

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

Fiscal Year 2016: July 1, 2015 to June 30, 2016

## **Supreme Court Cases:**

### **1. *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015)**

DETERMINATION OF LIABILITY – MULTIPLE INSURERS

EQUITABLE DEFENSES

NEGLIGENCE

The Supreme Court affirmed the decision of the district court that Twin City was solely liable for payment of the workers' compensation award, and denying Twin City's equitable defenses and counterclaims/crossclaims.

National Dynamics Corporation (National Dynamics) owned a boiler manufacturing plant, colloquially referred to as Nebraska Boiler, from 1989 until it was purchased by Aqua-Chem, Inc. in 1998. Aqua-Chem, Inc. changed its name to Cleaver-Brooks, Inc. (Cleaver-Brooks), the current owner of the plant. At the time of the sale to Cleaver-Brooks, National Dynamics entered into an agreement with Twin City Insurance Company (Twin City) to provide workers' compensation insurance coverage for claims made by employees working at the plant from 1992–1998. Fireman's Fund Insurance Company, later renamed American Insurance Company (American), provided workers' compensation insurance coverage for Cleaver-Brooks from 1992 to 2002, but this coverage did not extend back to claims arising from the plant prior to its purchase in 1998.

James Risor began working at Nebraska Boiler in 1973, and remained employed until his retirement in 2004. Risor sustained permanent hearing loss in both ears and filed a claim against Nebraska Boiler, the only named defendant, on January 20, 2004. The compensation court served notice of the petition only to Cleaver-Brooks. Neither National Dynamics nor the insurance companies were given notice. Cleaver-Brooks tendered the claim to American whose counsel operated under the mistaken belief that American had provided insurance coverage for Nebraska Boiler from 1992 to 2002, and represented this mistaken belief to the compensation court. On April 26, 2006, the compensation court entered an award finding that Risor was permanently totally disabled as a result of hearing loss, and that the date of injury was October 19, 1993. The date of injury was apparently a surprise to the parties, as Risor alleged in his complaint that he suffered injuries only as early as 2001. The court ordered payment to begin on the date of Risor's retirement, February 12, 2004.

After the award was entered, American realized that Cleaver-Brooks did not own the plant on the date of Risor's injury, so American was not the plant's insurer at that time. Nebraska Boiler filed a motion for continuance to allow additional parties who may have exposure to liability to be notified and given a chance to be served and present evidence to the court. The judge denied the motion and Risor and Cleaver-Brooks appealed the award to the review panel.

Twin City (the insurer from 1992–1998) was given notice of the claim against Nebraska Boiler on August 1, 2006, and on October 25, 2006, Twin City filed a motion for leave to intervene to participate as a party in the appeal to the review panel. The review panel denied the motion and Twin City appealed that decision which was decided in *Risor v. Nebraska Boiler and Twin City Fire Insurance Co.*, 274 Neb. 906, 744 N.W.2d 693 (2008) (*Risor I*). In *Risor I*, the Supreme

Court determined that Twin City did not have a right to post-award intervention in Risor's workers' compensation claim brought solely against his employer, Nebraska Boiler, noting that American believed it was the insurer for Nebraska Boiler during the period the compensation court determined Risor was injured, and that Nebraska Boiler's interests, represented by American, were substantially the same as Twin City's. The Supreme Court further indicated that Twin City was free to represent the interests of its insured, Nebraska Boiler, in the appeal of the award to the review panel, which Twin City chose not to do.

In May 2008, the review panel reversed the single judge's opinion and determined that payment of benefits should start from the date Risor was permanently injured in 1993 rather than the date of retirement in 2004. Nebraska Boiler appealed, and the Supreme Court affirmed the review panel's decision in *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009) (*Risor II*).

In November 2012, Cleaver-Brooks filed an action for declaratory judgment in district court to determine which party or parties were liable for Risor's claim. Twin City and American were named defendants in the action. The district court found that Twin City was solely liable for the award, determining that Twin City insured the plant at the time of Risor's injury and that laches and judicial estoppel did not apply and were not a defense to liability. The court also dismissed Twin City's counterclaims and cross claims against Cleaver-Brooks and American for negligence, equitable subrogation, indemnification, contribution, and unjust enrichment. Twin City appealed making a number of claims.

Twin City first claimed that the district court erred in finding Twin City solely liable, arguing that Risor brought the suit against Nebraska Boiler at the time of the complaint, but on the dates of injury he alleged, Cleaver-Brooks owned the plant. Twin City argued this indicated that Risor intended to file a complaint only against Cleaver-Brooks.

The Supreme Court began by describing the relationship between Nebraska Boiler, National Dynamics, and Cleaver-Brooks, noting that in *Risor I* the Court described Cleaver-Brooks as Nebraska Boiler's "parent company." In fact, Nebraska Boiler was merely a trade name used by National Dynamics and Cleaver-Brooks to refer to the plant. Cleaver-Brooks owned the plant outright when Risor filed his complaint.

Although Cleaver-Brooks was not a "parent company," the Supreme Court in *Risor I* correctly recognized that Twin City could potentially face liability for the award entered against Nebraska Boiler when holding that Twin City was not deprived of its right to procedural due process when its motion to intervene was denied. Further, Twin City was in privity with Nebraska Boiler whose interest in defending the suit was substantially the same as that of Twin City. The fact that Nebraska Boiler was not a separate legal subsidiary did not change this.

The Supreme Court also noted that the beneficent purpose of the Workers' Compensation Act requires that it be liberally construed, that delay, cost, and uncertainty are contrary to the purpose of the Act, and that the Act is intended to simplify legal proceedings to bring about speedy resolution of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays or technicalities. See *Estate of Teague v. Crossroads Co-op. Assn*, 286 Neb. 1, 834 N.W.2d 236 (2013), *Jackson v. Morris Communs. Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

From Risor's perspective, he worked at the same plant (Nebraska Boiler) his entire career even though it changed ownership several times. Although filing a complaint against Nebraska Boiler was technically inaccurate, his intent was clearly to receive compensation for the injury incurred during his employment at the plant regardless of who owned the plant at the time of his injury.

The compensation court had determined that Risor's injury occurred in 1993 and it was undisputed that Twin City, through its policy with National Dynamics, was the sole provider of

workers' compensation coverage at that time for employees working at the plant. Therefore, the Supreme Court held that Twin City was liable for the award and could not avoid payment by relying on a technical inaccuracy, i.e., the bringing of the claim against Nebraska Boiler rather than National Dynamics as employer in the claim.

Twin City next claimed the district court erred in rejecting Twin City's equitable defenses. Twin City argued that Cleaver-Brooks, through its attorney retained by American, represented to the compensation court that American's coverage of the plant started in 1992 (rather than 1998), and that judicial estoppel prevented Cleaver-Brooks and American from asserting an inconsistent position in this proceeding.

The Supreme Court noted that judicial estoppel is an equitable doctrine a court invokes at its discretion to protect the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. See *TFF, Inc. v. Sanitary & Improvement Dist. No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010), *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). The Court went on to find that there was no evidence of bad faith or an intent to mislead to gain some type of advantage on the part of Cleaver-Brooks or American. At the time of the misrepresentation, it was not in Cleaver-Brooks' or American's interest to represent that Cleaver-Brooks owned the plant in 1993. All the parties involved believed the earliest date of Risor's injury was 2001, three years after the plant was sold, and only after the award did the misrepresentation gain significance. Furthermore, American's attorney sought to correct the information once the mistake was uncovered.

Twin City further argued that the doctrine of laches should bar recovery against Twin City because Cleaver-Brooks unjustifiably delayed notifying Twin City of the claim by Risor. The doctrine of laches is not favored in Nebraska, and is only invoked if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice. See *Schellhorn v. Schmieding*, 288 Neb. 647, 851 N.W.2d 67 (2014), *Farmington Woods Homeowners Assn v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). Passage of time is not sufficient; it must be shown that because of the lapse of time, circumstances changed to the disadvantage or prejudice of another. *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006). Therefore, Twin City needed to prove that any delay in notification by Cleaver-Brooks and American was inexcusable, and that Twin City was prejudiced by the delay.

The Supreme Court found that because the original dates of injury claimed were all while Cleaver-Brooks owned the plant, Cleaver-Brooks or American had no reason to notify Twin City until the compensation court determined the date of injury to be in 1993. The compensation court entered the award on April 26, 2006, and Twin City was notified on August 1, 2006. Between those dates, Risor and Nebraska Boiler appealed and Nebraska Boiler's motion for a continuance was denied on May 10, 2016. The Court found no evidence suggesting any delay was inexcusable.

The Court further found that even if Cleaver-Brooks had some reason to know prior to the award that there was a potential claim for which Twin City could be liable, the evidence was not sufficient to establish that Twin City was prejudiced by the delay. American vigorously defended against Risor's claim, and the outcome would not likely have been different if Twin City participated. Further, in *Risor I*, the Court specifically granted Twin City a chance to participate in the appeal and they chose not to. To the extent Twin City may have been prejudiced, Twin City's own inaction contributed to that prejudice.

Twin City also argued that the district court erred in dismissing its counterclaim/crossclaim of negligence, arguing Cleaver-Brooks and American negligently injured Twin City when they failed to notify Twin City of the pending claim. For a negligence action, there must be a legal duty on part of the defendant to protect the plaintiff from injury, a failure to discharge that duty,

and damage proximately resulting from such undischarged duty. *Brown v. Soc. Settlement Assn*, 259 Neb. 390, 610 N.W.2d 9 (2000).

The Supreme Court began by noting that an insurer generally owes a duty to an insured to exercise reasonable care in defending a suit. However, there is no case law in Nebraska or in any other jurisdiction which has found that one insurance company owes a duty to notify another insurance company of potential claims, or suggesting Cleaver-Brooks having purchased the plant owed a duty to notify Twin City of such claims. The Court found that as matter of law, Cleaver-Brooks and American had no duty to notify Twin City. The Court further found that even if a duty existed, there was no evidence Cleaver-Brooks or American breached a duty of care. Cleaver-Brooks and American only had reason to believe Twin City could potentially be exposed to liability after the single judge determined the date of injury to be in 1993, to the surprise of the parties. Twin City was informed within a reasonable period after the judgment. Therefore, Cleaver-Brooks and American acted reasonably in protecting any interest Twin City had in the claim.

Lastly, Twin City claimed that the district court erred in dismissing Twin City's counterclaims/crossclaims of equitable subrogation, indemnification, contribution, and unjust enrichment, arguing that Cleaver-Brooks or American should compensate Twin City for payments made to Risor pursuant to the award. The Supreme Court found that because Twin City was the insurer for the plant at the time Risor was injured, Twin City was liable for payment of the award. Thus, the district court did not err is dismissing Twin City's remaining counterclaims/crossclaims.

## **2. *Jacobitz v. Aurora Cooperative*, 291 Neb. 349, 865 N.W.2d 353 (2015)**

### COURSE AND SCOPE OF EMPLOYMENT

### RECREATIONAL OR SOCIAL ACTIVITIES

### SUBSTANTIAL DIRECT BENEFIT TO EMPLOYER

The Supreme Court reversed and remanded the case for further hearing.

Plaintiff suffered a head injury while helping his employer after a customer appreciation supper at a community building. Attendance was not required and employees were not compensated. Plaintiff mailed the invitations and helped set up the tables prior to the supper. After the supper, plaintiff helped clean the smoker at a nearby storage facility. Plaintiff then rode in the bed of a pickup to get back to the community building and fell off, sustaining his injury. There was no testimony regarding how plaintiff fell out of the pickup and plaintiff did not remember. 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.

Defendant appealed the order on liability. The Supreme Court found that the order was not a final, appealable order because it only resolved the question of liability and did not determine benefits. On remand, the trial court awarded benefits to the plaintiff, finding that the injury arose out of and in the course of employment because the employer derived a substantial benefit from plaintiff's attendance at the supper. Defendant again appealed, arguing that the trial court incorrectly applied a substantial benefit, rather than a substantial direct benefit standard. The Supreme Court agreed.

The Court began its analysis by stating that in the case of recreational or social activities incident to employment, the test to determine whether an injury arose out of and in the course of employment is: (1) [The injuries] occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994), citing *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980).

The Supreme Court stated that the clear standard is a "substantial direct benefit" and not merely a "substantial benefit." However, the Court acknowledged it had not previously defined how "direct" fits into the analysis of a "substantial direct benefit." *Gray v. State, supra*. In this case, the compensation court found that the employer received a "substantial benefit" from the plaintiff attending the supper, visiting with customers, and helping with the smoker. The compensation court did not consider whether that substantial benefit was direct, as required by prior cases. See *Shade v. Ayars & Ayars, Inc., supra*; *Gray v. State, supra*.

Therefore, the Supreme Court held that the trial court applied the incorrect legal standard and remanded the case for a determination as to whether the employer received a substantial "direct" benefit from the plaintiff's participation in the customer appreciation supper.

NOTE: On remand, the trial court found that the employer received a substantial direct benefit and therefore the injury arose out of and in the course of employment. The trial court stated that the supper was more than just an event for employees. It was an opportunity for customers to meet and interact with employees, and it provided advertising, positive public relations, and promoted sales. The case was again appealed but the parties agreed to a Lump Sum

Settlement Leaving Medical Liability Open which was approved by the compensation court in 2016.

**3. *Gardner v. International Paper Destruction & Recycling*, 291 Neb. 415, 865 N.W.2d 371 (2015)**

EVIDENCE

LAW-OF-THE-CASE DOCTRINE

ODD-LOT DOCTRINE

PRE-EXISTING CONDITION

The Supreme Court affirmed the decision of the compensation court admitting certain medical reports into evidence and finding that given plaintiff's pre-existing mental and cognitive deficits and based on his work-related injuries, plaintiff was permanently totally disabled.

On April 16, 2009, plaintiff suffered injuries to his head, neck, and lower back while working for defendant. In an award dated September 23, 2010, the compensation court found that prior to the accident, plaintiff experienced symptoms of cognitive deficits, anxiety, and depression, and that plaintiff suffered a concussion in the work accident resulting in some temporary cognitive deficits that resolved and resulted in no permanent impairment. The court further found that plaintiff's pre-existing conditions were the same from a cognitive standpoint prior to and subsequent to the accident, that the exacerbation of symptoms from the accident was a temporary condition, and that plaintiff reached maximum medical improvement (MMI) for any cognitive symptoms resulting from the work accident. Lastly, the court found that the cause of plaintiff's cognitive deficits was due to pre-existing depression and anxiety, sleep apnea, and medications plaintiff was prescribed prior to the work accident.

Regarding plaintiff's other injuries, the compensation court found that plaintiff suffered work-related injuries to the cervical and lumbar spine and that plaintiff had not reached MMI for these injuries. The court awarded temporary benefits for various weeks and running temporary total disability after December 1, 2009. Defendant appealed the award which was affirmed by the review panel.

On May 6, 2013, defendant filed a petition to modify the award alleging that plaintiff had reached MMI and had experienced a decrease in incapacity. On May 24, 2013, the compensation court found that plaintiff reached MMI.

At trial on defendant's petition, plaintiff offered several reports, dated subsequent to the award, from Dr. Rich, a psychiatrist, who indicated that plaintiff suffered from pre-existing cognitive and mental deficits including depression, anxiety, and post-traumatic stress disorder, that plaintiff's cognitive deficits naturally progressed and intensified, and that plaintiff's cognitive and mental deficits along with the pain caused by the work injury limited his ability to return to work full time. Plaintiff also offered the report of Dr. Golnick dated March 25, 2013, who stated that plaintiff experienced depression, dizziness, cognitive and memory problems, regular episodes of confusion, anxiety, and had difficulty with word finding. Regarding plaintiff's loss of earning capacity, plaintiff offered several opinions from Patricia Reilly, the court-appointed vocational rehabilitation counselor, including opinions that when considering the opinions of Dr. Rich regarding plaintiff's pre-existing cognitive and mental deficits, plaintiff would fit the definition of odd-lot. Defendant objected to the offer of the reports of Dr. Rich and Dr. Golnick. The compensation court received the reports.

On August 8, 2014, the compensation court entered a further award applying the odd-lot doctrine and finding that based on the medical evidence and loss of earning capacity opinions of Patricia Reilly, plaintiff was permanently totally disabled. The court recognized its initial award in which it found that plaintiff's cognitive deficits were temporarily aggravated by the accident but

resolved to their prior state with no permanent impairment, but noted that although plaintiff's pre-existing emotional condition returned to its pre-accident state, it did not resolve. The court found that plaintiff's neck injury and subsequent treatment were work-related, and that the neck injury with continued pain combined with the prior pre-existing cognitive and mental deficits to result in plaintiff being permanently totally disabled.

Defendant appealed, claiming that the compensation court's finding in the original award regarding plaintiff's work-related head and mental injuries was the law of the case, thus precluding consideration of plaintiff's pre-existing mental and cognitive conditions and the reports of Drs. Rich and Golnick which discussed plaintiff's subsequent mental and cognitive condition.

The Supreme Court began by noting that the law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage. *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012). The Court then found that the fact decided in the original award which should not be relitigated was that plaintiff had pre-existing cognitive and mental deficits that remained after being temporarily exacerbated by the work injury — not that plaintiff had reached maximum medical improvement for the cognitive symptoms. Therefore, under the law-of-the-case doctrine, the trial court could and did properly consider plaintiff's pre-existing mental and cognitive deficits in the further award.

The Supreme Court also disagreed with defendant's argument that the reports of Drs. Rich and Golnick should not have been considered. Defendant argued the reports were not relevant because the trial court had already issued a decision regarding plaintiff's cognitive symptoms. The Supreme Court determined that the reports were relevant to the issue of plaintiff's mental health and cognitive condition as it related to his disability and employability at the time of the further award. Therefore, the trial judge did not err in admitting them.

The Supreme Court next examined consideration of plaintiff's pre-existing conditions in finding that plaintiff was permanently totally disabled. Citing *Schlup v. Auburn Needleworks, Inc.*, 239 Neb. 854, 479 N.W.2d 440 (1992), the Court noted that a claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability even though a pre-existing disability or condition has combined with the work-related injury to produce the disability for which an award is sought. In *Schlup*, a claimant was found permanently totally disabled under the odd-lot doctrine. That decision quoted Professor Larson who stated that a considerable number of odd-lot cases involve claimants whose adaptability to a new situation created by their physical injury was constricted by lack of mental capacity or education. *Schlup, supra*. See 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 83.04 (2015).

In the present case, the compensation court relied on the previous finding that plaintiff had pre-existing mental and cognitive deficits, and when applying the odd-lot doctrine, the court determined that plaintiff's work injury combined with his pre-existing mental and cognitive deficits had rendered him permanently totally disabled. Included in the evidence the compensation court relied on were the reports of Drs. Rich and Golnick that plaintiff's mental and cognitive deficits affected plaintiff's ability to work. The Supreme Court found that under odd-lot doctrine, the compensation court could look to plaintiff's work-related physical injury along with his pre-existing mental and cognitive deficits in order to determine his loss of earning capacity.

Therefore, based on the evidence and applicable law, the Supreme Court determined that the Workers' Compensation Court did not err in finding plaintiff permanently totally disabled.

#### **4. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015)**

##### PSYCHOLOGICAL INJURY

##### AGGRAVATION

##### EVIDENCE

The Supreme Court determined there was sufficient evidence for the trial court to find that plaintiff sustained a 100 percent loss of earning power due to three assaults which resulted in physical and psychological injuries.

Plaintiff was employed as a registered nurse and was assaulted by patients on three occasions. On April 16, 2008, a patient whipped plaintiff with a vacuum cleaner cord several times and punched her in the jaw. She sought medical treatment for bruising and pain and reported having difficulty eating and sleeping and other issues following the assault. In May 2008, plaintiff was kicked and bitten on the arm by a patient. She did not seek medical treatment, but her symptoms worsened and she reported panic attacks, anxiety, depression and other symptoms. A third incident occurred on July 6, 2008 when a patient grabbed her and made “extremely aggressive” sexual comments to her. She did not receive treatment for physical injuries associated with that assault. That month plaintiff underwent psychiatric evaluations by two doctors and was diagnosed with major depressive disorder and PTSD. She was hospitalized multiple times through March 2009 for her psychiatric injuries. Plaintiff’s expert psychiatric witness, Paula Malin, M.D., who examined plaintiff and reviewed her records determined that plaintiff’s treatment was directly related to the assaults, that she had been incapable of working since the assaults, and that she would require future treatment.

Plaintiff filed a petition in April 2009 alleging the assaults resulted in depression and post-traumatic stress disorder. Defendant claimed there was no evidence of physical injuries from the second and third assaults, so any psychological injuries that resulted from them were not compensable and any evidence related to them should be excluded. After weighing conflicting expert testimony and testimony from plaintiff, her husband, and her counselor, the trial court found that the first assault was an “accident” within the meaning of the Nebraska Workers’ Compensation Act and the second and third assaults were aggravations of the initial injury. The trial court ordered defendant to pay permanent and total disability benefits as well as past and future medical expenses.

Defendant appealed, objecting to the trial court’s reliance upon a report by plaintiff’s expert psychiatric witness, Dr. Malin. The Court had previously held that a claim for a psychological or mental condition requires that the mental condition must be related to or caused by the physical injury. See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007). Defendant argued that the trial court should not have considered the second and third assaults in its determination of plaintiff’s disability since there was no evidence that plaintiff suffered a physical injury in the latter assaults. Defendant also asserted that the trial court should not have considered Dr. Malin’s opinion which was in part based the latter assaults. Defendant claimed that without Dr. Malin’s opinion, plaintiff had no evidence of causation and failed to meet her burden of proof.

The parties had stipulated that the first assault involved a physical injury and was independently compensable. Defendant alleged that plaintiff suffered no physical injury from the second assault, so no resulting mental injury would be compensable. The Court disagreed, noting that although plaintiff did not receive immediate medical treatment for a physical injury, she did have physical injuries of a welt and bruises on her forearm, according to plaintiff’s testimony and an incident report. Plaintiff did not receive treatment for physical injuries, but the trial judge determined there was evidence to support a finding that the assault aggravated the preceding

compensable injuries. The trial court viewed the three assaults not as three separate accidents, but rather as an initial accident with two subsequent incidents which aggravated or cumulatively added to the damage and injury to plaintiff's mental health which began with the first accident. The Supreme Court held that a separate compensable injury for each and every work aggravation is not required if the initial cause of the injuries is a direct and natural result of the compensable injury. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

Defendant also argued that Dr. Malin was unaware of pertinent facts about plaintiff's past, so her opinions were based on insufficient information and should have been excluded for lack of foundation. The Court disagreed and pointed out that Dr. Malin stated she formed her opinions following a review of plaintiff's psychiatric records which detailed plaintiff's personal and psychological history. Whether Dr. Malin considered the entirety of plaintiff's history went to the weight to be given her opinions rather than their admissibility. The Court found that Dr. Malin's opinions had sufficient foundation based on her review of plaintiff's medical records and an in-person evaluation. Therefore, the trial court did not abuse its discretion in finding Dr. Malin's opinions had sufficient foundation.

Finally, defendant argued that there was insufficient competent evidence to support plaintiff's alleged mental injuries. If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, the Supreme Court is precluded from substituting its view of the facts for that of the compensation court. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013). In addition to plaintiff's testimony and Dr. Malin's opinions, the trial court found that in the 15 years prior to plaintiff's injuries, plaintiff was employed and married and there was no indication that she had any psychiatric problems. The Court held that there was ample evidence to support the trial court's findings and the trial court was not clearly wrong in finding that plaintiff's injuries were the result of the initial accident on April 16, 2008, with two subsequent incidents that aggravated or cumulatively added to the injury.

The Court affirmed the trial court's award which found plaintiff sustained a 100 percent loss of earning power due to psychological injuries resulting from the three assaults that occurred in the course of her employment with defendant.

## **5. *Tchikobava v. Albatross Express, LLC*, 293 Neb. 223, 876 N.W.2d 610 (2016)**

EVIDENCE

FUTURE MEDICAL EXPENSES

REVERSIBLE ERROR

TEMPORARY TOTAL DISABILITY

The Supreme Court affirmed the trial court's decisions denying admission of a deposition into evidence and denying an award of future medical expenses, but reversed the trial court's decision denying temporary benefits for a period of time.

Plaintiff was a truck driver who suffered a work-related injury on August 9, 2010, as a result of a motor vehicle accident. Following his injury, plaintiff was examined by a number of providers, diagnostic studies were performed, and treatment was received for complaints of chest wall pain, leg pain, and back pain. On November 22, 2010, plaintiff began seeing Dr. Reyfman, a pain management specialist, who diagnosed plaintiff with lumbar disk displacement, radiculopathy, a sprain of the ribs, and a fracture of one rib, and recommended continued physical therapy and activity modification. Dr. Reyfman further stated that there was a direct causal relationship between plaintiff's accident and injuries.

At trial, plaintiff testified that none of his medical treatment relieved his pain, that physical therapy made him worse, and that he was told he could not have surgery until he lost weight. Plaintiff further offered the deposition of Dr. Reyfman, which was taken in connection with a separate negligence action that plaintiff brought against the employer of the driver plaintiff alleged was responsible for his work accident. Defendant was a party in the negligence action for subrogation interests. Defendant's attorney in the negligence action was in the same office as its attorney in the workers' compensation case, and was given notice of the deposition but did not attend.

Defendant objected to admission of the deposition based on hearsay, relevance, and foundation. The trial court sustained the objection as to hearsay, reasoning that due process did not allow the out-of-court statement to be admitted to prove truth of the matter when defendant's attorney did not have the opportunity to cross-examine Dr. Reyfman.

In an April 1, 2015 award, the trial court found that plaintiff proved he suffered a lumbar herniated disc, lumbar radiculopathy, and a sprain of the ribs, but was not convinced he suffered a neck injury in the accident. The trial court awarded temporary total disability (TTD) from August 10, 2010, to December 8, 2010, and permanent total disability beginning on May 2, 2014. The court declined to award TTD from December 9, 2010 to May 1, 2014, stating that there was a lack of persuasive proof that plaintiff was treating or recuperating from his injuries after December 8, 2010, the date of the last record documenting medical treatment for his low back, until his office visit with Dr. Reyfman on April 30, 2014. The court further stated that although plaintiff testified he treated with his family doctor during that period, no reports were on the record regarding such treatment.

The trial court also denied future medical care, stating there was little to no evidence that plaintiff required ongoing medical care. Plaintiff appealed.

Plaintiff first argued that the trial court erred in not admitting the deposition of Dr. Reyfman into evidence. The Supreme Court began by noting that admission of evidence is within the discretion of the compensation court, whose determination will not be reversed absent an abuse of discretion, and that as a general rule, the court is not bound by the usual common law or

statutory rules of evidence, but subject to limits on constitutional due process. See *Hynes vs. Good Samaritan Hospital*, 291 Neb. 757, 869 N.W.2d 78 (2015), *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

The Supreme Court then found that it did not need to decide whether the trial court abused its discretion because even assuming that the trial court erred, any such error was not reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). The exclusion is not prejudicial where substantially similar evidence is admitted without objection. *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015). Where evidence is cumulative to other evidence received, its exclusion is not prejudicial. *Scott v. Khan*, 18 Neb. App. 600, 790 N.W.2d 9 (2010). The Supreme Court found that since evidence substantially similar to the deposition was in evidence, the deposition did not contain information that would have altered the trial court's decision, and the exclusion of the deposition did not unfairly prejudice a substantial right of plaintiff.

Plaintiff next argued that the trial court erred in not awarding future medical expenses. The Supreme Court began by noting that before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be necessary to relieve the injured worker from the effects of a work-related injury or occupational disease. *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012). Further, an award of future medical requires explicit evidence that future medical treatment is reasonable and necessary. *Adams v. Cargill Meat Solutions*, 17 Neb. App. 708, 744 N.W.2d 761 (2009). Since there was no stipulation, plaintiff was required to present evidence he was entitled to future medical benefits.

The Supreme Court first found that although the record showed that bariatric surgery to facilitate weight loss was recommended, none of the recommendations were attributed to plaintiff's work injury. Plaintiff also claimed he would require pain treatment for life. Citing *Adams, supra*, the Supreme Court stated that evidence plaintiff was taking pain medication at the time of trial and had taken it in the past was not sufficient explicit evidence to award future medical expenses. Therefore, the trial court did not err in not awarding such expenses.

Lastly, plaintiff argued that the trial court erred in not awarding TTD from December 9, 2010, through May 1, 2014. There were no medical records in evidence regarding the period of TTD at issue. However, plaintiff provided evidence regarding the status of his injury for that period in the form of his testimony. Plaintiff testified he regularly saw his family doctor who prescribed him with medication because of pain, and that because of his pain it was difficult to move and he did not apply for employment.

The Supreme Court cited Larson's treatise as support for the proposition that the compensation court may refuse to follow uncontradicted evidence in the record. 12 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 130.05[3] (2015). However, some explanation of the reasons for doing so would need to be provided. *Id.*

In the instant case, plaintiff's testimony was the only evidence in the record regarding TTD for the period at issue and there was no other evidence to support or contradict this testimony. The trial court's award failed to state what weight, if any, was given to plaintiff's testimony. Further, it was unclear whether TTD for the period at issue was denied because plaintiff's testimony was found to be unreliable, or whether the trial court disregarded plaintiff's testimony as evidence of the extent of disability since there were no medical records provided for the period at issue to assist it in making the ruling. Therefore, the Supreme Court reversed and remanded the case to the trial court on the existing record with directions to rule on plaintiff's claim for TTD, and to provide an explanation for its ruling.

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

### **1. *McDaniel v. Western Sugar Co-op.*, 23 Neb. App. 35, 867 N.W.2d 302 (2015)**

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

ASSAULT

The Court of Appeals found that the trial court was not clearly wrong in its factual finding that plaintiff's injury did not arise out of and in the course of his employment, and the Court affirmed the trial court's order dismissing plaintiff's petition with prejudice.

While performing his work duties, plaintiff encountered a co-worker. They walked together at first, and then the co-worker began assaulting plaintiff with a brass hammer and called him an "f'ing chimo," which is "short for child molester," because he discovered that plaintiff was a registered sex offender. Plaintiff suffered injuries to his nose, clavicle, and left shoulder. The co-worker was terminated.

Plaintiff filed a petition in the compensation court alleging that the assault arose out of and in the course of his employment. The trial court found the injury did not arise out of plaintiff's employment since he was assaulted for reasons that were personal to plaintiff and nothing in the workplace precipitated the assault. The trial court held that plaintiff was not entitled to workers' compensation benefits and dismissed his petition with prejudice. On appeal, plaintiff assigned that the trial court erred in finding the assault did not arise out of his employment and in dismissing his petition with prejudice.

Pursuant to § 48-101 of the Workers' Compensation Act, an employee is entitled to benefits when his or her injury arises out of and in the course of his or her employment. In order for an assault for personal reasons to be brought within the sphere of arising out of the employment, the employment must somehow exacerbate the animosity or dispute or facilitate an assault which would not otherwise be made. *Monahan v. United States Check Book Co.*, 4 Neb. App. 227, 540 N.W.2d 380 (1995). When assessing risk in these types of cases, the focus is on the motivation for the assault. See *id.* Plaintiff argued that but for his shared employment with the co-worker, they never would have met, the co-worker would not have learned of plaintiff's criminal history, and plaintiff would not have been assaulted. In *Monahan*, the Court stated the general rule is that assaults motivated by personal reasons, although occurring at work, are not compensable under workers' compensation law.

In the instant case, the Court found no evidence of any employment dispute between plaintiff and the co-worker or any animosity over work performance. Additionally, the Court found that even though defendant provided an environment and opportunity for the co-worker to assault plaintiff, the trial court's factual finding was not clearly wrong. It was plausible that the two men, who lived three blocks apart in a town of 1,500 people, could have met elsewhere and the co-worker would have had the opportunity to assault plaintiff.

The Court concluded that the trial court was not clearly wrong in determining the plaintiff's injury did not arise out of his employment.

**2. *Hunt v. Pick's Pack-Hauler, Inc. and Great West Casualty Company, Inc.*, 23 Neb. App. 278, 869 N.W.2d 723 (2015)**

CONSTRUCTIVE FRAUD

LUMP-SUM SETTLEMENT

SUMMARY JUDGMENT

The Court of Appeals affirmed the trial court's order of summary judgment and dismissal of plaintiff's petition.

In 2000, plaintiff injured his right arm as a truck driver for defendant. The parties entered into a final lump-sum settlement agreement in accordance with an award of benefits entered by the trial court. The compensation court approved the settlement in 2003 and defendant paid plaintiff pursuant to the settlement. Plaintiff filed a satisfaction and release of defendant's liability in 2003.

In 2011, plaintiff sustained a subsequent injury to his right shoulder while employed by a different employer. In 2012, Dr. Franssen stated his medical opinion that plaintiff's "right shoulder current symptomatology is an aggravation of a pre-existing condition." Dr. Adamson opined that the etiology of plaintiff's symptoms were related to his 2000 injury and concluded that plaintiff had temporarily aggravated a pre-existing condition as a result of his 2011 accident. Plaintiff entered into a release of liability for the 2011 injury, which was filed in the Workers' Compensation Court in 2013. The release did not provide for future medical care of his right shoulder.

In 2013, plaintiff filed a petition in the compensation court seeking to set aside the 2003 lump-sum settlement on the basis of constructive fraud, alleging that his treating physician had incorrectly determined that he had reached maximum medical improvement (MMI) at the time of the 2003 settlement. Plaintiff believed that the opinions of Drs. Franssen and Adamson given in 2012 indicated his right shoulder condition had gotten worse and that therefore his treating physician falsely, though unintentionally, represented that plaintiff had reached MMI in 2002. The compensation court granted defendant's motion for summary judgment, and dismissed plaintiff's petition. Plaintiff appealed.

The Court of Appeals began by reviewing the relevant statutes. Pursuant to §§ 48-139, 48-140, and 48-141, lump-sum settlements are final and not subject to readjustment "unless the settlement is procured by fraud."

Plaintiff claimed that the "contents of the Application for Lump Sum Settlement developed by the parties and submitted to the court was [*sic*] inaccurate and operated in such a manner as to perpetrate a constructive fraud upon the court within the meaning of . . . § 48-139." Plaintiff made no allegation that any party engaged in fraudulent action to procure the lump-sum settlement itself; rather, his allegations of fraud pertained solely to allegedly erroneous medical evidence offered and accepted by the compensation court at trial in 2003. The Court of Appeals stated that the terms of the lump-sum settlement were not the result of any party misrepresenting plaintiff's medical information to induce a settlement through pretrial negotiations; rather, the terms flowed directly from the compensation court's award following trial.

The Court went on to find that the lump-sum settlement statutes do not provide a mechanism for challenging the evidence upon which an award is based. The compensation court may modify or change its findings, order, award, or judgment at any time before appeal and within 14 days after the date of such findings, order, award, or judgment pursuant to Neb. Rev. Stat. § 48-180 (Cum. Supp. 2014), and may modify as set forth in § 48-141. However, plaintiff's argument did not fall within either of those statutes. Further, the plaintiff cited no authority that would allow the compensation court to set aside or modify a fully litigated award more than 10 years after its entry on

the basis of alleged constructive fraud occurring during trial. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008).

The Court of Appeals concluded that the facts of the case did not support a claim of constructive fraud for purposes of reopening or readjusting a lump-sum settlement, even assuming such a claim could be made based upon the alleged erroneous opinion of a claimant's own physician more than 10 years after the matter was fully litigated.

Because plaintiff's allegations of fraud did not pertain to the procurement of the lump-sum settlement as contemplated by §§ 48-139 to 48-141, but instead pertained only to trial evidence upon which the court's March 14, 2003, award was made, the compensation court properly dismissed plaintiff's petition to set aside the lump-sum settlement.

### 3. *Bolles v. Midwest Sheet Metal Co., Inc.*, 23 Neb. App. 269, 869 N.W.2d 717 (2015)

CLAIM PRECLUSION

DEATH BENEFITS

MEDICAL EXPENSES

STATUTORY INTERPRETATION

The Court of Appeals reversed the decision of the compensation court which dismissed plaintiff's claim for medical expenses, finding that plaintiff's claim was not barred by the doctrine of claim preclusion.

Gregory Bolles died in 2011, and his spouse, Stacy Bolles filed an action in the Workers' Compensation Court on her own behalf and on behalf of other dependents pursuant to Neb. Rev. Stat. § 48-122 through 48-124 (pertaining to injuries resulting in death). The trial court found that Gregory's death was work-related which was affirmed in *Bolles v. Midwest Sheet Metal Co.*, 21 Neb. App 822, 844 N.W.2d 336 (2014) (*Bolles I*). In July 2013, while the appeal in *Bolles I* was pending, Stacy filed a petition in the compensation court in her capacity as personal representative of Gregory's estate. The sole issue was reasonableness and necessity of Gregory's medical expenses totaling \$18,869.44. Defendant responded by filing a motion to stay or dismiss the matter and the trial court stayed the matter pending the decision in *Bolles I*.

After the stay was lifted in May 2014, the trial judge sustained defendant's motion to dismiss, noting that the plaintiffs in *Bolles I* were awarded various benefits but noticeably absent was any request or award for funeral or medical expenses. In rejecting the contention that a surviving spouse is not eligible for an award of medical expenses, the trial court cited *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.2d. 354 (2007), concluding that the case recognized that a surviving spouse may seek and obtain an award of medical expenses under § 48-122. The trial court found that the present claim could have been litigated in *Bolles I* and was thus barred by the doctrine of claim preclusion.

Stacy appealed, arguing that the claims asserted in *Bolles I* and in the present appeal were distinct and involved different causes of action, requiring different plaintiffs. The plaintiffs in *Bolles I* were Gregory's dependents who invoked their rights under § 48-122 to § 48-124. However, Stacey argued she could not assert a claim for medical benefits as Gregory's dependent because such benefits are recoverable under § 48-120 only by an employee, or in this case, his estate.

The Court of Appeals began with a review of the doctrine of claim preclusion. That doctrine bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if: 1) the former judgment was rendered by a court of competent jurisdiction, 2) the former judgment was final, 3) the former judgment was on the merits, and 4) the same parties or their privies were involved in both actions. *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

The Court disagreed that Stacy could have litigated the claim for medical expenses in *Bolles I*, noting that Stacy was not appointed personal representative of Gregory's estate until well after the filing of the petition in *Bolles I*. Therefore, the fourth prong requiring the same parties or their privies to be involved in both actions was not present in this case.

The Court of Appeals next discussed *Olivotto*, which involved an Award of workers' compensation benefits to a deceased's wife for weekly indemnity benefits, burial expenses, and medical expenses. In *Olivotto*, the Supreme Court held that upon the death of an employee from

work-related injuries, burial expenses shall be paid to his or her dependent or personal representative without deduction for payments of medical expenses. Defendant employer in *Olivotto* had argued that § 48-122 did not provide for payment of medical expenses to a surviving spouse.

The Court of Appeals acknowledged that *Olivotto* recognized an ongoing obligation of the employer to pay medical expenses to a dependent following the death of an employee, but distinguished *Olivotto* from the present case. In *Olivotto*, the employee died several months after filing a petition for workers' compensation benefits, including medical benefits, so his claim was still pending. Upon the employee's death, the employer entered into a stipulation that the petition could be amended to reflect his death and substitute his wife as the named plaintiff. When the employer complained on appeal that the Act did not provide a wife with a basis to recover medical expenses, the Supreme Court disagreed, holding that the employer could not complain about the issue on appeal when it had stipulated at trial that employee's wife could be substituted as the named plaintiff.

In the present case, Gregory collapsed at work and died on the same day. As a result, there was no pending petition for workers' compensation benefits at the time of his death, nor any stipulation between the parties with regard to a claim for medical expenses. Further, plaintiff in *Bolles I* left undecided the issue of medical expenses by indicating in her pretrial statement that medical expenses were not applicable.

The Court of Appeals found that based on the facts of this case, the doctrine of claim preclusion did not bar claims asserted in the current appeal, and that because of distinctive procedural facts, *Olivotto* was not controlling in the present case.

**4. *Yost v. Davita, Inc.*, 23 Neb. App. 482, 873 N.W.2d 435 (2015); 23 Neb. App. 732, 877 N.W.2d 271 (2016)**

MAXIMUM MEDICAL IMPROVEMENT

MODIFICATION

REASONABLE MEDICAL EXPENSES

NEWLY DISCOVERED EVIDENCE / POSTJUDGMENT MOTION

The Court of Appeals affirmed the trial court's findings that defendant was not required to pay for plaintiff's spinal cord stimulator and that plaintiff suffered an increase in incapacity and was at maximum medical improvement (MMI) for her mental injury. The Court also affirmed the trial court's refusal to reopen the record for further evidence.

Plaintiff sustained a compensable injury to her lower back. On November 25, 2009 the trial court determined plaintiff had reached MMI for her back injury and awarded a 35 percent permanent loss of earning capacity and past and future medical benefits. Plaintiff later filed a petition to modify the award, and the parties subsequently entered into a settlement agreement which was approved by the compensation court. The parties stipulated that plaintiff had suffered an increase in incapacity due solely to her work injury and again became temporarily totally disabled pending low-back surgery. The parties further stipulated that the back condition caused or aggravated depression symptoms, and plaintiff was entitled to all reasonable and necessary future medical care for her back injuries and depression.

In January 2011, plaintiff had surgery at the L4-5 and L5-S1 levels of her spine. She continued to have pain, so her surgeon recommended and plaintiff received a spinal cord stimulator in April 2013. Plaintiff treated for depression, insomnia and anxiety, and in May 2013 her treating psychiatrist reported that she was permanently and totally disabled from a psychiatric standpoint.

Defendant filed a petition for modification alleging plaintiff experienced a decrease in incapacity and reached MMI. Plaintiff claimed she reached MMI and requested that the court find her permanently and totally disabled and order defendant to pay for her spinal cord stimulator. In its February 13, 2015 further award, the trial court found that plaintiff reached MMI for her back condition as of October 19, 2012 and for her psychological condition as of June 18, 2014, and that plaintiff was completely disabled as a result of her depression. The court also found defendant was not liable for the cost of the stimulator since plaintiff testified it alleviated some symptoms in her legs and feet, but she still had pain in her back and the stimulator did not aid in her return to work. Also, several physicians opined the stimulator was not necessary and would not alleviate her symptoms.

Defendant then filed a motion to reopen the evidence. At the hearing, the defendant presented an affidavit of plaintiff's former husband indicating plaintiff made misrepresentations regarding the cause and extent of her injuries. The trial court found that it lacked authority to open the record and receive additional evidence after having already rendered a decision. On March 3, 2015, Defendant filed a motion requesting the opportunity to make an offer of proof to allow it to timely perfect an appeal from the denial of its request to reopen the evidence. On March 4, Plaintiff filed a notice of intent to appeal the further award. The trial court then dismissed defendant's motion when it determined it no longer had jurisdiction over the matter since plaintiff had filed her notice of appeal.

On appeal, plaintiff assigned that the trial court erred in failing to require that defendant pay for the spinal cord stimulator. In *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828

N.W.2d 154 (2013), the trial court iterated that § 48-120(1)(a) requires three factors be established: that the service (1) is reasonable, (2) is required by the work injury, and (3) will relieve pain or promote or hasten the employee's restoration to health and employment. In light of certain medical opinions which the trial court found credible and plaintiff's testimony that she still had pain in her lower back after the stimulator was implanted, the trial court found that it was not reasonable treatment. The Court of Appeals 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. Although there were conflicting medical reports, the Court of Appeals agreed with the trial court's determination that the cost of the stimulator outweighed the benefits.

Defendant cross-appealed and claimed the trial court erred in finding an increase in incapacity since the court found that any pain and treatment related to the L2-3 level of plaintiff's spine was not related to the June 2008 work accident, and plaintiff's depression was exacerbated by her generalized back pain, which included pain at the L2-3 level. 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 proved 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 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 relied upon two medical opinions that attributed plaintiff's incapacity and limitations solely to her work disability, and upon a loss of earning report which considered those reports and determined plaintiff suffered 100 percent loss of earning capacity as a result of her physical restrictions and her depression. The Court found no error in the trial court's reliance on those medical opinions to find plaintiff's increased incapacity was due solely to her work injury. Finally, the Court determined that the trial court was not clearly wrong in its factual findings that any pain and treatment related to the L2-3 level of plaintiff's spine was not related to the June 2008 work accident, and that plaintiff's L2-3 spine level was not a pain generator and therefore did not contribute to plaintiff's restrictions or depression.

Defendant also argued that the trial court erred in finding that plaintiff reached MMI for her psychological injury. The trial court considered the conflicting evidence but relied upon the treating psychiatrist's opinion that plaintiff had reached MMI for her psychological injuries. The Court reiterated that it would not substitute its judgment for that of the trial court and found no error in the trial court's finding that plaintiff reached MMI for her depression.

Finally, Defendant had filed a motion to reopen evidence, asking the trial court to reopen the record, accept new evidence and reconsider its decision in the further award. Under Neb. Rev. Stat. § 25-1142, a new trial may be granted on the basis of newly discovered evidence. However, pursuant to § 48-162.03, the compensation court does not have the authority to rule on motions for new trial. The Court found no error in the trial court's denial of defendant's motion to reopen evidence, since, regardless of the title of defendant's pleading, defendant was essentially asking the trial court for a new trial to reexamine an issue of fact based on new evidence, which is not permitted in the compensation court.

Finding no merit in the appeal or cross-appeal, the Court affirmed the trial court's determinations.

**5. *Travelers Indemnity Company v. Julie A. Wamsley, personal representative of the estate of Bruce F. Evertson, deceased.* 23 Neb. App. 734, 876 N.W.2d 678 (2016)**

SUBROGATION

FAIR AND EQUITABLE DISTRIBUTION OF THIRD-PARTY SETTLEMENT

The Court of Appeals affirmed the county court's order distributing the third-party settlement proceeds.

In 2014, the chief executive officer (employee) of Evertson Well Service (employer) was in a car accident with a tractor-trailer and was killed. The estate of the employee resolved the wrongful death claims with EMC, the truck driver's insurance carrier. Travelers, the workers' compensation insurer, consented to the settlement. EMC paid \$250,000.00 to the employee's children and \$250,000.00 to the widow.

Travelers claimed a subrogation interest in the entire amount allocated to the widow and future credits. The county court found that a fair and equitable distribution of the settlement was for the widow to receive \$207,416.69, for the estate attorneys to receive \$42,583.31, and for Travelers to receive nothing. Travelers appealed.

Travelers claimed that the county court erred in applying a "made whole" analysis instead of a "rule of proportionality" analysis in denying Travelers any portion of the third-party settlement for benefits previously paid or future credits. The Court first noted that § 48-118.04 does not prescribe an exact formula for making a fair and equitable distribution. In addition, the Nebraska Supreme Court has specifically rejected the adoption of the "made whole" doctrine or the "rule of proportionality" to determine what constitutes a fair and equitable distribution. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006); *Sterner v. American Fam. Ins. Co.*, 19 Neb. App. 339, 805 N.W.2d 696 (2011) (abuse of discretion for court to apply "made whole" analysis in dividing settlement). Under the plain language of § 48-118.04, the trial court is obligated to make a "fair and equitable distribution." The distribution is left to the court's discretion and is to be determined by the trial court under the facts of each case. *Turco, supra*; *Sterner, supra*.

In this case, the county court considered various factors including the employee's long-term marriage, the couple's enjoyment of travel, and their purchase of a dream home in California. The county court also considered factors such as that Travelers had charged and received the necessary premiums to provide workers' compensation coverage for the employer, that Travelers' financial risk was minimal and insurance companies are in the business of assuming risk, and Travelers did not expend any funds in securing the settlement. Therefore, the Court of Appeals concluded that the county court conducted a fair and equitable analysis.

Travelers also claimed that the county court erred in failing to grant it a future credit. Travelers claimed that a workers' compensation carrier is entitled under § 48-118 to treat amounts recovered by an employee from a settlement with a third-party tort-feasor exceeding the compensation benefits the employer or compensation carrier has paid as "advances against possible future compensation." Travelers relied upon language in § 48-118 which provides: "Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents and shall be treated as an advance payment by the employer on account of any future installments of compensation." (Emphasis supplied.) The Court of Appeals pointed out that in this case, the recovery against the tort-feasor was not made by the employer or workers' compensation carrier; rather, it was made by the employee's personal representative on behalf of the Estate, which recovery was then distributed to the beneficiaries. Thus, the language relied upon by Travelers was not applicable to the instant case.

The Court of Appeals affirmed the county court's fair and equitable distribution of the settlement proceeds.