

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

Fiscal Year 2015: July 1, 2014 to June 30, 2015

## **Supreme Court Cases:**

### **1. *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015)**

PARTIAL VS. TOTAL DISABILITY

LOSS OF EARNING POWER

WAITING-TIME PENALTIES

The Supreme Court upheld the trial court's award of 75 percent loss of earning capacity and denial of waiting-time penalties. The case was remanded to determine whether defendant was liable for certain mileage expenses.

The parties stipulated that plaintiff injured her left shoulder while working for defendant. Plaintiff had surgery to repair a rotator cuff tear, and multiple physicians opined that she developed complex regional pain syndrome (CRPS) after the surgery. At the request of plaintiff's attorney, Dr. D.M. Gammel reviewed medical records and examined plaintiff. He concluded that plaintiff's injury caused her CRPS and that she was permanently limited to working 4 hours per day. A court-appointed vocational rehabilitation counselor provided a loss of earning capacity analysis and estimated plaintiff would have a 75 percent loss of earning capacity (LOE). The trial court found plaintiff suffered 75 percent LOE rather than total disability, as the evidence and the court's observations of plaintiff indicated plaintiff was capable of doing more than she led her doctors to believe. Additionally, the trial court denied a waiting-time penalty, attorney fees, and interest under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014) because a reasonable controversy existed.

On appeal, plaintiff assigned that the trial court erred by finding she suffered a 75 percent LOE rather than finding she was totally disabled. Plaintiff argued that an injured worker with a permanent disability that prevents her from working "full-time" is, as a matter of law, totally disabled since she could not earn "wages similar" to those she would earn in a 40-hour workweek. The Court disagreed and concluded that a worker is not, as a matter of law, totally disabled solely because the worker's disability prevents him or her from working full time. Compensation for partial disability under § 48-121(2) is a function of the worker's "wages" and "earning power." For a permanently disabled hourly worker, § 48-121(4) requires that wages be calculated based on a 40-hour workweek. However, it does not mandate that earning power be deemed zero solely because the worker is unable to work full time. Whether a claimant has suffered a loss of earning power or is totally disabled are questions of fact and the Court would not consider any deficiencies in the loss of earning report or the sufficiency of the evidence supporting the trial court's factual finding that plaintiff suffered a 75 percent LOE since plaintiff did not specifically assign and argue such error.

Plaintiff also argued that, pursuant to Neb. Rev. Stat. § 48-125(1)(b), she was entitled to a waiting-time penalty, attorney fees, and interest since defendant failed to pay temporary total disability (TTD) benefits within 30 days of notice of her disability. Under § 48-125(1)(b), an employer must pay a 50 percent waiting-time penalty if (1) the employer fails to pay compensation within 30 days of the employee's notice of disability and (2) no reasonable controversy existed regarding the employee's claim for benefits. When compensation is so delayed and the employee receives an award from the compensation court, the employee is

also entitled to attorney fees and interest. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). The trial court found that defendant had no basis for discontinuing TTD benefits at the time it did so; however, no waiting-time penalty was awarded because defendant presented evidence at trial that justified its discontinuation of benefits. The Court explained that whether a reasonable controversy existed under § 48-125 is a question of fact. A reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Under the *Mendoza* test, when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court. The Supreme Court has held that a reasonable controversy existed even though the evidence showing the controversy was unknown at the time the employer refused benefits. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). Plaintiff conceded that the evidence produced at trial showed the existence of a reasonable controversy, and the Court affirmed the trial court's denial of a waiting-time penalty, attorney fees, and interest.

The Court remanded the case for consideration of certain exhibits to determine whether any mileage expenses were owed by defendant. The trial court's award of 75 percent loss of earning capacity and denial of waiting-time penalties, attorney fees, and interest were affirmed.

## **2. *Canas-Luong v. Americold Realty Trust*, 22 Neb. App. 999, 866 N.W.2d 101 (2015)**

MAXIMUM MEDICAL IMPROVEMENT

LOSS OF EARNING POWER

REASONED DECISION

STACKING OF MEMBER AND NONMEMBER IMPAIRMENTS

DOUBLE RECOVERY

The Supreme Court reversed the trial court's award of permanent disability benefits for a member injury since plaintiff had not yet reached maximum medical improvement for all of her injuries.

Plaintiff was shot by a co-worker and sustained right upper extremity and whole body injuries. She also developed post-traumatic stress disorder (PTSD) and depression as a result of her member and whole body injuries. The trial court later found that plaintiff had reached maximum medical improvement (MMI) for her physical injuries, but that she had not yet reached MMI for her psychological injuries. The trial court ordered temporary total disability benefits from the date of the injuries through the date of the trial and until such time as plaintiff reached MMI for the psychological injuries. The trial court also awarded 39 percent permanent partial disability (PPD) benefits for the impairment to plaintiff's right upper extremity, future medical care, and vocational rehabilitation evaluation after plaintiff reached MMI, both for a loss of earning assessment and to help her find suitable work.

Defendant appealed arguing that the trial court did not provide a decision with a meaningful basis for appellate review. The Court found that the trial court did provide a reasoned decision which was not ambiguous.

Defendant also argued that the trial court should not have awarded PPD benefits for the scheduled member injury and a separate, future loss of earning capacity award for the whole body injury because it would result in an impermissible double recovery by plaintiff. Defendant cited *Bishop v. Specialty Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009), which stands for the proposition that when a whole body injury is the result of a scheduled member injury and the member injury was considered in the assessment of the whole body impairment, a separate award for the member injury should not be entered.

However, the Court noted that the application of *Bishop* could not be determined until plaintiff reached MMI for all injuries. A claimant has not reached MMI until all the injuries resulting from an accident have reached maximum medical healing. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Prior to reaching MMI for all injuries, it is unknown whether the PPD to the right upper extremity should be factored into the loss of earning capacity analysis or whether a separate scheduled member award would be appropriate. Therefore, the Court concluded that the trial judge's PPD award was premature because plaintiff had not yet reached MMI for the psychological injuries.

The Court reversed the award of permanent partial disability benefits and affirmed the remainder of the trial court's award.

### 3. *Damme v. Pike Enterprises*, 289 Neb. 620, 856 N.W.2d 422 (2014)

PRE-EXISTING CONDITION

CAUSATION

TEMPORARY TOTAL DISABILITY

INCARCERATION

The Supreme Court affirmed the trial court finding that incarceration does not bar receipt of benefits.

Plaintiff had a history of neck and back degenerative disk disease and treatment prior to her 2009 back injury with defendant when she bent over to put bags on a table. The trial court found that the 2009 injury was compensable and aggravated plaintiff's pre-existing back problems. The court further found that her 2013 surgery was reasonable and necessary. The court awarded temporary total disability, including a six-month period in 2011 when plaintiff was incarcerated, and future medical benefits.

On appeal, defendant argued that the evidence showed the 2009 incident was a temporary aggravation of plaintiff's pre-existing back problems and that the compensation court erred in finding a work-related injury because plaintiff failed to present a medical expert's opinion establishing that the work-related event caused her injury. Defendant further argued that plaintiff was not entitled to temporary benefits during her incarceration and that she obtained the back surgery in an effort to obtain more narcotic prescriptions.

Plaintiff argued that, when read in context, two physician statements concluded that there was an exacerbation of her pre-existing lumbar degenerative disk disease on October 15, 2009. In addition, their opinions were sufficient to show she sustained a work-related injury to her back and the surgeon's notes were sufficient to show the surgery was necessary to treat her condition.

The Supreme Court agreed with plaintiff. Regarding plaintiff's pre-existing condition, the Court noted that a claimant must prove by a preponderance of evidence that the claimed injury 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. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). A claimant can recover benefits when an injury, arising out of and in the course of employment, combines with a pre-existing condition to produce disability, even if no disability would have occurred absent the pre-existing condition. The lighting up or acceleration of a pre-existing condition by an accident is a compensable injury. *Id.* In this case, two physicians stated that plaintiff suffered an exacerbation of a pre-existing lumbar degenerative disk disease and one stated that her employment was a contributing cause of her symptoms. The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Swanson*, *supra* note 7.

As for evidence of causation and the need for surgery, the Court acknowledged that one physician reported he could not determine how much of the plaintiff's symptoms could be attributed to the 2009 injury. However, a claimant is not required to prove apportionment of symptoms to an accident if the evidence shows that the accident is a contributing cause of the injury. "The law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing

factor. If it was, the concurrence of the personal cause will not defeat compensability.” *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996).

The Court went on to note that two physicians stated plaintiff’s exacerbation was temporary, but there was also evidence that plaintiff was not at maximum medical improvement and that nonsurgical treatment was unsuccessful. Plaintiff’s surgeon reported that plaintiff’s 2009 diskogram showed a loss of disk space, that her lumbar pathology was likely causing her symptoms, and that surgery was indicated. The Supreme Court found that these conclusions were sufficient to link the necessity of plaintiff’s surgery to the marked deterioration of her lumbar disk spacing that physicians noted soon after her injury.

Defendant also argued that the trial court erred in awarding temporary benefits during plaintiff’s 2011 incarceration and that there was no record of work restrictions. The Supreme Court first noted that it independently reviews questions of law decided by a lower court. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013). Whether to recognize a nonstatutory defense in a workers’ compensation case presents a question of law. *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

The Court began with the observation that there is no workers’ compensation statute providing a defense to paying disability benefits when a claimant is incarcerated. The Court next addressed defendant’s argument that temporary disability benefits are intended to replace a claimant’s wages while he or she is healing from an injury. The Court acknowledged that temporary disability benefits are payable for the period during which the employee cannot work because he or she is submitting to treatment, convalescing, or suffering from the injury. *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013). However, as further set forth in *Zwiener*, the level of a worker’s disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages. *Zwiener*, *supra* note 16. Although showing reduced wages and shortened work hours can support a finding of diminished earning capacity, the claimant can also prove disability through impairment ratings and the claimant’s lost access to jobs based on his or her physical restrictions and vocational impediments. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

Therefore, the Court held that under Nebraska’s workers’ compensation statutes, an award of disability benefits does not depend upon the claimant’s ability to prove he or she has lost wages because of a work-related injury. If a claimant can prove a loss of earning capacity, his or her incarceration after sustaining a compensable injury is not an event that bars the claimant’s receipt of disability benefits. The Court further noted that the Legislature could amend the Act in this regard but has not done so.

The Supreme Court then reviewed whether plaintiff proved her earning capacity had been diminished. It noted that plaintiff’s nurse practitioner wrote work release notes for her and recommended home health care services. Plaintiff testified that before her surgery in 2013, she required home health care because she had trouble toileting and doing simple household chores by herself. She said she later reapplied twice to defendant and at other places of employment, but she received no job offers. The Supreme Court determined that the record was sufficient to support the trial court’s finding of total disability from the date of injury to the date plaintiff was released by her surgeon to return to work.

The Supreme Court concluded that the compensation court did not err in finding plaintiff proved she sustained a work-related injury in October 2009 that was a contributing factor to her temporary total disability. Further, plaintiff’s incarceration was not an event that barred her receipt of disability benefits.

#### 4. *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014)

REPETITIVE TRAUMA INJURY

DATE OF INJURY

STARE DECISIS

The Nebraska Supreme Court affirmed the trial court's determination that the date of injury was the date plaintiff first missed work due to her injury, even though she had previously sought medical treatment.

Plaintiff worked as a dental hygienist for more than 30 years for several employers and claimed a repetitive trauma injury to her cervical spine. In 2008, plaintiff first sought medical treatment for her neck pain. She treated for her injury during off hours or off days and did not miss any work. The insurance carrier for the employer at that time accepted the claim and paid the medical expenses. In February 2009, for the first time, plaintiff missed work in order to see a doctor. At this time, ownership of her employer had changed, as did the insurance carrier. After receiving a medical report stating that plaintiff's work conditions had not caused her injury, the insurance carrier denied the claim. Plaintiff then filed a petition seeking benefits.

The trial court found that plaintiff's pre-existing neck condition was aggravated by her employment and awarded benefits. The trial court also determined that the date of injury was February 11, 2009, when the plaintiff first missed work due to the injury, and that the employer and its insurance carrier on that date were responsible for indemnity and medical benefits.

On appeal, defendants claimed that plaintiff failed to link her injury to defendant employer, as opposed to her other employers over the last 30 years. The Supreme Court stated that plaintiff "did not have to specifically prove that her injury arose out of her employment with [defendant]." In the present case, the medical evidence established a causal relationship between plaintiff's work as a dental hygienist and her injury. And it was undisputed that she worked as a dental hygienist for defendant. Therefore, the Court held that plaintiff had presented evidence showing her injury arose from the risks arising within the scope of her employment, even if she could not pinpoint that it arose directly as a result of her employment with defendant.

The Supreme Court next addressed the date of plaintiff's injury in the context of repetitive trauma. The compensability of repetitive trauma injuries is tested under the statutory definition of accident. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). An accident is "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2). In this case the parties agreed that the injury was unexpected or unforeseen, that it produced objective symptoms of an injury, and that it happened suddenly and violently. However, they disagreed on *when* it happened suddenly and violently.

As stated in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), the identifiable point in time at which a repetitive trauma injury manifests is when there is a sudden result, characterized by an employee's discontinuing employment and seeking medical treatment. Defendants argued that the discontinuation-of-employment part of that test causes harm to part-time workers or night-shift workers who, realizing they have suffered a work-related injury and need medical treatment, seek treatment during non-work hours. In addition, defendants argued that it is unjust to subsequent employers to fix the date of injury based on the date employment is discontinued if the symptoms of the injury surfaced and the employee sought medical treatment during the tenure of the *previous* employer. Therefore, defendants urged Supreme Court to adopt the test used in Iowa. In Iowa, a repetitive trauma injury manifests when both the

fact of the injury and the causal relationship of the injury to the claimant's employment are plainly apparent to a reasonable person. *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001).

The Supreme Court declined to do so, stating that the test adopted in Nebraska has certain advantages, including its basis in objective criteria, i.e., the date the employee seeks medical treatment and the date the employee must discontinue work. Under this test, it is unnecessary to engage in a subjective analysis of when an injury or its relation to the employment would be plainly apparent to a reasonable person. In addition, the requirement that the employee miss work is related to a determination of the time when the injury manifests itself in disability. Both before and after an employee's maximum medical improvement, an employee's disability is determined by the employee's diminution of employability or impairment of earning power or earning capacity. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). Thus, even if an employee is experiencing pain and seeks medical treatment, no disability is manifested until there is a diminution of employability. Such diminution reasonably can only occur when an employee's injury interferes with his or her ability to perform the requirements of the job. The point at which an employee must miss work because of the injury is therefore a reasonable standard of disability manifestation.

The Supreme Court went on to state that its existing date-of-injury test is also fair to employees, because a date of injury is conclusively established once symptoms become so severe that work is missed. The rule may seem unfair to some employers under circumstances where symptoms and medical treatment occur while work is being performed for one employer but no work is missed until work is being performed for another employer. But due to the progressive nature of repetitive trauma injuries, the test employs a "necessary legal artifice . . . in order for repetitive trauma cases to be manageable within the statutory framework of an accident." *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

Finally, the Court noted that it had previously declined to overrule the same line of precedent challenged in this case. As stated in *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), when judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the Court's interpretation. The Legislature not only acquiesced in the Supreme Court's interpretation of Neb. Rev. Stat. § 48-151 regarding repetitive trauma injuries, but has declined the express invitation of a majority of the Court to consider and amend such interpretation.

The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Dawes, supra*.

The Supreme Court concluded that the compensation court did not err in finding the date of injury to be February 11, 2009, the date plaintiff first missed work due to her pain, even though she had previously sought medical treatment.

## **5. *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, 849 N.W.2d 117 (2014)**

### REASONABLE MEDICAL EXPENSES

#### HOME HEALTH CARE

#### ATTORNEY FEES

The Supreme Court upheld the trial court's award of assistive devices, compensation to plaintiff's wife for home health care, and attorney fees.

Plaintiff suffered extensive compensable injuries to his whole body, incurred over \$2,000,000.00 in medical expenses, and required 24-hour home health care which was provided by hired professionals and plaintiff's wife. The trial court ordered defendant to (1) provide and pay for a custom lightweight wheelchair, a custom powered wheelchair, and a wheelchair accessible van; (2) reimburse plaintiff for home health care provided by plaintiff's wife; and (3) pay plaintiff's attorney fees in the amount of \$36,555.00. On appeal, defendant assigned the trial court erred in finding that plaintiff was entitled to attorney fees in the amount of \$36,555.00, that plaintiff's wife was entitled to compensation for providing home health care, and that plaintiff was entitled to a wheelchair accessible van. Plaintiff cross-appealed, assigning that the trial court erred as a matter of law by limiting the amount of § 48-125 attorney fees awarded to the time expended by his attorneys.

The Court found there was sufficient evidence in the record to support an award of a wheelchair accessible van. Under Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2012) the employer is liable for all reasonable medical, surgical, and hospital services, including appliances as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. The Court had not previously defined "appliance" or determined whether a wheelchair accessible van is an "appliance;" however, the Court has consistently liberally construed the Nebraska Workers' Compensation Act and broadly interpreted the term "appliance." In *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000), the Court held that home modifications for an injured employee bound to a wheelchair could be medical expenses under the appliances or supplies categories and stated that the modifications are compensable if they are "required by the nature of the injury" and if the modifications "relieve pain or promote and hasten the employee's restoration to health and employment." Since the record in the present case contained sufficient evidence to establish that a wheelchair accessible van is an "appliance," the trial court was not clearly wrong in determining that defendant should pay for it.

The Court also found sufficient evidence to support the award of compensation for home health care for 48 hours of care on weekends and 12 hours of care each weekday. Defendant argued that many hours spent by plaintiff's wife "on-call" were spent sleeping, completing ordinary household duties, and caring for herself, which hours should be considered noncompensable. Pursuant to § 48-120, an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-related injury, so long as the cost of the care is fair and reasonable. The Court had previously allowed payments to spouses and unrelated persons who provide the care. The requirements that must be met before compensation may be rendered for care to an injured employee by the spouse in the home include: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse. *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*, 228 Neb. 38, 421 N.W.2d 25 (1988). Ordinary housekeeping tasks, which generally include cleaning, preparation of meals, and washing and mending clothes, are noncompensable. Compensable tasks include serving meals in bed,

bathing and dressing, administering medication, and assisting with sanitary functions. A person rendering necessary medical services to a disabled worker on an "as-needed" basis need not render the services during each moment of compensated time, but, rather, must be available to perform the needed services during the times when needed. *Id.* The record contained sufficient evidence that plaintiff required 24-hour on-call care, beyond normal household duties, and \$1,080 per week for 108 hours of care was reasonable.

Finally, both parties argued that the trial court erred in the amount of attorney fees awarded. The Court explained that the determination of an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis. In making that calculation, the trial court should consider, as in other attorney fee contexts, the value of legal services rendered by an attorney by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). Particular attention should be given to the amount of legal work performed in relation to the amount of the unpaid medical bill and the amount of the unpaid medical bill in relation to the workers' compensation award received. *Id.*

Defendant argued that the award for attorney fees was unreasonable because (1) plaintiff's attorney's work involved minimal legal skill, (2) defendant was late in paying a small amount of the bills, and (3) attorney fees awarded should be only for fees directly attributed to the collection of unpaid bills according to the decision in *Harmon*. The Court deferred to the factual findings of the trial court and rejected the arguments that plaintiff's attorney's work involved minimal legal skill and that defendant was late in paying a small amount of the bills. The Court also clarified that the opinion in *Harmon* does not state that only attorney fees directly related to the collection of unpaid medical bills can be awarded, but simply that attorney fees in that case were unreasonable; however, in this case the award of the full amount of attorney fees was reasonable.

On cross-appeal, plaintiff argued that the trial court could have awarded more than the billed amount requested by plaintiff since the interest Precast Haulers' insurer made from late payment was greater than the award of attorney fees, and that thus, there was little deterrent in the trial court's award. The Court found no indication the trial court judge felt she was limited to awarding only the billed amount and plaintiff did not ask the trial court to award more than the billed amount. Thus, the trial court did not err in awarding the billed amount. Since great deference is given to the trial court's findings of fact, the trial court did not clearly err in awarding the full amount of attorney fees requested by plaintiff.

Finding no error, the Court affirmed the trial court's order.

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

### **1. *Contreras v. T.O. Haas, LLC*, 22 Neb. App. 276, 852 N.W.2d 339 (2014)**

CAUSATION

EVIDENCE

PERMANENT TOTAL DISABILITY

SUFFICIENCY OF EVIDENCE

The Court of Appeals affirmed the decision of the trial court admitting certain exhibits into evidence and finding that plaintiff was permanently and totally disabled.

On August 23, 2010, plaintiff suffered a back injury while working for defendant. Plaintiff saw his family physician, Dr. Citta, in September 2010, and after continued complaints of severe back pain, was referred to Dr. McKeag for further pain management.

Dr. McKeag noted that plaintiff's story and injury were reasonable, but that he had an exaggerated presentation. Dr. McKeag recommended and administered an injection. After no significant relief, Dr. Citta referred plaintiff to Dr. Jimenez, a neurosurgeon, who diagnosed plaintiff with degenerative disc disease and a herniated disc at L5-S1 and recommended surgery, which plaintiff had in March 2011. In June 2011, plaintiff reported disabling excruciating back pain, and Dr. Jimenez recommended additional conservative treatment. In August 2011, after plaintiff continued complaining of severe back pain, Dr. Jimenez recommended spinal fusion surgery. After receiving a second opinion, plaintiff chose not to undergo fusion surgery. Plaintiff continued care with Dr. Citta and Dr. McKeag who continued to recommend conservative treatment, but plaintiff continued to report ongoing back pain.

Plaintiff filed a petition alleging a work injury and requesting indemnity and medical benefits. At trial, defendant stipulated that plaintiff suffered a back injury requiring surgery, but disputed the extent of plaintiff's restrictions and loss of earning capacity due to his back injury.

Plaintiff testified that despite taking pain medications continuously since his injury, he continued to suffer from back pain. Both parties offered conflicting medical evidence concerning the degree of plaintiff's impairment, the cause of plaintiff's ongoing back pain following surgery, and plaintiff's ability to return to work. The trial court found that plaintiff reached maximum medical improvement in September 2011, was entitled to temporary total disability benefits prior to and after September 2011, and was entitled to permanent total disability benefits. The trial court also awarded compensation for past and future medical expenses.

Defendant appealed making a number of arguments, the first being that the trial court erred by admitting portions of Exhibit 22, and portions of Exhibit 23.

The Court of Appeals began by noting the relevant law regarding admission of evidence. As a general rule, the Workers' Compensation Court is not bound by usual common law or statutory rules of evidence, and that subject to the limits of due process, the Legislature granted the court powers to prescribe its own rules of evidence. Neb. Rev. Stat. §§ 48-168 (Reissue 2010) and 27-1101(4)(d) (Reissue 2008); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004). For expert testimony to be admissible in workers' compensation cases, an expert witness must qualify as an expert, their testimony must assist the trier of fact to understand the evidence or determine a fact at issue, there must be a factual basis for their testimony, and their testimony must be relevant and based on a reasonable degree of medical certainty. *Veatch v. American Tool, supra*.

The Court then examined Exhibit 22 which consisted of records from plaintiff's physical therapist, Tyler Sexson. Pages 36 through 48 of Exhibit 22 contained the results of a functional capacity evaluation (FCE) and an opinion that the FCE was an accurate portrayal of plaintiff's pain and limitations during the FCE. At trial, defendant objected to pages 36 through 48 on the basis of relevance and foundation. On appeal, defendant argued that the trial court erred in admitting those pages because the results of the FCE were not valid due to the indication of symptom magnification, and because Sexson erroneously indicated that the validity of the FCE was given to a medical degree of certainty even though he was not a medical doctor.

The Court of Appeals found that the results of the FCE demonstrated plaintiff's level of impairment and ability to perform movement and tasks in light of his injury, that this was clearly relevant to the determination of plaintiff's disability and loss of earning capacity, and that although there was some evidence of plaintiff exaggerating his symptoms, this did not make the results of FCE inadmissible. This was an issue that defendant could have and did raise at trial. Further, the Court noted that defendant even offered the report of another doctor who gave a conflicting opinion regarding plaintiff's level of impairment and the validity of the FCE.

Although the Court recognized that Sexson erroneously indicated his opinion was based on a reasonable degree of medical certainty, Sexson's misstatement did not equate to his answers being inadmissible. Sexson was a physical therapist who had a great deal of experience in performing FCEs as well as experience with plaintiff and his injury and abilities since he was plaintiff's physical therapist over a two-year period. The Court found that Sexson was qualified to offer an opinion on whether plaintiff was exaggerating his symptoms during the FCE and that it was relevant to the trial court's determination of plaintiff's disability and loss of earning capacity.

The Court of Appeals next examined Exhibit 23 which consisted of records from Dr. McKeag including pages 17 and 22 where Dr. McKeag indicated that he agreed with the FCE. At trial, defendant objected to page 17 of Exhibit 23 on the basis of relevancy and foundation, but did not object to page 22. On appeal, defendant alleged that page 17 of Exhibit 23 was not admissible because Dr. McKeag admitted he was not an expert regarding FCEs and because he did not indicate that his opinion was based on a reasonable degree of medical certainty.

The Court of Appeals began by noting that at trial, defendant did not object to page 22 of Exhibit 23 which contained the same information as page 17 of Exhibit 23. Thus, even if the trial court erred in admitting page 17, any error was harmless as the same information was included in another portion of the same exhibit admitted without objection.

The Court further noted that it could not say the trial court erred in admitting page 17 of Exhibit 23 into evidence. Although Dr. McKeag indicated he was not an expert regarding FCEs, he was clearly qualified to provide his opinion regarding plaintiff's physical health and ability to perform certain tasks. Dr. McKeag saw plaintiff at least 10 times between October 2010 and October 2012, and at each visit evaluated plaintiff's ability to perform certain movements in light of his pain. Given Dr. McKeag's knowledge of plaintiff's physical health and general agreement with the FCE, this certainly provided relevant information to the trial court. Dr. McKeag did not indicate any disagreement with the FCE other than to note his lack of experience with FCEs in general. This information was associated with the weight of Dr. McKeag's opinion rather than its admissibility.

Lastly, the Court of Appeals noted that although expert medical testimony must be based on a reasonable degree of medical certainty, testimony need not be couched in those exact magic words. See *Edmonds v. IBP, Inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992). The Court found that Dr. McKeag's medical opinion was admissible even though he did not explicitly state it was based on a reasonable degree of medical certainty because his agreement with the FCE

needed to be read in conjunction with his medical expertise and experience as plaintiff's physician. Although he noted his lack of expertise with FCEs, nowhere in his opinion did Dr. McKeag provide any indication his opinion was not based on a reasonable degree of medical certainty.

Defendant next argued there was not sufficient evidence to support the trial court's finding that plaintiff was permanently and totally disabled. The Court of Appeals noted the relevant law regarding the sufficiency of evidence to support the findings of fact made by the Workers' Compensation Court. When an appellate court reviews the sufficiency of evidence to support the findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party, and when faced with conflicting medical opinions, the compensation court is entitled to accept the opinion of one expert over another, and an appellate court will not substitute its judgment for that of the compensation court. See *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007); *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997).

The Court of Appeals examined each of defendant's arguments regarding the sufficiency of evidence beginning with the claim that there was not enough competent medical evidence to demonstrate a causal connection between plaintiff's back condition after surgery and the work injury, or between his back condition and his restrictions from the FCE and resulting loss of earning capacity.

The Court noted that a claimant is entitled to an award of workers' compensation benefits if the claimant shows by a preponderance of the evidence that he or she sustained a work-related injury. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Moreover, an injured worker is required to prove by competent medical evidence a causal connection between the alleged injury, employment, and disability. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

The Court found there was sufficient evidence to demonstrate that plaintiff's condition after surgery was causally related to his work injury and that his condition caused the physical restrictions reflected in the FCE. Evidence was submitted and the compensation court accepted opinions from Dr. Jiminez, Dr. McKeag, and testimony from plaintiff indicating that plaintiff continued to have severe back pain following his surgery in 2011, that his back condition was caused by his work injury, and that his condition caused physical restrictions reflected in the FCE.

The Court of Appeals next examined defendant's argument that the only competent evidence at trial showed that plaintiff was capable of doing medium work which resulted in a 20 – 25 percent loss of earning capacity. The Court noted that defendant's argument was contradicted by evidence in the record, specifically the FCE and opinions of Sexson and Dr. McKeag which demonstrated that after plaintiff's March 2010 surgery, he had considerable physical restrictions as a result of his work injury. The Court further noted that defendant's argument reiterated its previous assertions that the FCE and Dr. McKeag's agreement with the FCE should have been excluded at trial, and that these arguments had already been rejected. The Court concluded that although there was conflicting evidence in the record, there was sufficient evidence to support the finding of the compensation court that plaintiff was permanently and totally disabled.

## **2. *Michie v. Anderson Builders, Inc.*, 22 Neb. App. 731, 859 N.W.2d 906 (2015)**

### CAUSATION

### DEATH BENEFITS

### EVIDENCE

### EXPERT OPINIONS

The Court of Appeals affirmed the decision of the trial court denying death benefits to the widow of an injured worker.

Bernard Michie sustained a work-related injury to his lower back in April 2010 and received ongoing treatment for pain associated with his injury until he died in April 2012. At the time of his death, Michie was taking oxycodone and cyclobenzaprine related to his work injury. Michie's widow, Diana Estes, alleged that Michie died from an accidental overdose of the medications he was taking related to his work injury, and was therefore entitled to death benefits.

At trial, Estes offered post-mortem toxicology results which showed that Michie's blood had a concentration of 27 nanograms per milliliter of oxycodone and 60 nanograms per milliliter of cyclobenzaprine. Estes further offered an autopsy report from Dr. Wilkerson, a forensic pathologist, who concluded that Michie had no definitive cause of death and that the manner of his death was undetermined, although he did find that evidence suggested multiple drug intoxication as the most likely cause of death. Finally, Estes offered the verdict of the coroner from Laramie County, Wyoming, the location where Michie died, who concluded that Michie's cause of death was from mixed drug toxicity due to an overdose of his prescribed medications, and that the manner of his death was accidental.

Defendant presented expert testimony of Dr. John Vasiliades, who was not a licensed physician, but who was a board-certified clinical chemist, toxicologist, and forensic toxicologist with a bachelor's degree and doctorate in chemistry. Dr. Vasiliades had completed fellowships in chemistry and toxicology, was employed at the time of trial as a toxicologist at a toxicology lab, and who had qualified hundreds of times in state and federal courts as a toxicology and forensic toxicology expert.

Dr. Vasiliades reviewed medical records, the autopsy report, the toxicology results, and the coroner's investigation report. He testified that he was familiar with the prescription drugs in Michie's system and their effects on the human body, and that the concentrations of the drugs in Michie's blood were in the therapeutic or even subtherapeutic range. The amount of oxycodone in Michie's blood (27 nanograms) was a level he would expect based on Michie's use. Dr. Vasiliades stated that oxycodone becomes toxic at levels in excess of 600 nanograms per milliliter while cyclobenzaprine becomes toxic at levels in excess of 300 nanograms per milliliter. He opined that the concentrations of the drugs were so low that they "certainly" did not cause Michie's death. According to Dr. Vasiliades, neither concentration was high enough to cause death individually or in combination with one another, especially since Michie was a chronic user and could likely withstand higher concentrations of the drugs.

When asked of the possibility that Michie suffered an adverse or allergic reaction due to the medications, Dr. Vasiliades testified that such reactions would have occurred the first few times Michie had taken the drugs and since Michie had been taking them for a long period of time, his death was not caused by an adverse or allergic reaction to the medications.

The trial court awarded indemnity and medical benefits for Michie's back injury, but accepted the opinion of Dr. Vasiliades and denied death benefits, finding that Estes failed to meet her burden of proving that Michie's death was work-related. The parties appealed.

The Court of Appeals began by examining Estes' claim that the compensation court erred in failing to give full faith and credit to the verdict of the Laramie County Coroner as required by U.S. Const. art. IV, § 1. A judgment rendered by a sister court is to be given full faith and credit and has the same validity and effect in Nebraska as in the state which rendered the judgment, *In re. Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009). The Court first noted that it did not believe the verdict by the coroner was a judgment entitled to full faith and credit. However, even if it were, the Full Faith and Credit Clause would only require that it be given the same validity and effect that it would have in Wyoming, and a coroner's verdict is merely advisory and has no probative effect under Wyoming law. See *Raigosa v. State*, 562 P.2d 1009 (Wyo. 1977). The Court found that since the coroner's verdict would not be treated as conclusive evidence in a Wyoming court, the Full Faith and Credit Clause did not require it to be given such effect in Nebraska courts. Therefore, the compensation court was entitled to consider and weigh the coroner's verdict just as any other piece of evidence received at trial.

Next, the Court of Appeals examined Estes' claim that the compensation court erred in allowing the testimony of Dr. Vasiliades, who had no medical training, on the issue of causation contrary to *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). That decision provides that in cases where the claimed injuries are of such character as to require skilled and professional persons to determine causation, an employee is required to show competent medical testimony to prove causation.

The Court began by noting that the fact the plaintiff is required to show causation through competent medical testimony does not mean nonmedical testimony is inadmissible. Expert testimony is admissible in the compensation court if the witness qualifies as an expert, the testimony aids the trier of fact to understand evidence or determine a fact in issue, the witness has a factual basis for their opinion, and the testimony is relevant. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). The Court further noted that scientific, rather than medical testimony, has been considered in workers' compensation cases for the purpose of determining causation. See *Ward v. City of Mitchell*, 224 Neb. 711, 400 N.W.2d 862 (1987).

The Court of Appeals then found that although Dr. Vasiliades was not a medical expert, he was an expert in the science of toxicology and had qualified as such hundreds of times in state and federal courts. Further, his testimony was certainly helpful to the trier of fact in understanding the toxicology reports and whether the concentration of drugs could have caused Michie's death. In addition, Dr. Vasiliades' opinion that the concentration was therapeutic rather than toxic was relevant as to cause of death. The Court held that since Dr. Vasiliades' testimony was relevant and supported by proper foundation, the trial court did not err in admitting it as expert testimony.

Finally, the Court of Appeals examined Estes' claim that the compensation court erred in failing to find that the medications prescribed for Michie's injury contributed to his death. Estes argued that a causal link was established because those were the only medications found in Michie's body at the time of death. The Supreme Court disagreed, stating that the presence of the medications alone was not enough to establish a causal link. The trial judge relied on the opinion of Dr. Vasiliades that the concentration of drugs did not cause Michie's death, rather than plaintiff's expert, Dr. Wilkerson. In considering the evidence in the light most favorable to the successful party and without substituting its judgment for that of the compensation court, and after noting that the trial judge is entitled to accept the opinion of one expert over another, the Court found that the record contained sufficient evidence to support the findings of the trial court.