stipulation, and on the existing record, plaintiff was permanently and totally disabled as a result of the accident.

2. Harris v. Iowa Tanklines, Inc., 20 Neb. App. 513, 825 N.W.2d 457 (2013)

STATUTORY INTERPRETATION

WAITING-TIME PENALTIES

The Court of Appeals upheld the review panel's decision that, pursuant to the plain language of Neb. Rev. Stat. §48-125(1), plaintiff was entitled to waiting-time penalties, attorney fees and interest.

On May 11, 2010, the Workers' Compensation Court issued an order approving the parties' Application for Lump Sum Settlement of workers' compensation benefits for \$315,000 plus payment for a Medicare set-aside trust. Defendant paid \$50,000 to plaintiff on a timely basis, leaving a balance of \$265,000. On June 10, 2010, 30 days after the date of the court's order, defendant issued a check for \$265,000 and took it to United Parcel Service (UPS) to be delivered to defendant's counsel's office on June 11, 2010. On June 11, 2010, plaintiff's counsel picked up the check from defendant's counsel's office. On June 6, 2011, plaintiff filed a motion for penalties and attorney fees alleging he did not receive the lump-sum settlement within 30 days of the court's order pursuant to §48-125(1). Defendant argued that delivery to defendant's counsel was merely a "link in the chain of delivery" which began on the 30th day after issuance of the order of approval, and plaintiff received the check the same day he would have received it had it been sent directly to him.

The trial court found that defendant's payment was not delinquent since it was mailed within 30 days after the order of approval was issued and plaintiff's counsel received the check the same day it was delivered to defendant's counsel. The court relied on Brown v. Harbor Fin. Mortgage Corp., 267 Neb. 218, 673 N.W.2d 35 (2004), in determining whether the check was timely sent. In Brown, the employer mailed a check for payment of workers' compensation benefits directly to the employee's counsel on the 30th day after entry of the award and it was received on the 31st day; therefore, the payment was not delinquent.

In the instant case, the review panel found that the trial court misinterpreted §48-125(1), which specifically states "payments shall be sent directly to the person entitled to compensation or his or her designated representative." Applying the definition of "directly" found in Lydick v. Insurance Co. of North America, 187 Neb. 97, 187 N.W.2d 602 (1971), the review panel determined that payment was not sent directly to plaintiff or his counsel, as required by §48-125(1). Had the check been issued sooner to defendant's counsel who then sent it to plaintiff or his attorney within the 30-day time period, no penalties would be due.

The Court of Appeals agreed that payment was not made directly to plaintiff or his agent, as required by the express terms of §48-125(1) and that the review panel was correct in awarding attorney fees and reversing the trial court's decision that the payment to plaintiff was timely sent and delivered.

3. Heesch v. Swimtastic Swim School, 20 Neb. App. 260, 823 N.W.2d 211 (2012)

ATTORNEY FEES

COMMON FUND DOCTRINE

JURISDICTION

PENALTIES

REASONABLE CONTROVERSY

SUBROGATION

The Court of Appeals affirmed the opinion of the Workers' Compensation Court that it lacked jurisdiction to order payment of attorney fees from a private health insurer for recovery of its subrogation interest it had paid on behalf of the injured worker, and remanded the case back to trial court to determine penalties owed by defendant under §48-125 after finding there was no reasonable controversy.

On March 15, 2010, plaintiff suffered an injury to her back. While undergoing conservative treatment, plaintiff had three epidural injections which caused an allergic reaction resulting in hypersensitivity to various chemicals. The trial court found that certain medical treatments received by plaintiff were reasonable and necessary and related to the work injury, and ordered defendant to pay medical expenses for such treatment, and to reimburse \$22,683.39 to Blue Cross Blue Shield (BC/BS) for payments made towards plaintiff's medical expenses. The court also rejected plaintiff's claim that BC/BS should pay her attorney a fee for securing recovery of its subrogation interest ordered to be paid on the basis that BC/BS was not a party to the litigation, citing Kaiman v. Mercy Midlands & Dental Plan, 1 Neb. App. 148, 491 N.W.2d 356 (1992). Plaintiff appealed, claiming the trial court erred in finding it lacked jurisdiction to determine if plaintiff's attorney was entitled to a fee from BC/BS. In Kaiman, the Court of Appeals found that the common fund doctrine permits the injured worker to shift an appropriate share of the cost of litigation to a health care insurer who substantially benefits from litigation through reimbursement. However, the Court of Appeals noted that in Kaiman, the claim for attorney fees from the HMO was brought in the district court, while in the present case, the claim for fees from BC/BS was brought in the Workers' Compensation Court where BC/BS was not a party to the litigation. Pursuant to §48-120(8), "no supplier or payor may be made or become a party to any action before the compensation court."

Plaintiff cited §48-161 which 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..." and the Supreme Court's opinion in Midwest PMS v. Olson, 279 Neb. 492, 778 N.W.2d 727 (2010), as support for her position that the compensation court could award an attorney fee in the present case. The Court of Appeals noted that whether BC/BS had to pay an attorney fee did not affect a worker's right to workers' compensation benefits. The Court noted further that pursuant to §48-120, BC/BS could not be a party to litigation in the compensation court. If BC/BS were ordered to pay an attorney fee, a property right of significance would be involved. Due process requires notice and opportunity to be heard that is appropriate to the nature of the case. Prime Realty Dev. v. City of Omaha, 258 Neb. 72, 602 N.W.2d 13 (1999). Therefore, BC/BS should have a forum and an opportunity to be heard as to what fee it owed claimant's attorney. However, the proper forum was in the district court, not the compensation court. The Court of Appeals found that while the compensation court has jurisdiction to decide ancillary matters, there is no authority that holds an award of attorney fees for creation of a common fund is within such ancillary jurisdiction when the entity from which fees are sought is not a party to the case. Therefore, the compensation court did not err in holding that it lacked

jurisdiction to award attorney fees to plaintiff's attorney for recovery of BC/BS' subrogation interest.

The Court of Appeals then looked at whether there was a reasonable controversy that would prevent defendant from having to pay statutory penalties under §48-125 for nonpayment of medical expenses. The Court noted that in this case, the question was whether defendant had a basis in fact for disputing the claim. In defendant's amended answer, defendant admitted the allegations made by plaintiff that she suffered a back injury. According to the Court, this was a judicial admission which bound defendant and completely resolved the question of whether plaintiff suffered a work-related back injury on March 15, 2010. Nebraska law is also clear that an injury suffered in the course of reasonable treatment for a compensable injury is likewise compensable. Smith v. Goodyear Tire & Rubber Co., 10 Neb. App. 666, 636, N.W.2d 884 (2001). Dr. Mercier was of the opinion that plaintiff's treatment for the back was reasonable and necessary. Such treatment included the epidural injections that resulted in adverse health consequences requiring diagnosis and treatment, and those associated expenses were compensable. Therefore, the Court held that based on the judicial admission along with Dr. Mercier's opinion that all treatment for the back condition was reasonable and necessary, there was no reasonable controversy over compensability of plaintiff's injury or medical expenses, including those for her allergic reaction to the epidural injections. Therefore, the case was remanded for assessment of penalties as provided in §48-125.

4. Hernandez v. JBS USA, 20 Neb. App. 634, 828 N.W.2d 765 (2013)

TEMPORARY BENEFITS

UNEMPLOYMENT COMPENSATION

VOCATIONAL REHABILITATION BENEFITS

The Court of Appeals affirmed the trial court's award of temporary benefits but reversed the court's reduction of the employee's benefits by the amount of unemployment benefits he had received.

Plaintiff injured his back on three occasions, underwent treatment, and was provided with restrictions. The employer adopted the restrictions as indicated on its "Employee Restricted/Modified Duty" form. After the injuries, the defendant added "tail tucking" to plaintiff's duties and shortly thereafter, plaintiff was terminated. The parties disputed the circumstances regarding the termination. Plaintiff claimed that he told his supervisors that tail tucking was outside his restrictions and that he was terminated for complaining. Defendant claimed the tail tucking duties were within plaintiff's restrictions and he was suspended and eventually terminated due to his refusal to do that job. After termination, plaintiff began receiving unemployment benefits.

The trial court awarded plaintiff past and future medical expenses, a vocational rehabilitation evaluation, temporary total, and temporary partial disability benefits. The court made no finding on maximum medical improvement (MMI) or permanent disability. For the time period plaintiff was receiving unemployment benefits, the court reduced the temporary total disability benefits by the amount of unemployment benefits received.

On appeal, the parties agreed that the trial court erred in awarding a vocational evaluation and the Court of Appeals agreed. A trial court may not award vocational rehabilitation benefits until the applicant is at MMI and the court makes a finding of permanent impairment. Green v. Drivers Mgmt., Inc., 263 Neb. 197, 639 N.W.2d 94 (2002).

Regarding entitlement to temporary benefits, defendant claimed plaintiff was not terminated but voluntarily abandoned his job; therefore, he was not entitled to such benefits. Employees who are entitled to workers' compensation benefits remain entitled to workers' compensation benefits if their employment is terminated. Guico v. Excel Corp., 260 Neb. 712, 619 N.W.2d 470 (2000). The Court of Appeals stated that while the trial court did not make a finding whether or not plaintiff voluntarily abandoned his job, it did find that the job requirements were outside plaintiff's restrictions. There was conflicting testimony on whether defendant offered to accommodate plaintiff. The trial court had discretion to accept the testimony of plaintiff and reject that of defendants. Estate of Coe v. Willmes Trucking, 268 Neb. 880, 689 N.W.2d 318 (2004). There was also evidence that defendant believed plaintiff was terminated. On its "Employment Termination Checklist," defendant checked the involuntary termination box. The Court of Appeals found the trial court made a supportable finding that plaintiff did not voluntarily abandon his job and thus did not err in awarding temporary benefits.

In his cross-appeal, plaintiff claimed the trial court erred in reducing temporary total disability benefits by the amount of his unemployment benefits. The Court of Appeals first noted that the Nebraska Legislature has addressed the coordination of unemployment and workers' compensation benefits in Neb. Rev. Stat. §§48-130, 48-147, and 48-628. Section 48-130 states: "No savings or insurance of the injured employee or any contribution made by him or her to any benefit fund or protective association independent of the Workers' Compensation Act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall

benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act.”

The Court went on to observe that these statutes have been interpreted to mean that "benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Workmen's Compensation Act, nor are they to affect liability for compensation to the injured employee." Maxey v. Fremont Department of Utilities, 220 Neb. 627, 634, 371 N.W.2d 294, 300 (1985). The amounts plaintiff received in unemployment benefits were paid from a collateral source, the Unemployment Compensation Fund, pursuant to the Employment Security Law.

Further, the Court noted that §48-628(5)(b) of the Employment Security Law disqualifies a person from receiving unemployment benefits while receiving compensation for temporary disability under the Workers' Compensation Act, unless the amount of workers' compensation benefits is less than the amount recoverable for unemployment. The Court of Appeals opined that the ability to offset the amount of unemployment benefits by the amount of workers' compensation benefits, however, does not permit the converse. There is no provision in the Workers' Compensation Act that limits an employee's ability to receive workers' compensation benefits because he or she is simultaneously receiving unemployment benefits. When read together, §§48-130 and 48-628 suggest that if an individual qualifies for both workers' compensation benefits and unemployment benefits, workers' compensation benefits should be paid and unemployment benefits should cease.

The Court of Appeals concluded that the trial court erred as a matter of law in reducing plaintiff's workers' compensation benefits by the amount he was receiving from the unemployment insurance fund. Because the trial court erred in reducing the amount of plaintiff's benefits, it erred also in awarding temporary partial disability benefits instead of temporary total disability benefits. The case was remanded for a finding in accordance therewith.

5. **Hubbart v. Hormel Foods, 20 Neb. App. 309, 822 N.W.2d 444 (2012)**

VOCATIONAL REHABILITATION PLAN — INDEPENDENT EVALUATION

The Court of Appeals upheld the review panel's affirmance of the trial court's order approving an amended vocational rehabilitation plan for plaintiff to reinstate GED training for one year. Independent evaluation of the plan was not necessary, as the plan had been adopted by the court and was entitled to a rebuttable presumption of correctness under §48-162.01(3).

Plaintiff was awarded vocational rehabilitation benefits. The trial court found that she participated in a GED program and was making progress until she returned to Thailand following the death of her mother. She was then unable to pass the four remaining subject tests in order to obtain her diploma through the GED program. The court ordered the court-appointed counselor, Michelle Holtz, to submit the amended plan for continuation of GED classes. Holtz then filed the amended plan which indicated that the plan was approved by Holtz and plaintiff. The plan document had been signed by one of the court's vocational rehabilitation specialists with a note to "[i]mplement [it] per [the trial court's] order..." Defendant filed objections to the plan and at trial submitted a rebuttal report by Patricia Conway indicating that plaintiff should have been participating in skills training programs rather than GED programs since it was unlikely that plaintiff would obtain her GED diploma and there were several jobs available which did not require a GED diploma. At trial, the court found that the court had previously approved a plan for continued GED program classes and the plan had been approved by the vocational rehabilitation section of the court, so the court formally adopted the plan.

Defendant appealed to the review panel which affirmed the order in its entirety. Defendant then appealed to the Court of Appeals, assigning that the trial court erred by approving the amended vocational plan without submission of the plan to a vocational rehabilitation specialist in violation of §48-162.01, and that the evidence did not support the adoption of the ordered vocational plan.

Defendant cited Rodriguez v. Monfort, Inc., 262 Neb. 800, 635 N.W.2d 439 (2001) in arguing that the trial court erred by approving the plan without first submitting it to a vocational specialist for an independent evaluation pursuant to §48-162.01. In Rodriguez, the Supreme Court found that §48-162.01 requires both the submission of a plan by the vocational rehabilitation counselor and the approval of the plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness. The Court determined that the instant case was distinguishable, as there was no plan yet established in Rodriguez. However, here, the plan was already established and approved, and the court merely continued the plan pursuant to §48-162.01(7) which provides that the trial court may "modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment, or as otherwise required in the interest of justice."

The Court concluded that the amended plan by Holtz was entitled to a rebuttable presumption of correctness under 48-162.01(3), so no other independent evaluation was required. Additionally, the Court found that the trial court was not clearly wrong in approving the amended plan by Holtz rather than the job placement plan suggested by Conway.

6. Jurgens v. Irwin Industrial Tool Company, 20 Neb. App. 488, 825 N.W.2d 820 (2013)

MODIFICATION

REASONED DECISION

The Court of Appeals affirmed the decision of the trial court that plaintiff suffered an increase in incapacity in her depression due solely to her work-related injury.

In March 2002, plaintiff injured her right hand and upper extremity and in August 2002, she injured her left hand, shoulder, and upper extremity. In 2005, the trial court found these injuries compensable, and also found that plaintiff's injuries caused a compensable aggravation of preexisting depression that was not work disabling. The court awarded permanent partial disability (PPD) benefits, past and future medical expenses, and vocational rehabilitation (VR).

In 2006, plaintiff began a VR program. Despite her continued left shoulder pain, she excelled in the program until early 2009, when her pain was so severe it prevented her from sleeping and attending some classes.

Plaintiff began conservative treatment which failed and in April 2009, she had surgery on her left shoulder which did not reduce her pain. After time off to recover from surgery, plaintiff returned to her VR program, but was in constant pain and felt overwhelmed, so she dropped out.

Plaintiff then sought a modification of her award claiming an increase in incapacity due solely to her work-related injuries. Relying on the opinions of Dr. Strasburger, Dr. Wampler, and Dr. Duffy, the trial court found that plaintiff suffered an increase in incapacity due solely to her work-related injuries, that she was entitled to periods of temporary total disability (TTD) and temporary partial disability, and she had not yet reached maximum medical improvement (MMI) for her depression. The review panel affirmed.

Defendant appealed, claiming the trial court erred in finding plaintiff suffered an increase in incapacity due solely to her work-related injury, as such a finding could not be established prior to an employee reaching MMI and without a showing of permanent disability. Defendant further claimed that the trial court failed to provide a well-reasoned decision as it did not state upon which condition there was an increase in incapacity, and erred in admitting testimony of Dr. Duffy and Dr. Wampler.

The Court of Appeals found that the opinion of Dr. Wampler that plaintiff's depression and anxiety worsened over time resulting in increased difficulty with sleep, worsening tolerance for pain, and increased fear avoidance behaviors was sufficient to establish a change in impairment. The Court further found that since plaintiff's depression had not previously been disabling, the opinion of Dr. Duffy that plaintiff needed treatment for depression before being reintroduced to the workplace was sufficient to establish the necessary change in disability. Therefore, the evidence was sufficient to establish a change in incapacity. The Court then held that there is no requirement that an employee reach MMI prior to modification of an award as stated in Bronzynski v. Model Electric, 14 Neb. App. 355, 707 N.W.2d 46 (2005), and Hohnstein v. W.C. Frank, 237 Neb. 974, 468 N.W.2d 597 (1991).

The Court of Appeals next looked at whether the increase in incapacity was due solely to the work-related injury and found that there was sufficient evidence to affirm the trial court's holding in that regard. Dr. Wampler stated that the change in incapacity was due solely to the work injury. Dr. Duffy opined that the exacerbation of plaintiff's depression was associated with her inability to finish her VR program and the increased pain that caused this inability was related to the work injury. Plaintiff stated that her increased pain caused her depression, and Dr. Wampler,

Dr. Duffy, and plaintiff all stated that plaintiff's depression increased because of pain from her injury and for that reason, she had to leave her VR program.

The Court then held that the trial court provided a well-reasoned decision because the judge discussed the evidence upon which she relied to support her decision. Although the opinion did not separately address both the left shoulder and depression, it was apparent that the court was awarding benefits for depression.

Lastly, the Court held that the trial court did not abuse its discretion in admitting the opinions of Dr. Duffy and Dr. Wampler. An expert's opinion is relevant if it makes any fact of consequence more likely than it would be without the evidence. Neb. Rev. Stat. §27-401 (Reissue 2008); Paulson v. State, 249 Neb. 112, 541 N.W.2d 636 (1996). The opinion has foundation if it has a factual basis and assists the trier of fact to understand the evidence or determine a fact in issue. Olivotto v. DeMarco Bros. Co., 273 Neb. 672, 732 N.W.2d 354 (2007). Dr. Duffy based his opinion on medical records and an examination, thus he had a factual basis for his opinion.

Defendant also claimed that that Dr. Wampler's testimony regarding fear avoidance was outside the scope of his expertise. The Court disagreed, noting that Dr. Wampler did not diagnose fear avoidance, but instead used the term to describe a pattern of behavior he had experienced with many patients. Dr. Wampler also reviewed records and examined plaintiff. Therefore, Dr. Wampler had sufficient foundation upon which to base his opinions and the trial court did not abuse its discretion in admitting his testimony.

7. **Wissing v. Walgreen Company**, 20 Neb. App. 332, 823 N.W.2d 710 (2012)

CONFLICTING MEDICAL OPINIONS

STATUTE OF LIMITATIONS — EXCEPTIONS

LATENT AND PROGRESSIVE INJURY

The Court of Appeals affirmed the trial court's determination that plaintiff's injury was latent and progressive.

Plaintiff injured his right shoulder in 2007 and defendant last made a payment on April 30, 2008. Plaintiff continued to experience pain and on October 20, 2010, he filed a petition alleging a cervical injury as a result of the 2007 accident. At trial the parties stipulated that the claim was barred by the two-year statute of limitations found in Neb. Rev. Stat. §48-137 unless there was an applicable exception. Plaintiff claimed that the cervical spine injury was latent and progressive and thus was not barred by the statute of limitations.

The trial court found that the cervical injury was caused by the 2007 accident and that it was latent and progressive; therefore the statute of limitations was tolled. The review panel affirmed.

The Court of Appeals reviewed the applicable statutes and case law. Neb. Rev. Stat. §48-137 provides: "In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment."

There are two exceptions to the statute of limitations: (1) where a "latent and progressive" injury is not discovered within two years of the accident which caused the injury and (2) where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability. Snipes v. Sperry Vickers, 251 Neb. 415, 557 N.W.2d 662 (1997). Plaintiff relied on the first exception.

Where an injury is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee. Maxey v. Fremont Department of Utilities, 220 Neb. 627, 371 N.W.2d 294 (1985). Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations with respect to a workers' compensation claim begins to run. Id. In the case of a latent injury, the time for commencement of the action is one year after the employee obtained knowledge that the accident caused the compensable disability. Seymour v. Journal-Star Printing Co., 174 Neb. 150, 116 N.W.2d 297 (1962).

Defendant relied on the proposition from Maxey that it is the knowledge of a compensable disability which controls, not the awareness of the full extent of the disability. According to defendant, plaintiff knew he had an injury and related it to the work injury, but did not file a claim until more than two years later. Defendant also argued that it did not matter that different body parts were injured as in this case, or that the cervical spine condition arose later.

The Court of Appeals disagreed, stating that Maxey was referring to that employee's knowledge of the compensable disability of his injured knee, of which he was aware from the time of the accident and evidenced by his seeking out treatment paid for by his own insurance. Here, the

plaintiff had no knowledge of a compensable disability relating to his spine, only to his shoulder, and that was why the spine injury was considered latent. While the spine injury may have manifested itself at the time of the initial treatment, it was overlooked by the treating physician and the symptoms were diagnosed as part of the shoulder injury. The spinal injury did not manifest itself any differently until August 2010, when it became reasonably discoverable by plaintiff because of the newly intense pain, at which point he sought medical treatment promptly. Plaintiff filed his petition two months later.

Defendant also claimed that there was no credible evidence of a cervical spine problem resulting from the January 2007 accident. However, at trial reports from three physicians were accepted into evidence with conflicting medical opinions regarding causation for the cervical injury. The physician who treated plaintiff immediately after the accident stated "It is my opinion with a high degree of medical certainty that patient's current spinal diagnosis is directly related to his right shoulder injury on or about [January 1, 2007] . . . " Therefore, the Court of Appeals found there was credible evidence to support the trial court's factual determination and stated that an appellate court's task is not to choose between competing and conflicting expert testimony. Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003).

The Court concluded that the trial court did not err in finding the latent and progressive exception applied in this case to toll the statute of limitations; therefore, defendant was liable for past and future medical expenses for the treatment of plaintiff's cervical spine and right shoulder. Further, the trial court did not err in determining that the cervical spine condition was caused by the accident.