

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

Fiscal Year 2014: July 1, 2013 to June 30, 2014

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

### **1. Burnett v. Tyson Fresh Meats, Inc., 21 Neb. App. 910, 845 N.W.2d 297 (2014)**

SCHEDULED MEMBER VS. WHOLE BODY INJURIES

RESIDUAL IMPAIRMENT TEST

EXPERT OPINIONS

The Supreme Court affirmed the compensation court's order awarding plaintiff temporary total disability benefits and outstanding medical and mileage expenses, but denying him permanent partial disability benefits. Plaintiff's injury was a body-as-a-whole injury as a result of his hip replacement, and no loss of earning benefits were awarded since plaintiff had no permanent work restrictions.

The parties stipulated that plaintiff's injury occurred in the course and scope of his employment when he slipped and fell down a small set of stairs and had immediate pain in his hip. Plaintiff had hip replacement surgery and at trial testified that he had no problems or pain since he returned to work. The surgeon, Dr. Adamson, diagnosed plaintiff with a strain and contusion of his left hip and pre-existing arthritis. Dr. Adamson also stated x-rays taken before and after the injury were the same. He opined that plaintiff had no permanent restrictions, and he assigned 23 percent impairment to plaintiff's left hip. Dr. Gammel later reviewed the medical records and opined that plaintiff's work injury caused a permanent aggravation of his preexisting left hip degenerative joint disease. Dr. Gammel further opined that plaintiff had no work restrictions and he assigned 23 percent impairment to plaintiff's left lower extremity. Dr. Gammel also stated plaintiff's surgery was reasonable and necessary as a result of his work accident since there was no abrupt clear change in plaintiff's condition until that time. Dr. Adamson disagreed and stated plaintiff's hip pain was the natural progression of degenerative osteoarthritis and not a result of the work injury.

The trial court rejected Dr. Adamson's opinion that plaintiff would have needed surgery eventually with or without the injury, as this legal proof standard had been specifically rejected by the Supreme Court in Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb 459, 461 N.W.2d 565 (1990). The court awarded temporary total disability benefits between the date of surgery and the date plaintiff returned to work. The court found that plaintiff's injury was a whole body injury rather than a scheduled member injury, but with no evidence of work restrictions, the court denied loss of earning capacity benefits.

On appeal, plaintiff assigned that the trial court applied the incorrect legal test for determining whether a disability is to a scheduled member (the lower extremity) or the body as a whole (the hip) and for not awarding permanent partial disability benefits for a scheduled member injury. Defendant cross-appealed, assigning that the court erred in adopting Dr. Gammel's opinion.

The Court of Appeals found the residual impairment test to be the correct legal test for determining whether a disability is to a scheduled member or the body as a whole. Jeffers v. Pappas Trucking, Inc., 198 Neb. 379, 253 N.W.2d 30 (1977) and Ideen v. American Signature Graphics, 257 Neb. 82, 595 N.W.2d 233 (1999). Those cases state that the test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the

residual impairment, not the situs of the injury. Here, as in Jeffers, plaintiff underwent a total hip replacement, not merely a replacement of the head of the femur. The Court determined the evidence supported the trial court's decision that plaintiff's injury resulted in a total hip replacement and the hip is not a scheduled member injury pursuant to § 48-121(3), so plaintiff's injury was to the whole body. The Court did not address plaintiff's contention that the trial court erred by failing to award permanent partial disability benefits based upon a scheduled member injury, as it was not necessary to adjudicate the case.

Defendant argued that the trial court erred in relying upon Dr. Gammel's opinion that the injury was an aggravation rather than Dr. Adamson's opinion the injury was temporary. In considering the evidence in the light most favorable to the successful party and without substituting its judgment for that of the compensation court, the Court found that the trial judge did not err when he relied upon Dr. Gammel's opinion in determining that plaintiff's work injury aggravated his preexisting hip condition.

The Court affirmed the order of the trial court.

## 2. Hadfield v. Nebraska Medical Center, 21 Neb. App. 20, 838 N.W.2d 310 (2013)

### MEANINGFUL APPELLATE REVIEW

#### REPETITIVE TRAUMA

The Supreme Court reversed the order of dismissal and remanded the case to the compensation court with directions to consider the case under a cumulative, repetitive trauma theory.

Plaintiff was employed as a sonographer. She filed a petition claiming a work injury in 2011 and that she repetitively performed approximately seven to eight sonograms per day causing injury to her left arm. Plaintiff's job was to scan patients in order to provide images for a radiologist which required pushing the ultrasound machine cart to various locations. Plaintiff also had to transport and position patients, apply gel, and run a computer.

At trial, plaintiff testified that she experienced sharp pain in her left elbow when she squeezed a gel bottle. Plaintiff told a medical provider that she went to bed one night and woke up with a painful elbow. The evidence included conflicting medical reports regarding causation of the injury. The trial court dismissed the case, placing more weight on the medical reports stating the injury was not caused by her work as a sonographer. The trial court found that the plaintiff failed to prove by a preponderance of the evidence that she sustained an injury in the course and scope of her employment.

Plaintiff appealed, claiming the court erred in failing to address the issue of repetitive trauma as pled in the petition, and therefore the order failed to provide a basis for meaningful appellate review as required by Workers' Comp. Ct. R. of Proc. Rule 11(A).

The Supreme Court first noted that the definition of "accident," as used in § 48-101, includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. Risor v. Nebraska Boiler, 277 Neb. 679, 765 N.W.2d 170 (2009). Additionally, a claimant does not have to make specific election between cumulative trauma and specific injury. Armstrong v. Watkins Concrete Block, 12 Neb. App. 729, 685 N.W.2d 495 (2004). Therefore, plaintiff was permitted to make a claim under a repetitive trauma theory in addition to a specific injury theory.

The Court next noted that the trial court's order of dismissal summarized plaintiff's petition as alleging an injury on a specific date to her left elbow when she squeezed a bottle of gel. The judge did not refer to the allegation that plaintiff suffered this injury after repetitively performing several sonograms per day. The order also noted that the employee health clinic's medical record made no mention of the "acute" injury. Based on these facts, the Court concluded it was not clear from the order whether the compensation court properly considered the cumulative, repetitive trauma as pled in plaintiff's petition.

The Court recognized that previous case law has held that silence in an order on a request for relief not spoken to must be construed as a denial of such request. Dawes v. Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N.W.2d 167 (2003). However, Dawes also held that a trial judge's failure to discuss a specific request for relief may nonetheless constitute error requiring reversal or remand of the cause when the order does not comply with Rule 11 by providing a basis for a meaningful appellate review. Rule 11 is designed to ensure that compensation court orders are sufficiently clear in addressing requests for relief in order that an appellate court can review the evidence relied upon by the trial judge in support of his or her findings.

In this case the Supreme Court could not conclusively determine whether the compensation court considered cumulative trauma in its decision because the order did not provide sufficient factual findings and a rationale on this issue to allow for a meaningful appellate review.

Therefore, the judgment was reversed and the case remanded to the compensation court with directions to consider the claim under a repetitive trauma theory.

### 3. **Jacobitz v. Aurora Cooperative, 287 Neb. 97, 841 N.W.2d 377 (2013)**

#### FINAL ORDER

#### INTERLOCUTORY APPEAL

The Supreme Court dismissed defendant's appeal because the order appealed from was not final.

Plaintiff suffered an injury while helping the employer clean and put away a grill after a customer appreciation supper. In a bifurcated proceeding, the trial court found that the employee was injured in the course of employment and reserved the issue of benefits for later determination.

The issue on appeal was whether the court's order was final. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (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. Becerra v. United Parcel Service, 284 Neb. 414, 822 N.W.2d 327 (2012).

The Supreme Court stated that only the second category was applicable here. A party can appeal an order from the Workers' Compensation Court if it affects a party's substantial right. 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 is taken. 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. Becerra v. United Parcel Service, *supra*.

The Court acknowledged that there have been two conflicting lines of cases dealing with final orders in workers' compensation appeals. On one hand, appellate courts have permitted employers to appeal from a trial court's rejection of a complete defense to liability. A complete defense is an affirmative defense, which, if successful, would have permitted the employer to prevail even if the claimant proved that he or she sustained a work-related injury. On the other hand, in cases where the defense is that the claimant failed to prove a work-related injury, the Court has held that an appeal is interlocutory when the trial court has reserved issues for later determination. These cases have created confusion as to whether an employer can appeal from a trial court's finding of liability, even if the court has reserved its decision regarding benefits.

The Court resolved the confusion by holding as follows: A Workers' Compensation Court's finding of a compensable injury or its rejection of an affirmative defense without a determination of benefits is not an order that affects an employer's substantial right in a special proceeding. Therefore, such an order would not be final and appealable.

The Court cited various considerations in support of its holding. Interlocutory appeals conflict with the beneficent purpose of the Nebraska Workers' Compensation Act to provide injured workers with prompt relief from the adverse economic effects caused by a work-related injury. Zwiener v. Becton Dickinson-East, 285 Neb. 735, 829 N.W.2d 113 (2013). Permitting an employer to appeal will frequently cause a hardship for the prevailing claimant because Nebraska's workers' compensation statutes do not require the employer to pay benefits or waiting-time penalties pending an appeal based on a reasonable controversy.

But if the issue of benefits has been decided before an employer appeals and the award is affirmed on appeal, then the employer must pay the benefits within 30 days after the appellate

court's mandate is filed in the Workers' Compensation Court. Lagemann v. Nebraska Methodist Hosp., 277 Neb. 335, 762 N.W.2d 51 (2009); Neb. Rev. Stat. § 48-125(1)(b) (Reissue 2010).

Nevertheless, permitting piecemeal appeals defeats the waiting-time penalty rule that requires prompt payment of benefits after an appeal, when an employer has appealed in good faith but the claimant prevailed. Instead of receiving a speedy payment of benefits immediately after the mandate is issued, a prevailing claimant would face further litigation on the issue of benefits. At that point, the employer could appeal again if a reasonable controversy existed regarding the court's award of benefits.

Comparable concerns are not raised by precluding an employer's interlocutory appeal when the court has determined only that the claimant's injury is compensable or that the employer's affirmative defense is without merit, but has not determined benefits. In that circumstance, the employer sustains no economic detriment by waiting to appeal until the trial court enters an award that specifies the claimant's benefits. In the instant case, the Supreme Court concluded that defendant did not appeal a final order because the trial court had determined only that plaintiff's accident occurred in the scope of his employment, but had not yet determined benefits.

The appeal was dismissed and remanded for further proceedings.

#### 4. Kim v. Gen-X Clothing, 287 Neb. 927, 845 N.W.2d 265 (2014)

##### CONFLICTING EXPERT TESTIMONY

##### FUTURE MEDICAL EXPENSES

The Supreme Court affirmed the trial court's award of indemnity and medical benefits.

Plaintiff was employed by defendant, a retail clothing store. While he was working, the store was robbed and plaintiff was shot several times. After the shooting, the perpetrators made telephone calls to plaintiff, threatening him and his family.

The trial court found plaintiff was not at maximum medical improvement, that he was entitled to temporary total disability (TTD) benefits and inpatient treatment for chemical dependency, that an emergency room visit was compensable, and that defendant was liable for future medical expenses.

On appeal, the Supreme Court disagreed with defendant's position that plaintiff was not entitled to TTD benefits. At trial, there was contradictory expert testimony regarding whether plaintiff could return to work, as well as inconsistent opinions expressed by one of the experts. Nonetheless, the Supreme Court found that all opinions had been considered by the trial court, which found some expert testimony more persuasive than other testimony. This it was allowed to do. Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003). In addition, where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact. Id.

Defendant next argued that plaintiff was a lifelong drug abuser and would have needed inpatient treatment regardless of the shooting; thus, the compensation court erred in finding that plaintiff's inpatient chemical dependency treatment was compensable.

One expert had testified that plaintiff's prior drug use was recreational, that he was not dependent prior to the shooting and subsequent PTSD, and that the inpatient treatment was likely necessary as a result of the shooting. That expert indicated that at the time plaintiff began treatment, which was before he began to heavily self-medicate for the PTSD, plaintiff did not meet the definition of chemical dependency. Another expert opined that plaintiff was a lifelong drug user and that his current use and inpatient treatment were not related to his PTSD diagnosis. Plaintiff alternately suggested that he had, and had not, used certain drugs in the past. However, the Court found that his testimony was consistent with respect to his description of that use as recreational.

The Supreme Court concluded that this case presented nothing more than conflicting expert opinions. Where the record presents such conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court. As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. Id.

The Supreme Court also found the trial court did not err in finding that plaintiff was entitled to future medical expenses. There was testimony showing that future medical treatment was reasonably necessary and that plaintiff was continuing counseling and medication management.

Therefore, the decision of the trial court was affirmed.

## 5. **Lenz v. Central Parking System of Neb., 288 Neb. 453, 848 N.W.2d 623 (2014)**

EQUITABLE PRINCIPLES

JURISDICTION

STATUTE OF LIMITATIONS – EXCEPTIONS

STATUTORY INTERPRETATION

The Supreme Court affirmed the decision of the trial court awarding workers' compensation benefits for a material and substantial increase in disability.

On December 20, 2008, plaintiff suffered an injury resulting in frostbite on his right foot which defendants did not dispute as being work-related. Defendants voluntarily paid temporary total disability benefits until June 21, 2009, and medical expenses for treatment of plaintiff's injury until mid-2009. In April 2009, plaintiff moved to Colorado where he continued to receive treatment for his frostbite injury but he did not submit the medical bills to defendants. Plaintiff returned to Nebraska in 2012 where he continued to receive treatment because ulcers caused by his frostbite injury had not healed. In September 2012, plaintiff was hospitalized for an infection in the ulcers which spread, requiring a partial amputation of the fifth metatarsal in his right foot on October 31, 2012.

In January 2013, plaintiff filed a petition with the Workers' Compensation Court. Defendants asserted that plaintiff's claim for benefits was barred by the statute of limitations in Neb. Rev. Stat. § 48-137. It was not disputed that plaintiff's petition was filed more than two years after the last payment of benefits by defendants. Plaintiff asserted that his claim was not barred citing an exception to § 48-137 recognized in White v. Sears, Roebuck & Co., 230 Neb. 369, 431 N.W.2d 641 (1988).

The trial court found that the bone infection, diagnosed on October 28, 2012, and the resulting amputation constituted a material and substantial increase in disability resulting from the original work injury. Since plaintiff had filed his petition within two years of the material and substantial change, his petition was timely under White. The court concluded that plaintiff sustained a 20 percent permanent impairment to his right foot as a result of the change related to the October 28, 2012, worsening of his condition, and awarded plaintiff 30 weeks of permanent partial disability and reimbursement for medical expenses and mileage incurred on and after October 28, 2012. Defendants appealed.

The Supreme Court first noted there are two exceptions to the statute of limitations in § 48-137, the first being where a "latent and progressive" injury is not discovered within two years of the accident which caused the injury. Snipes v. Sperry Vickers, 251 Neb. 415, 557 N.W.2d 662 (1997). The second exception applicable in this case is articulated in White, where the Supreme Court reasoned that where there is no dispute about the compensable nature of an injury sustained and an employer voluntarily paid workers' compensation benefits, an employee is entitled to receive additional compensation where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability. The Court explained that in White, it was further held that in the event parties do not agree about this additional compensation, an employee can file a petition, which petition must be filed within two years from the time the employee knows or is chargeable with knowledge that his condition has materially changed as to entitle the employee to additional compensation.

Defendants argued that the exception recognized in White was based in equity and was therefore unenforceable under the reasoning of Bassinger v. Nebraska Heart Hosp., 282 Neb. 835, 806 N.W.2d 395 (2011). In Bassinger, the Supreme Court held that the common-law

misrepresentation defense was not enforceable due to its equitable nature. The compensation court has no equity jurisdiction and there is no authority to apply equitable principles to the Workers' Compensation Act.

In the instant case, however, the Supreme Court distinguished the exception to § 48-137 established in White from the common-law misrepresentation defense in Bassinger, noting that the exception in White was not based on equitable principles or defenses, but upon statutory interpretation. The Court further noted that appellate courts have recognized the exception multiple times since White and the Legislature has not amended § 48-137 to preclude application of the exception. Because the Legislature is presumed to have acquiesced to the Court's interpretation, the Court stated it would continue to apply the exception established in White.

Defendants then argued that the exception did not apply to plaintiff, claiming that he did not have a worsening of his condition. The Supreme Court disagreed, finding that in October 2012, plaintiff developed an infection of the bone in the fifth metatarsal in his right foot which was distinct from his previous episodes of recurring ulcers. The infection resulted in partial amputation of the fifth metatarsal which was not previously required to treat plaintiff's injury. Based on these facts, the Court found that plaintiff suffered a material change in condition in October 2012.

The Court further found that since Dr. Black concluded that plaintiff suffered 20 percent impairment to his right foot after the partial amputation, plaintiff's change in condition resulted in an increase in disability which entitled plaintiff to additional compensation. Therefore, the Supreme Court held that the bone infection, diagnosed in October 2012, and the resulting amputation constituted a material change in condition and substantial increase in disability. Since plaintiff filed his petition within two years of the material and substantial change, his petition was timely under White and the judgment of the compensation court was affirmed.

## **6. Liljestrand v. Dell Enterprises, Inc., 287 Neb. 242, 842 N.W.2d 575 (2014)**

DUE PROCESS

LAW-OF-THE-CASE DOCTRINE

REBUTTABLE PRESUMPTION

The Supreme Court reversed and remanded the case to the Workers' Compensation Court for a new trial.

Plaintiff injured his back in September 2001. After surgery, he was given restrictions and in September 2002, Ronald Schmidt, the agreed-upon vocational rehabilitation counselor concluded plaintiff had a 60 to 65 percent loss of earning power and recommended vocational rehabilitation consisting of college for retraining as a financial advisor. The original trial court awarded plaintiff vocational rehabilitation which ended in 2004. Plaintiff obtained a job as a financial advisor, but due to reduced mental acuity from use of narcotic pain medication along with his physical restrictions, plaintiff felt he could not perform work as a financial advisor or a subsequent position he took recruiting nurses.

In 2010, plaintiff's surgeon referred him to a pain clinic and concluded that his restrictions had not changed but deferred to physicians treating plaintiff's pain. A different physician determined that plaintiff's condition deteriorated since his 2002 loss of earning power evaluation, that plaintiff's medications were appropriate, and that plaintiff was totally disabled.

In November 2010, plaintiff's then vocational rehabilitation counselor, Stephen Schill, prepared a loss of earning power report finding that plaintiff was permanently and totally disabled. In 2011, Schmidt provided an updated loss of earning capacity report finding plaintiff had a loss of earning capacity of 34 percent.

After a 2011 hearing where the sole issue was the nature and extent of plaintiff's permanent disability, the trial court found plaintiff's testimony credible that he needed medications to control his back pain and that they reduced his mental acuity. The court found that plaintiff's loss of earning capacity had increased and that he was completely disabled as of October 2010 due to the effect of medication coupled with plaintiff's physical restrictions.

On appeal, the review panel could not tell whether the trial judge considered the rebuttable presumption of correctness afforded Schmidt's report as it was not mentioned, so the cause was remanded in order for the trial court to address the presumption.

On further appeal, the Court of Appeals affirmed the decision of the review panel. The Court found that the review panel's order was final because it had the effect of taking away the award of permanent total disability, thus affecting plaintiff's substantial right. The Court further stated that deciding whether the presumption was rebutted would necessarily mean that the trial judge must decide the case anew. However, the original trial judge had retired, and on remand the case was assigned to a new judge.

In December 2012, after reviewing the record, the new trial judge issued an Award on Mandate where he concluded that the evidence at trial had rebutted Schmidt's updated report. He further found that plaintiff was permanently and totally disabled as of October 5, 2010, and awarded him permanent total disability benefits. Defendant appealed, arguing that due process requires a decision to be entered into by a judge who heard all the evidence and observed the witnesses.

The Supreme Court began by noting it would not question the conclusions of the Court of Appeals because those conclusions were not before the Court; the Court of Appeals decision was the law of the case on remand and could only reasonably be interpreted as vacating the Award. The successor trial judge treated the original order as vacated and did not limit his decision to whether evidence had rebutted the presumption, as he also ruled on plaintiff's entitlement to disability benefits.

The Supreme Court then noted that state courts generally agree that a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard (see Annot., 84 A.L.R.5th 399 (2000)), although courts differ on when parties have consented to the procedure or agreed on the facts underlying the issue. The Court agreed with this general rule because it rests upon the principle that due process entitles a litigant to have all the evidence submitted to a single judge who can see witnesses testify and can weigh their testimony and judge their credibility. Smith v. Freeman, 232 Ill. 2d 218, 902 N.E.2d 1069, 327 Ill. Dec. 683 (2009). The Court further found that this rule is consistent with the deference given to the trial court's findings of fact in a bench trial because the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. Henderson v. City of Columbus, 285 Neb 482, 827 N.W.2d. 486 (2013). Even under more lenient standards of review, deference has been given to a trial court's assessment of conflicting evidence because the trial court had the advantage of hearing and observing important parts of evidence that are not readily apparent from the cold record. See, e.g., Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013); U.S. Cold Storage v. City of La Vista, 285 Neb. 579, 831 N.W.2d 23 (2013); Coffey v. Coffey, 11 Neb. App. 788, 661 N.W.2d 327 (2003). The Court found that these principles weighed against a successor judge making findings of fact from a transcript of proceedings before a different judge.

In the instant case, the parties did not consent to the procedure, and they had presented conflicting evidence at the original hearing as to whether the presumption had been rebutted. Schmidt admitted that he did not consider the effect of pain medications on plaintiff's ability to work. However, he also testified that no physician provided him with restrictions based on plaintiff's medications and that Nebraska law prohibited him from investigating this information himself. Plaintiff challenged that assertion. Defendant challenged both plaintiff and his wife about why they would leave their children in his care if he could not drive or care for their needs because of his medications and physical restrictions.

The Supreme Court remanded the case to the Workers' Compensation Court for a new trial, holding that the successor judge's ruling on these issues without a new evidentiary hearing violated defendant's right to due process.

## 7. Rader v. Speer Auto, 287 Neb. 116, 841 N.W.2d 383 (2013)

### MODIFICATION

#### DISABILITY VS. IMPAIRMENT

The Supreme Court affirmed the trial court's denial of plaintiff's petition to modify a compensation award since she failed to meet her burden of proving that a material and substantial change for the worse in her condition warranted modification under Neb. Rev. Stat. § 48-141(2).

Plaintiff sustained a compensable injury, and on March 30, 2007 the trial court issued an award of past and future medical benefits. Plaintiff later filed a petition to modify the award, and on April 10, 2009 the trial court issued a further award finding that plaintiff had reached maximum medical improvement and sustained a loss of earning power of 50 percent. In the further award, the court also determined that surgery was not warranted at that time, but the court awarded future medical and vocational rehabilitation benefits. On February 15, 2013, the trial court denied plaintiff's June 29, 2012 Petition to Modify, except for certain medical expenses.

On appeal to the Supreme Court, plaintiff claimed that the trial court erred when, except for certain medical expenses, it denied her petition to modify wherein she claimed an increase in her loss of earning capacity. Plaintiff also claimed the trial court incorrectly concluded that it could not award higher loss of earning capacity benefits since defendant had already paid 300 weeks of disability benefits pursuant to § 48-121(2). The Court did not consider that argument since it was not necessary to its resolution of the appeal. However, it did conclude that the trial court had subject matter jurisdiction to consider the modification since, in accordance with § 48-141, plaintiff filed the petition to modify more than six months after the Further Award was entered by the trial court.

The Court reiterated that upon appellate review, the findings of fact made by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Whether an applicant's incapacity has increased under the terms of § 48-141 is a finding of fact. Section 48-141 allows the trial court to modify an award if a party can prove an increase or decrease of incapacity due solely to the injury. The applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had been previously made. Lowe v. Drivers Mgmt., Inc., 274 Neb. 732, 743 N.W.2d 82 (2007). In determining whether the evidence relied upon by the trial court supported its decision that plaintiff did not prove an increase in incapacity, the Court cited Jurgens v. Irwin Indus. Tool Co., 20 Neb. App. 488, 495, 825 N.W.2d 820, 827 (2013). In Jurgens, the Nebraska Court of Appeals summarized the two requisite showings needed to establish a change in incapacity under § 48-141 and stated: "To establish a change in incapacity, an applicant must show a change in impairment and a change in disability. . . . Impairment refers to a medical assessment whereas disability relates to employability."

The trial court determined that pursuant to a loss of earning report by the court-appointed counselor, plaintiff proved a 5–10 percent increase in disability; however, the judge found this did not establish a material and substantial change in her condition as required by § 48-141(2). The Supreme Court agreed, noting that although the compensation court found a modest increase in the loss of earning power which would support a worsening of disability, given the record as a whole, plaintiff failed to establish a worsening of impairment as the Workers' Compensation Court implicitly found. As to impairment, the Supreme Court also looked to a report by Dr. Wampler who opined that plaintiff's worsening function and symptoms were attributable to a medical condition not related to the work injury.

The Court concluded that the evidence supported the trial court's decision that plaintiff failed to establish a material and substantial change for the worse in her condition warranting a modification of the Further Award.

## 8. **Rodgers v. Neb. State Fair, 288 Neb. 92, 846 N.W.2d 195 (2014)**

### STATUTORY INTERPRETATION

#### MULTIPLE-MEMBER LOSS OF EARNING POWER

#### EXPERT OPINION

The Supreme Court reversed and remanded the trial court decision, finding that the absence of an expert opinion of permanent physical restrictions for a member injury does not preclude a loss of earning capacity calculation under the third paragraph of Neb. Rev. Stat. § 48-121(3).

The parties stipulated that plaintiff injured both knees arising out of an in the course of his employment on September 7, 2009. Plaintiff had surgery on both knees, and he was diagnosed with chronic regional pain syndrome in the right knee. Physicians assigned a permanent partial impairment rating for each knee. Permanent restrictions were assigned for the right knee, but none were assigned for the left knee. A vocational counselor, agreed upon by the parties, determined plaintiff's loss of earning capacity to be approximately 65 percent.

In its award filed July 3, 2013, trial court concluded that in order to perform a loss of earning capacity calculation under the third paragraph of Neb. Rev. Stat. § 48-121(3) (Reissue 2010), there must be expert opinion of permanent physical restrictions as to each injured scheduled member. The third paragraph of § 48-121(3), added in 2008, provides:

If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision.

The trial court interpreted the first sentence to mean that there must be a loss as in the physical removal of a part of a scheduled member, or loss of use of more than one member in the form of permanent restrictions assigned to each member. The court concluded that plaintiff was limited to scheduled member benefits only, and loss of earning capacity benefits could not be authorized under § 48-121(3) since no permanent restrictions were assigned for the left knee.

On appeal, plaintiff claimed that the trial court erred when it concluded that the third paragraph of § 48-121(3) requires that there must be specific expert evidence of permanent physical restrictions as to each scheduled member in order to calculate an award of a loss of earning capacity under this statute. Noting that statutory interpretation presents a question of law, the Supreme Court concluded that the trial court erred as a matter of law when it limited the application of the third paragraph of § 48-121(3) to only those cases in which an expert opinion existed regarding the permanent physical restrictions as to each injured member. The Court agreed with plaintiff's contention that the trial court should have scrutinized restrictions at the point of the loss of earnings capacity analysis rather than requiring proof of physical restrictions before performing a loss of earning capacity analysis. Loss of earning power analysis requires proof of impairment or restrictions, but the Court found no authority requiring proof of both impairment and restrictions. See Green v. Drivers Mgmt., Inc., 263 Neb. 197, 206, 639 N.W.2d 94, 103 (2002). Additionally, the Court noted that the degree of disability may be determined without expert evidence and the trial judge may rely on a claimant's testimony.

The Court concluded that the plain language of the statute does not include the extra requirement of restrictions for each member injury. The Legislature clearly intended to extend the opportunity to receive benefits for loss of earning capacity to workers with multiple member injuries resulting from the same accident or illness and for whom there is evidence of a 30 percent loss of earning capacity.

The Court reversed and remanded the cause to the trial court for a decision consistent with its opinion.

## **9. Visoso v. Cargill Meat Solutions, 287 Neb. 439, 843 N.W.2d 597 (2014)**

LOSS OF EARNING POWER

RELEVANT LABOR MARKET

SUFFICIENCY OF EVIDENCE

The trial court's finding of a 45 percent loss of earning capacity was reversed and remanded.

Plaintiff was injured in 2006 and was awarded temporary benefits in 2008. In 2011 defendant filed a modification action to discontinue temporary benefits and determine plaintiff's loss of earning power (LOEP). The trial court determined plaintiff's current home in Mexico was the appropriate hub community for determining LOEP. The appointed counselor submitted a report stating that she was unable to provide an analysis with a reasonable degree of certainty for the community in Mexico due to a lack of information such as labor market statistics, job availability, and willingness of employers to accommodate restrictions. Plaintiff's rebuttal counselor concluded that plaintiff sustained 100 percent loss of earning whether the hub was Mexico or Schuyler, NE, the community where the injury occurred. The trial judge found that plaintiff failed to meet his burden of proving LOEP in his community in Mexico and denied the claim for permanent impairment and loss of earning.

In a prior appeal, the Supreme Court found that "when no credible data exists for the community to which the employee has relocated, the community where the injury occurred can serve as the hub community." Visoso v. Cargill Meat Solutions, 285 Neb. 272, 826 N.W.2d 485 (2013). Therefore, the cause was remanded to the Workers' Compensation Court to allow plaintiff to establish loss of earning capacity using Schuyler as the hub community.

On remand the trial court reviewed the LOEP reports and found that plaintiff suffered a 45 percent LOEP. Plaintiff again appealed, claiming the court erred in finding that the opinions of the appointed counselor were not rebutted.

In its order, the trial court stated that it had reviewed the reports of both the appointed and rebuttal counselors and found the appointed counselor to be more persuasive. According to the Supreme Court, however, it did not appear from the order that the judge reviewed any other part of the record on remand, including the rebuttal counselor's deposition and trial testimony. The Court stated that there was at least some evidence in the record which was relevant but not considered on remand. Since the trial court failed to weigh all of the evidence in making its factual findings, the Supreme Court was unable to determine on review whether the findings of fact by the compensation court supported the order.

Plaintiff also asserted that the trial court erred in not allowing the parties to present new evidence of loss of earning capacity based on the Schuyler hub community. The Supreme Court noted that although the trial judge determined plaintiff's new community in Mexico was the appropriate hub to determine LOEP, he also received into the record evidence regarding LOEP based on the Schuyler area, including reports, depositions, and testimony. Furthermore, plaintiff failed to identify what additional information was needed and not previously submitted into evidence. Therefore, the Court concluded that evidence regarding the Schuyler area was complete and no additional evidence was needed on remand.

The case was remanded so that the compensation court could make a finding as to whether the appointed counselor's report was rebutted after considering all of the evidence in the record.

## 10. Wingfield v. Hill Brothers Transportation, 288 Neb. 174, 846 N.W.2d 617 (2014)

### CAUSATION STANDARD – EXERTION/STRESS INJURY

The Supreme Court affirmed the trial court's dismissal of plaintiff's claim for benefits related to deep vein thrombosis and a pulmonary embolism.

Plaintiff was a truck driver for 35 years and worked for defendant for about a month before the February 2010 accident. On February 26, 2010, plaintiff experienced chest pain, went to the doctor, and was diagnosed with deep vein thrombosis and a pulmonary embolism. Plaintiff had been hospitalized for the same conditions on two occasions prior to his employment with defendant.

The compensation court dismissed plaintiff's claim, noting that the prior episodes of deep vein thrombosis and pulmonary embolism required it to consider the appropriate level of proof necessary to establish that his injuries arose out of his employment. The trial court looked to Leitz v. Roberts Dairy, 237 Neb. 235, 465 N.W.2d 601 (1991), in which the Supreme Court stated that causation in heart attack cases requires proof of both legal and medical causation. The trial court applied this split test of causation to plaintiff's claim, finding that "the distinction between the movement of a blood clot . . . through a vein leading to the lung (pulmonary embolism) and a clot . . . flowing through an artery to the heart (heart attack) is less than clear." Id. The compensation court concluded that plaintiff had failed to prove medical causation, i.e., that the employment contributed in some material and substantial degree to cause the injury as required by Leitz. The trial judge relied on an expert opinion that stated the pulmonary embolism was not specifically work related, but rather was caused by a combination of multiple risk factors. Therefore, plaintiff failed to establish that his employment with defendant caused the February 26, 2010, accident.

On appeal, the Supreme Court first addressed the appropriateness of applying the causation standard used in heart attack cases. As set forth in Zessin v. Shanahan Mechanical & Elec, 251 Neb. 651, 558 N.W.2d 564 (1997), heart injury causation consists of two elements: (1) legal causation and (2) medical causation. Under prong one, when a preexisting condition is present, an exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary non-employment life of the employee or any other person. Under prong two, medical causation is established by a showing by a preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury. Id.

But in compensation cases not involving injury from heart attack, a claimant with a preexisting condition must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition, no disability would have resulted. Swanson v. Park Place Automotive, 267 Neb. 133, 672 N.W.2d 405 (2003).

The generalized nature of heart attack cases however, makes it difficult to attribute the attack to the work. Morton v. Hunt Transp., 240 Neb. 63, 480 N.W.2d 217 (1992). Thus, the question to be determined is whether the injury was the result of a personal rather than an employment risk. Sellens v. Allen Products Co., Inc., 206 Neb. 506, 293 N.W.2d 415 (1980). Through the separation of legal and medical causation, it is possible to compensate those heart attack victims whose work placed a greater strain on their hearts than would ordinary non-employment life. Morton v. Hunt Transp., supra.

Under the legal test, the claimant must establish that the proximate cause of the heart attack was work-related and break any causal connection between the natural progression of a preexisting condition or disease and the injury at the workplace. Leitz, supra note 1. Under the medical test, "the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this collapse." 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 46.03[1] at 46-6 (2013). The medical test establishes whether the exertion contributed causally to the collapse as a matter of medical fact. Id.

Finally, the Supreme Court recognized that the split causation test has been held to be logically applicable to injuries other than heart attacks, such as stroke cases. For example, in Smith v. Fremont Contract Carriers, 218 Neb. 652, 358 N.W.2d 211 (1984), the Court held that the unique problem of proving causation for a heart attack when a preexisting condition is present is also present when a claimant has suffered a stroke.

Turning to the instant case, the Supreme Court stated that the same problem of proving causation existed with plaintiff's injuries of deep vein thrombosis and pulmonary embolism. The compensation court received evidence that the injuries could have arisen from multiple causes, both personal and employment related. These causes included inadequate anticoagulation, obesity, trauma, surgery, heredity, prolonged sitting, and smoking. The possible causes for plaintiff's development of deep vein thrombosis and pulmonary embolism demonstrated that his injuries were akin to the generalized nature of heart attacks, making it difficult to factually attribute his injuries to the work. Morton, supra note 13. As in cases of heart attack or stroke, the compensation court was required to address complex issues of causation and to determine whether plaintiff's injuries arose from a personal or employment-related risk. The Supreme Court concluded that it was logical for the court to extend the split test of causation in this case.

The issue of causation of an injury is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong. Way v. Hendricks Sodding & Landscaping Inc., 236 Neb. 519, 462 N.W.2d 99 (1990). The compensation court found that plaintiff failed to establish the medical cause prong of the split causation test. Its determination was not clearly wrong and the dismissal of plaintiff's claim was affirmed.

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

### **1. Bolles v. Midwest Sheet Metal Co., 21 Neb. App. 822, 844 N.W.2d 336 (2014)**

CAUSATION – HEART ATTACK CASES

EVIDENCE

REASONED DECISION UNDER RULE 11

The Court of Appeals affirmed the decision of the compensation court awarding workers' compensation benefits, holding that the Workers' Compensation Court provided a well-reasoned decision and that evidence was sufficient to establish legal and medical causation.

On July 27, 2011, plaintiff suffered a heart attack while replacing a compressor in an air-conditioning unit at a nursing home and died as a result. On that day, the air temperature and heat index values were extremely high throughout the day (at nearby locations temperatures were between 87 and 90 degrees while the heat index values were between 93 and 100 degrees), plaintiff performed much of his work in direct sunlight, and there was little to no airflow where plaintiff was working.

Plaintiff had a prior history of cardiac issues, including a heart attack in May 2008, resulting in angioplasty and placement of a stent, high blood pressure, high cholesterol, and plaintiff had been a smoker. Plaintiff was also not an active person outside of work and was not involved in aerobic activities.

In its Award, the compensation court noted the applicable case law for recovering benefits in heart attacks suffered at work, made numerous specific factual findings regarding the work plaintiff was performing, the weather conditions on the date of injury, and plaintiff's non-employment life and activities, evaluated the conflicting medical opinions, and made findings regarding the credibility of witnesses. The compensation court concluded that there was sufficient evidence to demonstrate legal and medical causation and awarded workers' compensation benefits.

Defendant appealed asserting that the compensation court failed to provide a well-reasoned decision under Rule 11 of the Workers' Compensation Court Rules of Procedure and that the court erred in finding sufficient evidence to demonstrate legal and medical causation.

The Court of Appeals began by noting that Rule 11(A) requires the compensation court to write decisions that provide the basis for meaningful appellate review and which specify the evidence upon which the judge relies. Jurgens v. Irwin Indus. Tool Co., 20 Neb. App. 488, 825 N.W.2d 820 (2013). The Court held that the compensation court's award provided sufficient detail and explanation of how and why the court reached its decision to allow meaningful review and sufficiently specified the facts and evidence upon which it relied. Although the trial court did not make specific findings on details such as how long plaintiff spent working in the heat and in direct sunlight, the court made specific findings concerning the work performed by plaintiff. These included the nature of the work, the fact that it was performed in direct sun with no shade, how long it took plaintiff to remove the compressor, the weight of the compressor, and how the compressor was disconnected, removed, replaced, and connected. The court also specifically found the report and conclusions of plaintiff's expert, Dr. Di Maio, more persuasive than defendant's expert.

The Court of Appeals next analyzed the sufficiency of the evidence of causation. The Court began by noting that in workers' compensation cases involving heart attacks, the foremost and essential problem is causation, specifically whether the employment caused the employee's

injury or death from a heart attack. Zessin v. Shanahan Mechanical & Elec., 251 Neb. 651, 558 N.W.2d 564 (1997); Rosemann v. County of Sarpy, 237 Neb. 252, 466 N.W.2d 59 (1991). See, also, Toombs v. Driver Mgmt., Inc., 248 Neb. 1016, 540 N.W.2d 592 (1995). There are two elements required to show that employment caused a heart attack: (1) legal causation and (2) medical causation. Zessin, supra; Toombs, supra; Leitz v. Roberts Dairy, 237 Neb. 235, 465 N.W.2d 601 (1991).

In heart attack cases where the employee's pre-existing heart disease or condition contributes, legal causation is established only if the employee shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary non-employment life of the employee or any other person. Id.

The Court of Appeals agreed with the trial court's finding of legal causation, noting that much of plaintiff's work on July 27, 2011 was performed in direct sunlight in extremely high temperatures where there was little to no airflow. In addition, the evidence demonstrated that plaintiff did not exert himself in his non-employment life. Therefore, plaintiff's work on the date of injury constituted an exertion or stress greater than that experienced during the non-employment life of plaintiff or any other person.

The Court of Appeals next analyzed medical causation, noting that in cases involving heart attacks caused by exertion or stress, medical causation is established by showing that the employment contributed in some material and substantial degree. Zessin, supra; Leitz, supra. See also Toombs, supra.

The compensation court relied on the opinion of Dr. Di Maio who reviewed depositions of plaintiff's co-workers, climatological data, plaintiff's medical and ambulance records, and the work performed by plaintiff on the date of injury. Dr. Di Maio opined that the stress of working in direct sunlight and high temperatures and humidity were a contributing cause to plaintiff's heart attack because it put stress on plaintiff's heart, and that the strain would have been sufficient to aggravate an existing heart disease and cause death. Dr. Di Maio further specifically found that plaintiff's working in an environment of elevated temperatures and humidity was a material and substantial cause of plaintiff's death. Therefore, the Court of Appeals held that the opinion of Dr. Di Maio was sufficient to establish medical causation.

The trial court's decision was affirmed.

## 2. **Brittain v. H & H Chevrolet LLC, 21 Neb. App. 986, 845 N.W.2d 619 (2014)**

### ARISING IN THE COURSE OF EMPLOYMENT – SUBSTANTIAL DEVIATION

#### STATUTORY INTERPRETATION

The Court of Appeals affirmed the trial court's decision dismissing plaintiff's claim for workers' compensation benefits, finding that plaintiff's injury did not arise in the course of his employment.

Plaintiff worked as a lot porter for defendant, an automobile dealership, and his duties included removing trash from the service building and disposing of it in dumpsters on the premises. Plaintiff also had a hobby in which he scavenged discarded metal from various sources, stored it in his home, and sold it to a recycling center. On February 27, 2012, plaintiff loaded a cart with trash from the service building and wheeled the cart across the defendant's parking lot to a dumpster. Plaintiff, while dumping the trash, noticed a piece of metal in the trash and decided to salvage it. He removed it from the trash and began wheeling the cart back toward the service building. On the way, plaintiff stopped at his personal vehicle, a truck, to load the metal so he could take it home and sell it. Plaintiff stopped the cart at the front of his truck and walked toward the back of his truck to load the metal in the truck bed. The parking lot was clear of snow and ice except for the area near the back of plaintiff's truck where defendant had piled plowed snow. Plaintiff put the metal in the back of his truck, turned to go back to the front of his truck, and slipped on some ice and fell injuring his right hip.

Defendant's employee handbook included a provision prohibiting outside employment and taking new and used parts from the premises. Plaintiff had signed an acknowledgment that he had read and would abide by the handbook. At trial, plaintiff stated that he did not feel like he was breaking any rules by removing metal from defendant's premises citing another employee who was doing the same. The other employee, however, had specifically sought and was given permission to remove certain metal items from the premises of defendant on his own time. Plaintiff never sought or was given similar permission.

The trial court dismissed plaintiff's claim for workers' compensation benefits, finding that plaintiff had no work-related business for stopping at his truck, that he substantially deviated from his employment, and was no longer in the course and scope of his employment when he was injured. Plaintiff appealed.

The Court of Appeals began by noting that pursuant to Neb. Rev. Stat. § 48-101, an employee is entitled to workers' compensation benefits for his or her injury when it arises out of and in the course of his or her employment if the employee was not willfully negligent at the time of the injury. The test for whether an employee's injury arose "in the course of" his or her employment is whether there is a work connection as to time, place, and activity. Micek v. CNG Financial, 265 Neb. 837, 660 N.W.2d 495 (2003), Skinner v. Ogallala Pub. Sch. Dist. No. 1, 262 Neb. 387, 631 N.W.2d 510 (2001). Specifically it is required that the injury be shown to have arisen within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Id.

The Court then focused on whether the purpose of plaintiff's activity at the time of his injury was related to his employment, noting that an activity is related to employment if it carries out the employer's purposes or advances its interests directly or indirectly. Skinner, supra.

The Court of Appeals found that plaintiff's job duties did not include removing scrap metal from defendant's premises for his own personal gain and that he was not given permission to do so. The Court further found that although another employee was granted permission by defendant to recycle certain metal items on his own time, the type of recycling that plaintiff and the other

employee were engaged in would be impermissible according to defendant's employee handbook if undertaken during work hours.

The Court then found that while plaintiff was injured during his working hours, the activity of going to his truck and loading materials had no purpose related to his employment and was for his own benefit and not for the benefit of defendant. Therefore, the compensation court was not clearly wrong in finding that plaintiff's injury did not arise in the course of his employment with defendant and was not a compensable injury under § 48-101.

### 3. Deleon v. Reinke Mfg. Co., 287 Neb. 419, 843 N.W.2d 601 (2014)

#### FINAL ORDER

#### STATUTORY CONSTRUCTION

The Court of Appeals determined it did not have jurisdiction to review an order which did not affect a substantial right; however, it did have jurisdiction over a second order pursuant to Neb. Rev. Stat. § 48-1,112 (Cum. Supp. 2012) and concluded that the plain language of that order obligated defendant to pay disability benefits until the date of maximum medical improvement for all plaintiff's injuries.

On August 13, 2010, the trial court awarded plaintiff temporary total disability (TTD) benefits from March 25, 2009 until he reached maximum medical improvement (MMI) from all his injuries. The award was affirmed on appeal by the Nebraska Court of Appeals on August 12, 2011. On September 17, 2012, plaintiff filed a motion to compel defendant to pay the awarded benefits after defendant unilaterally stopped making payments on November 30, 2011. The trial court found no reasonable controversy as to plaintiff's entitlement to TTD payments through August 30, 2011, the date the parties stipulated plaintiff reached MMI. On December 3, 2012, the court entered the award for TTD, 50 percent waiting-time penalty and \$1,000.00 attorney fee.

Plaintiff filed a petition to modify the 2010 award on September 5, 2012, alleging an increase in his incapacity and asking the court to determine his permanent disability and entitlement to vocational rehabilitation (VR) benefits. Plaintiff filed a subsequent motion requesting a court-appointed vocational rehabilitation counselor be directed to prepare a loss of earning power (LOEP) and VR evaluation. On December 3, 2012, the court sustained plaintiff's motion for a LOEP and VR evaluation, but made no determination as to plaintiff's entitlement to such benefits.

On December 31, 2012, defendant appealed both orders entered by the trial court on December 3, 2012. Defendant assigned that the court erred in finding plaintiff was entitled to TTD, a waiting-time penalty, attorney fees, and a VR evaluation. Plaintiff argued that the Supreme Court did not have jurisdiction to review the December 3, 2012 orders.

To determine whether it had jurisdiction over the orders appealed, the Court looked to Neb. Rev. Stat. § 48-1,112 which requires an appeal of a Workers' Compensation Court order to be reviewed by a workers' compensation review panel if the case was pending before the trial court on August 27, 2011 and a hearing on the merits had been held. If no hearing on the merits was held prior to August 27, 2011, then the Court of Appeals or the Supreme Court would review the appeal. Plaintiff contended that since his motion to compel was simply a means of enforcing the 2010 award, the requisite hearing on the merits was the May 10, 2010 hearing, so defendant should have filed its appeal with the compensation court review panel. The Court determined that the plain meaning of "hearing on the merits" relative to this appeal was the October 11, 2012 hearing which preceded the issuance of the December 3, 2012 order from which defendant appealed. Since that hearing occurred after the August 27, 2011 statutory deadline, defendant properly filed its appeal with the Court of Appeals.

The Court further agreed with plaintiff's argument that it could not review the order directing a vocational counselor to evaluate plaintiff's loss of earning power and entitlement to VR because it was not a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Selma Development v. Great Western Bank, 285 Neb. 37, 825 N.W.2d 215 (2013). Under § 25-1902, a final order is (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special

proceeding, or (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Becerra v. United Parcel Service, 284 Neb. 414, 822 N.W.2d 327 (2012). The Court concluded that the order directing an evaluation by a vocational counselor did not affect a substantial right of the defendant since the trial court made no determination as to plaintiff's ultimate entitlement to VR or LOEP benefits; therefore, it was not a final, appealable order.

Finally, defendant argued that it had paid all temporary benefits due until plaintiff reached MMI for his physical injuries, and it was not obligated to pay temporary benefits related to plaintiff's psychiatric condition because defendant contended no medical evidence existed stating plaintiff could not work as a result of his psychiatric condition. The Court rejected this argument since the 2010 award clearly stated defendant was ordered to pay temporary benefits until plaintiff reached MMI for all his injuries including the psychiatric condition. Since the language of the order was clear, there was no reasonable controversy as to plaintiff's entitlement to benefits and the trial court properly imposed a waiting-time penalty and awarded attorney fees.

The Court dismissed the appeal with respect to the order directing an evaluation by a vocational counselor for lack of jurisdiction, and it affirmed the order enforcing the 2010 award.

#### 4. **Roness v. Wal-Mart Stores, 21 Neb. App. 211, 837 N.W.2d 118 (2013)**

##### CAUSATION

##### EVIDENCE – MEDICAL

##### RULES OF PROCEDURE

The Court of Appeals reversed the opinion of the trial court awarding workers' compensation benefits, holding that medical evidence was insufficient to establish causation.

In 2005, prior to plaintiff's employment with defendant, she had surgery for carpal tunnel syndrome in her right hand. In December 2010, plaintiff began to have symptoms of carpal tunnel syndrome in her hands. She notified defendant and they sent her to an urgent care facility where plaintiff was treated by a physician's assistant. Plaintiff was released to return to work but continued to have symptoms so was referred to an orthopedic specialist, Dr. Gilles, whose impression was bilateral carpal tunnel syndrome and a recommendation of electrical studies. Defendant denied plaintiff's request for electrical studies and plaintiff was seen for an independent medical exam by Dr. Sollender, who agreed with the diagnosis of bilateral carpal tunnel syndrome, but specifically opined that it was not work related.

Plaintiff filed a petition alleging an aggravation of bilateral carpal tunnel syndrome. The compensation court held two hearings, the first in May 2012, where one of the exhibits plaintiff offered was an April 2011 letter from the physician's assistant who first treated plaintiff. The second hearing was in August 2012, where plaintiff offered as exhibits medical notes, the April 2011 letter, a deposition from the physician's assistant, and a letter from Dr. Gilles. Defendant challenged the admission of the notes, letter, and the deposition of the physician's assistant arguing that they were not properly admissible since physician's assistants are not mentioned in Rule 10 of the Workers' Compensation Court Rules of Procedure.

The trial court awarded plaintiff compensation benefits, ruling that the records from the physician's assistant were admissible. Defendant appealed, challenging the admission of the records from the physician's assistant and the court's conclusion that there was sufficient medical evidence to establish causation.

The Court of Appeals noted that the question of whether evidence from a physician's assistant, a medical provider not specifically mentioned in the text of Rule 10, can be properly admissible in the compensation court pursuant to Rule 10 is one of first impression in Nebraska. However, the Court declined to determine the question of admissibility because even assuming all the evidence was properly received by the compensation court, there was insufficient evidence to establish causation.

In its analysis of causation, the Court first noted that to recover workers' compensation benefits when the nature and effect of an injury are not plainly apparent, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, employment, and disability. See Winn v. Geo. A. Hormel & Co., 252 Neb. 29, 560 N.W.2d 143 (1997); Frank v. A & L Insulation, 256 Neb. 898, 594 N.W.2d. 586 (1999). Although expert medical testimony need not be couched in magic words such as "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the employment and the alleged injury or disability. See Frank, supra. Since plaintiff's injury was not plainly apparent, she was required to present sufficient medical testimony to establish causation. To meet this burden, plaintiff presented the records, letter, and deposition of the physician's assistant who treated plaintiff and the letter from Dr. Gilles.

The Court of Appeals found that taken on its own, the letter from the physician's assistant amounted to an opinion that plaintiff had carpal tunnel syndrome, a representation that the physician's assistant could not provide a causation opinion, and a recognition that plaintiff's work duties were consistent with actions that aggravate carpal tunnel syndrome. As for the deposition of the physician's assistant, the Court concluded that at most, she indicated that it was possible plaintiff's carpal tunnel syndrome was caused by work. The physician's assistant specifically declined to give a causation opinion and lacked the information and foundation to do so. Therefore, the Court held this evidence failed to establish causation.

The Court of Appeals next analyzed the evidence from Dr. Gilles. The letter from Dr. Gilles indicated that she only saw plaintiff once, that plaintiff related her symptoms to her work injury, and stated as follows: "I certainly do believe that [plaintiff's] symptoms could have likely aggravated [a] preexisting condition and that she probably had a tenosynovitis associated with it but without further objective studies, I cannot give you a better treatment plan or history course." The Court then concluded, contrary to the decision of the trial court, that the opinion of Dr. Gilles contained no reference to plaintiff's employment and at most to be that plaintiff suffered an aggravation of her prior carpal tunnel syndrome. As such, this evidence provided no causation opinion.

Therefore, the compensation court was clearly wrong in finding the evidence sufficient to support an award of benefits and its order was reversed.