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

Fiscal Year 2009: July 1, 2008 to June 30, 2009

## *Supreme Court Cases:*

### 1. Bishop v. Specialty Fabricating Co., 277 Neb. 171, 760 N.W.2d 352 (2009)

SCHEDULED MEMBER V. WHOLE BODY INJURIES

STACKING

LOSS OF EARNING POWER

REASONED DECISION

The Supreme Court affirmed the judgment of the trial court which did not permit a separate award for a scheduled member injury in addition to benefits based upon loss of earning power.

Plaintiff injured her left arm and was paid permanent partial disability benefits based on a 22 percent impairment rating. She also developed post traumatic stress disorder (PTSD) as a result of her member injury. After plaintiff completed vocational rehabilitation and returned to work, she was unable to maintain her employment due to her PTSD. Two loss of earning power assessments were completed. One assessment stated plaintiff sustained a 12 percent loss of earning power, and the other stated there was a 20–24 percent loss of earning power.

The trial court awarded benefits based on a 35 percent loss of earning power less the amount defendant paid to plaintiff for her scheduled member injury. The Court found that the member injury was an “essential factor” in assessing loss of earning power, so a separate award for the member injury would lead to an impermissible double recovery.

Plaintiff appealed arguing that the trial court’s award failed to issue a reasoned opinion. The Court found that the trial judge made a reasoned decision in awarding a 35 percent loss of earning power. The judge found that the loss of earning evaluations did not take into account the fact that plaintiff was unable to sustain her employment after vocational rehabilitation due to her PTSD. This was sufficient reasoning for awarding 35 percent loss of earning power rather than the ratings provided in the loss of earning power assessments. The Court also found that the trial judge made specific findings that plaintiff’s PTSD resulted from her scheduled member injury and that permanent loss of earning power could not be fairly and accurately assessed without considering the impact of the scheduled member injury. Therefore, the Court concluded that the trial court’s findings were sufficient for a meaningful appellate review.

Plaintiff also argued that the trial court should not have determined her loss of earning power by considering the impact of the scheduled member injury upon her employability and that scheduled member benefits should have been awarded in addition to the loss of earning benefits. In Madlock v. Square D Co., 269 Neb. at 682, 695 N.W.2d at 418, the Supreme Court held that the trial court must consider whether the member injury is an “essential factor” in assessing loss of earning and awarding benefits. If so, then a separate award for a member injury would be an impermissible double recovery. In this case, plaintiff argued that her scheduled member injury was not an “essential factor” in assessing her loss of earning since her member injury was not required for continued existence of her mental and emotional restrictions. The Court stated that “essential factor” pertains to causation rather than whether one injury can continue to exist without the other. If plaintiff had not injured her wrist, she would

not have sustained a compensable psychological injury. Therefore, to avoid a double recovery, when a body as a whole injury is the result of a member injury, the member injury should be considered in the assessment of the whole body impairment, with no separate award for the member injury.

**2. Lagemann v. Neb. Methodist Hosp., 277 Neb. 335, 762 N.W.2d 51 (2009)**

STATUTORY INTERPRETATION

WAITING-TIME PENALTY

APPEALS

The Supreme Court affirmed the review panel's affirmance of the trial court's denial of waiting-time penalties.

The trial court awarded the plaintiff benefits. The plaintiff appealed the award to a review panel, and the defendant cross-appealed. The review panel affirmed the trial court's award. The plaintiff appealed to the Court of Appeals, but the defendant did not cross-appeal. The Court of Appeals affirmed the review panel decision, and filed its mandate in the Workers' Compensation Court on August 15. The defendant paid the benefits due under the original award on August 14. The plaintiff subsequently requested that the trial court award waiting-time penalties under Neb. Rev. Stat. §48-125 for late payment of benefits. The trial court applied Leitz v. Roberts Dairy, 239 Neb. 907, 479 N.W.2d 464 (1992) and rejected the plaintiff's claim for penalties. The plaintiff appealed the denial of penalties, the review panel affirmed, and the plaintiff further appealed.

The Supreme Court held that the trial court correctly applied the holding in Leitz. The Court reasoned that Legislature amended Neb. Rev. Stat. §48-125 in 1999 after the Leitz decision by adding "or after thirty days from the entry of a final order, award, or judgment of the compensation court…" to the situations where a delinquent payment would result in waiting-time penalties. The Legislature did not change the original language. The Court found that the 1999 amendment codified the Leitz decision. The Court reasoned that by amending Neb. Rev. Stat. §48-125 following Leitz to track that holding, the Legislature acquiesced to the Court's interpretation. Any cases prior to the amendment that were contrary to the Leitz holding were also disapproved by the 1999 amendment.

Under Leitz as codified by the 1999 amendment to Neb. Rev. Stat. 48-125, a waiting-time penalty cannot be assessed absent a final adjudication after appeal. The adjudication is not final until the mandate is filed in the Workers' Compensation Court, and the 30-day period begins on that date. In this case, payment was made before the mandate was filed, and the trial court properly declined to award penalties.

The Supreme Court also specifically rejected the plaintiff's argument that Neb. Rev. Stat. §48-125 requires payment of any uncontested portion of an award while an appeal is pending. The Court reasoned that that if the Legislature had intended such a result, the language of the 1999 amendment would have so indicated.

**3. Obermiller v. Peak Interest, L.L.C., 277 Neb. 656, 764 N.W.2d 410 (2009)**

STATUTE OF LIMITATIONS

STATUTORY CONSTRUCTION

WAITING-TIME PENALTIES

The Supreme Court reversed the trial judge's order granting summary judgement and remanded the cause to the trial court.

On October 23, 1996, plaintiff sustained an injury at work. On February 7, 2003, defendant mailed the last payment to plaintiff's treating physician. On February 13, 2003, plaintiff's treating physician received the payment. On February 8, 2005, plaintiff filed a workers' compensation claim against defendant. The trial judge ruled that the statute of limitations barred plaintiff's claim and granted summary judgment for defendant. The review panel affirmed.

The Supreme Court began by stating that §48-137 sets out the two-year statute of limitations for workers' compensation claims, but noted that the workers' compensation statutes do not define the "time of the making of the last payment" which triggers the statute of limitations, so it is unclear whether this means when payment is mailed or when it is received. The Supreme Court then noted that the trial court and the review panel relied on the Court's decision in Brown v. Harbor Fin. Mortgage Corp., 267 Neb. 218, 673 N.W.2d 35 (2004), to conclude that the date payment is mailed triggers the statute of limitations. In Brown, the Court considered whether an employer should be subjected to a 50 percent penalty pursuant to 48-125(1) for delinquent payments 30 days from the entry of an award, where the insurance carrier mailed a payment within 30 days of the entry of the award, but which was received by the employee 33 days after the entry of the award. The Court concluded in Brown that the employer mailed payment within 30 days and was not delinquent.

Defendant argued that §§48-125 and 48-137 should be construed consistently so that an employer or insurance carrier makes payment when it mails a payment and not when the payment is received. The Court noted that there are fundamental differences between time limits for payment of benefits under 48-125 and for filing a claim within the statute of limitations under 48-137. These differences lie in which party is being penalized for not complying with the time limit and the purpose that the date of payment serves under each statute.

Under §48-125, the employer or insurance carrier is penalized for not complying with the time limit for payment, thus it is important for the employer to know when payment will avoid a penalty. The date of mailing rule puts the time limit in control of the employer or insurance carrier who is the party who will be penalized for noncompliance. Therefore, it allows the employer to know when payment has to be made to avoid penalty.

But under §48-137, it is the employee who is penalized for not complying with the time limit, and the date of mailing rule, if used, would create an unsure trigger date for the employee. Using the date the employee receives payment to trigger the statute of limitations puts compliance with the time limit in control of employee who is the party who will be penalized for noncompliance.

Therefore the Supreme Court distinguished the present case from Brown and held that under §48-137, the "time of making of the last payment" which triggers the statute of limitations is the date the employee or employee's provider receives payment.

**4. James E. Risor v. Nebraska Boiler, 277 Neb. 679, 765 N.W.2d 170 (2009)**

REPETITIVE TRAUMA V. OCCUPATIONAL DISEASE

DATE OF INJURY

CREDIT FOR WAGES PAID

NOTICE OF INJURY

STATUTE OF LIMITATIONS — FAILURE TO FILE FIRST REPORT OF INJURY

LAW-OF-THE-CASE DOCTRINE

The Supreme Court affirmed the review panel's decisions in the substantive appeal and its decision to deny the insurer's intervention as this Court decided in Risor v. Nebraska Boiler (Risor I) in 2008.

Plaintiff initially sought treatment for hearing loss in 1988, but the medical records did not mention his work environment as a possible cause of his hearing loss. He first missed work time due to the hearing loss on October 19, 1993 to see a physician for a hearing loss evaluation per defendant's referral. Plaintiff testified that everyone he worked with knew about his hearing loss and accommodated him. In January 2004, Plaintiff filed a petition seeking workers' compensation benefits for hearing loss and other injuries. Plaintiff retired on February 12, 2004. Defendant filed its first report of injury for plaintiff's hearing loss on February 17, 2004. In July 2005, a physician reported that plaintiff had 100 percent impairment for both ears and his employment with defendant was a definitive contributor. In April 2006, the trial court awarded permanent total disability benefits for 100 percent hearing loss. In May 2006, defendant attempted to obtain a new trial because the incorrect insurance carrier participated in the April trial. The review panel denied intervention by the actual carrier, Twin City Fire Insurance Company (Twin City), and the Court affirmed in Risor I.

On appeal to the Supreme Court, defendant argued that the hearing loss was an occupational disease rather than an accident. If an occupational disease, payments to plaintiff would commence on the date of disability (loss of labor market access), or February 12, 2004 when plaintiff retired. If an accident, payments to plaintiff would commence on the date of the injury (when plaintiff first missed work and sought treatment), October 19, 1993. Section 48-101 requires an employer to compensate an employee "[w]hen personal injury is caused to an employee by accident or occupational disease . . ." The review panel recognized a split of authority on whether hearing loss is a repetitive trauma injury (classified as an "accident") or an occupational disease. Pursuant to §48-151(3), an occupational disease must be peculiar to a particular trade, occupation, process, or employment. Defendant argued that repetitive trauma injuries involve an employee's job duties or physical actions, and noise exposure did not involve an employee's job duties or physical actions, so the injury must be an occupational disease. The Court held that "injury" as defined by the Act is broad enough to include loud noise, and noise exposure is not a condition of employment peculiar to plaintiff's employment since many occupations involve loud noise exposure. Defendant also argued that plaintiff's hearing loss was not an "accident" because it was not "unexpected or unforeseen" since defendant required employees to wear hearing protection. The Court stated that the employees were entitled to rely on the hearing protection so as not to expect or foresee they would have hearing loss. The review panel affirmed the trial court's decision that plaintiff's gradual 100 percent hearing loss was a repetitive trauma injury and should be tested under the statutory definition of an "accident" rather than an "occupational disease." The Court agreed.

Defendant argued that the review panel erred in affirming the trial judge's finding that the date of injury was October 19, 1993. Section 48-151(2) defines "accident" as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." "Suddenly and violently" is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. Defendant contended that there was insufficient evidence to prove plaintiff missed work for the October 19, 1993 medical appointment. Alternatively, defendant argued the date of injury was some time in the 1980's when plaintiff first had symptoms, so plaintiff's claim was time-barred. The Court found no evidence that plaintiff discontinued work in the 1980's to seek medical treatment, and the trial court could have reasonably concluded that the claim was not compensable until plaintiff discontinued work for the October 19, 1993 appointment. Defendant then argued that its accommodation of plaintiff's hearing loss in the 1980's effected a discontinuance of employment. In Owen v. American Hydraulics, 258 Neb. 881, 606 NW.2d 470 (2000), the Court recognized that a job transfer can constitute a discontinuance of work that establishes the date of injury; however, here the accommodation was not sufficient to establish the date of injury since plaintiff was not transferred to a position away from the noise. Finally, defendant argued that plaintiff did not plead October 19, 1993 as the date of injury, so the trial court was clearly wrong in finding October 19, 1993 was the date of injury. The Court found that defendant was sufficiently advised that October 19, 1993 was a possible date of injury, and defendant defended against the issue. The Court held that the review panel did not err in affirming the trial court finding that plaintiff's date of injury was October 19, 1993.

Plaintiff was awarded permanent total disability benefits, and defendant was ordered to begin payment while plaintiff was still working for defendant. Defendant argued that paying disability benefits while plaintiff was working and receiving wages was grossly unfair. Section 48-119 requires compensation to be paid from the date of disability. As stated in Ludwick v. TriWest Healthcare Alliance, 267 Neb. 887, 678 N.W.2d 517 (2004), "disability" is defined in terms of employability and earning capacity rather than loss of bodily function. In gradual injury cases, the date of injury is the date disability begins. The Court held that the workers' compensation statutes do not require a claimant's award for a scheduled disability to be reduced by subsequently earned wages, so a worker is entitled to compensation for a scheduled disability even if he or she continues to work.

Defendant also argued that plaintiff did not give timely, written notice of his injury as required by §48-133, so he could not make a claim for compensation benefits. Section 48-133 requires such notice unless it can be shown that the employer had notice or knowledge of the injury. Notice or knowledge of a worker's injury is sufficient if a reasonable person would conclude that the injury is potentially compensable and that the employer should investigate the matter further. See Scott v. Pepsi Cola Co., 249 Neb. 60, 541 N.W.2d 49 (1995). The review panel found that defendant had notice of the injury because (1) defendant took precautions to prevent the noise level at its workplace from causing hearing loss; (2) its nurse referred plaintiff to a hearing specialist in 1993; and (3) it knew the results of plaintiff's evaluation. Also, the review panel noted the trial judge's finding that plaintiff's hearing loss in the 1980's was accommodated by defendant. The Court affirmed the review panel's decision that defendant had sufficient notice.

Defendant argued that plaintiff's claim was barred by the §48-137 two-year statute of limitations since plaintiff knew he had a hearing loss in the 1980's and thought it was work related but he did not file a petition. Plaintiff filed a petition in January 2004, and defendant filed the first report of injury on February 17, 2004. Section 48-144.04 provides an exception to the two-year limitation on filing a claim: If the employer, insurer or risk management pool has knowledge of an injury and does not file a first report of injury, then the two-year limitation does not begin to run until the report is filed with the compensation court. The Court noted that the same test for knowledge of the injury applies to §§48-144.04 and 48-133, and the Court already determined that defendant had knowledge of the injury for purposes of §48-133. Defendant did not file the

first report of injury until after plaintiff filed his petition; therefore, the claim was not barred by the statute of limitations. The Court affirmed the review panel's affirmance of the trial judge's determination that the exception under §48-144.04 applied.

Finally, defendant argued that the review panel incorrectly determined that the Supreme Court addressed its arguments in Risor I regarding Twin City's right to participate in these proceedings. In Risor I, the Court held that an employer's insurer is not a necessary party in a workers' compensation action brought solely against the employer and that the workers' compensation statutes did not authorize postjudgment intervention. Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication. Pennfield Oil Co. v. Winstrom, 276 Neb. 123, 752 N.W.2d 588 (2008). Here, the Court held that the review panel correctly declined to consider arguments regarding Twin City's participation in this action since this Court had already decided that issue in Risor I.

**5. Stacy v. Great Lakes Agri Mktg., 276 Neb. 236, 753 N.W.2d 785 (2008)**

SCHEDULED MEMBER V. WHOLE BODY INJURIES

PERMANENT TOTAL DISABILITY

MAXIMUM MEDICAL IMPROVEMENT

VOCATIONAL REHABILITATION

ATTORNEY FEES

The Supreme Court affirmed the review panel's affirmance of the trial court's award of benefits.

The plaintiff sustained a work-related injury when a piece of metal hit his right knee and caused a fracture. He developed deep vein thrombosis in his right leg, required continuing anticoagulation therapy, and he developed reflex sympathetic dystrophy. The employer offered him a desk position as a return to work option, but the plaintiff declined the job offer.

The Court first addressed the issue of whether the trial court was correct in determining that the plaintiff's injury was a scheduled member injury to his right lower extremity rather than a whole body injury. Under Ideen v. American Signature Graphics, 257 Neb. 82, 595 N.W.2d 233 (1999), the test for whether an injury is a member or whole body injury is the location of the residual impairment, not the situs of the injury. In this case neither the medical testimony or the plaintiff's own testimony established a whole body impairment caused by any of the diagnosed conditions. The need for anticoagulation therapy could not establish a whole body injury as a matter of law because there was no evidence of whole body impairment. The Court noted that the effects of the medical treatment could be a direct and natural result of the original injury, but in this case there was no evidence that the effects produced a whole body impairment. While there was evidence in the record showing that the plaintiff suffered from reflex sympathetic dystrophy, there was not evidence that the condition had spread or caused impairment to other parts of the plaintiff's body. Therefore, the evidence supported the trial court's determination that the compensable impairment was to the scheduled member only.

The plaintiff argued that the trial court erred in failing to find the plaintiff was entitled to permanent total disability benefits as a matter of law. The Court noted that it was not incorrect for the vocational counselor or the trial court to rely on the fact that there was a position available at the defendant employer. A trial court cannot be expected to ignore an actual available position, at least when there is no indication that an offer was not genuine. Additionally, the Court noted that an award of permanent total disability depends on a finding that the plaintiff sustained a whole body injury, which was not the case here.

The plaintiff argued that the trial court erred in the finding the plaintiff to be at maximum medical improvement. The Court noted that the determination of maximum medical improvement is a question of fact, and there was expert evidence supporting the trial court's finding. Therefore, the trial court was not clearly wrong in finding maximum medical improvement.

The plaintiff also disputed the trial court's decision to decline vocational rehabilitation services. The Court noted that both experts opined that services were not warranted because of the available position with defendant. The Court also noted that awarding services would be contrary to the statutory priorities for vocational rehabilitation set forth in Neb. Rev. Stat. 48-162.01(3) in light of the available position with the defendant, and there was no evidence that the offer was insincere.

The Court also determined that the trial court was not clearly wrong in finding that a reasonable controversy existed regarding extent of permanent disability, because there were conflicting expert opinions on the issue of the extent of permanent disability.

Finally, the Court upheld the review panel's determination that no attorney fee was due to plaintiff on appeal. At trial, there was an issue about what amount of credit the defendant was claiming in its summary of benefits paid. Plaintiff alleged that two entries in the underlying payment information had been double counted in the summary. The trial court indicated it would reserve a finding on credit until the parties could resolve the confusion. However, in its written order, the trial court awarded credit based on the disputed summary. The review panel reversed the credit finding and declined an attorney fee because there was no clear increase in the amount of the award. The Supreme Court upheld the review panel's denial of the attorney fee first, reasoning that under Neb. Rev. Stat. §48-125(2) there must be both an increase in the award and the amount of compensation must be "disputed" in order to sustain an award of a fee. Here, the Court noted, it was unclear whether there would be an increase in the award. The error committed by the trial court was not necessarily the amount of credit awarded, but the failure to reserve the issue until the confusion was resolved. The Court said that while an appeal based on incorrect credit could result in a reduction of credit and concomitant increase in the award, as required by §48-125, in this case the issue of the proper amount for credit was still undetermined, and it was impossible to tell whether there would be an increase in the award. Additionally, there was no evidence that defendant agreed with the finding or was arguing against plaintiff's claim of incorrect credit. Therefore, the amount of compensation may not have been "disputed" as is also required by §48-125.

**6. Stueve and Krafka v. Valmont Industries, 277 Neb. 292, 761 N.W.2d 544 (2009)**

ATTORNEY FEE

The Supreme Court reversed the decision of the review panel and remanded the case with specific directions.

The trial court awarded temporary total and permanent partial benefits for bilateral hand injuries, and temporary benefits for a shoulder injury. The permanent partial benefits awarded for the hand injuries totaled $47,602.49.

Two years later, the claimant's attorney filed a motion to withdraw and there was a hearing to determine the attorney fees due. The trial court found that the attorney was entitled to a fee of one-third of the future temporary total benefits awarded for the shoulder. Upon a change in claimant's status — i.e., if the claimant reached maximum medical improvement and then became entitled to permanent benefits or temporary benefits during vocational rehabilitation, or if he reached maximum medical improvement and became entitled to permanent indemnity — the attorney fee would terminate upon motion of the claimant and order of the court. On appeal, the review panel pointed out that the award provided for payment of both temporary and permanent benefits, but the trial court failed to address attorney fees for permanent benefits. The case was remanded for additional findings regarding attorney fees for permanent benefits. After remand, the trial court entered another order that failed to clarify when permanent indemnity benefits were paid or address future payments for the shoulder injury and their relevance to the attorney lien. However, that order was affirmed by the review panel.

The Workers' Compensation Court is the appropriate forum to determine attorney fees and that power is derived from Neb. Rev. Stat. §48-108, which allows the compensation court to enter a lien "against any amount thereafter to be paid as damages or compensation." Foster v. BryanLGH Med. Ctr. East, 272 Neb. 918, 725 N.W.2d 839 (2007). When an attorney's services are terminated prior to completion of the representation, the attorney is entitled to the reasonable value of his or her services rendered up to the time of termination. Baker v. Zikas, 176 Neb. 290, 125 N.W.2d 715 (1964).

The Supreme Court stated that when determining a satisfactory fee for services, the primary inquiry is reasonableness. The Nebraska Rules of Professional Conduct list the following eight factors in determining reasonableness: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, 3) the fee customarily charged in the locality for similar legal services, 4) the amount involved and the results obtained, 5) the time limitations imposed by the client or by the circumstances, 6) the nature and length of the professional relationship with the client, 7) the experience, reputation, and ability of the lawyers performing the services, and 8) whether the fee is fixed or contingent. Neb. Ct. R. of Prof. Cond. §3-501.5.

The Court found that the parties signed a contingency fee contract and during the pendency of the contract, the claimant was awarded $47,602.49 for his hand injuries and an undetermined amount of future benefits for the shoulder injury. However, there was not a clear record of the amount the attorney had been paid to date or a clear order determining either the amount or method by which the attorney would be paid in connection with future benefits. Therefore, the Court found that the attorney was due one-third of the amount awarded up to the date he was discharged and a reasonable amount of future benefits the claimant will recover on his shoulder injury, which benefits were due to the attorney's work.

The Court reversed the review panel order with orders to remand to the trial court. The Court instructed the trial court to determine the amount the attorney had been paid and the amounts

still owed for the shoulder injury, using the factors outlined in the Court's opinion and found in the Code of Professional Responsibility.

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

**1. Adams v. Cargill Meat Solutions, 17 Neb. App. 708, ___N.W.2d___ (2009)**

FUTURE MEDICAL EXPENSES

The Court of Appeals reversed the review panel's affirmance of the trial court's award of future medical expenses and remanded with directions to remand to the trial court to modify the award of future medical expenses.

After the submission of evidence, the trial court entered an order on December 7, 2007, awarding various benefits to the plaintiff, which included an award for payment of future medical expenses. The trial court stated the basis for the award of future medical expenses was the fact that the plaintiff continued to take prescription medication. The review panel affirmed the award of future medical expenses, stating that an inference could be drawn from plaintiff's continued use of prescription medication that a physician was continuing to prescribe the medication, and the need for it would continue into the future.

The Court of Appeals cited Foote v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001), which held that a stipulation of the parties or evidence that future medical treatment is reasonably necessary to alleviate the effects of the work injury is a prerequisite to an award of future medical expenses. Here, there was no stipulation. The evidence cited in support of the need for future medical treatment was plaintiff's testimony that she was currently taking prescription medication. Her testimony did not indicate whether her need for prescription medication would continue, and it indicated that despite taking the medication, she still had pain. None of the medical opinions contained a statement that plaintiff would need future medical treatment, and a few of the medical opinions indicated that she would not.

The plaintiff's testimony that she was currently taking prescription medication, but that it was not alleviating the symptoms, was insufficient for an award of future medical benefits. The Court of Appeals noted that the plaintiff's testimony did not indicate for how long she would continue to take the medication. The Court stated that "an award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury."Adams v. Cargill Meat Solutions, 17 Neb. App. 708, 714, ____ N.W.2d ___, ___ (2009). In this case, there was no evidence that the plaintiff would need the medication into the future, nor was there evidence that it was necessary to relieve her from the effects of the injury as she testified the medication was not relieving her pain.

**2. Kruid v. Farm Bureau Mutual Insurance Company and Western Agricultural Insurance Company, 17 Neb. App. 687, (2009)**

DISTRICT COURT JURISDICTION

INSURANCE POLICY COVERAGE UNDER THE ACT

SUMMARY JUDGMENT

The Court of Appeals reversed the district court's grant of summary judgment and remanded the case for further proceedings.

The employer operated a business in Nebraska and also had a warehouse for that business in South Dakota. In 2004, an employee working at the South Dakota facility suffered an injury. The workers' compensation carrier denied coverage on the grounds that the policy did not cover the employee in South Dakota. The employer filed an action in district court requesting attorney fees he had expended in defending the workers' compensation claim in South Dakota and a declaration that the policy covered his South Dakota employees. The carrier moved for summary judgment on the grounds that the terms of the policy did not provide coverage for the employees in South Dakota.

The Court of Appeals first noted that summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence. Jardine v. McVey, 276 Neb. 1023, 759 N.W.2d 690 (2009).

The Court agreed with the employer that the plain language of the policy would exclude the claim, but stated that the policy necessarily provided all coverage mandated by the Workers' Compensation Act. An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute. Lynch v. State Farm Mut. Auto. Ins. Co., 275 Neb. 136, 745 N.W.2d 291 (2008). However, when an applicable statutory provision conflicts with the provisions of an insurance policy, the statute and not the insurance policy controls. Danner v. State Farm Mut. Auto. Ins. Co., 7 Neb. App. 47, 578 N.W.2d 902 (1998).

The Court stated that the Act mandates that insurers cover all of the employees for which the employer is liable under the Act. Pursuant to Neb. Rev. Stat. §48-146, all workers' compensation insurance policies "shall include within their terms the payment of compensation to all employees, officers, or workers who are within the scope and purview of the …Act." The plain language of the statute requires that a workers' compensation insurance policy cover all employees that fall within the purview of the Act. Thus, under Nebraska's full coverage statute, the policy covers all employees, including those in South Dakota, as long as the employee falls within the scope of the Act.

Therefore, the question became whether the Act could apply to this claim. The Court opined that there was sufficient evidence presented to create a question of material fact as to whether the employer was an employer under the Act and whether the injured worker qualified as an employee under the Act. Therefore the carrier was not entitled to summary judgment.

The carrier also asserted that the district court did not have jurisdiction to hear the case because the Workers' Compensation Court had exclusive, original jurisdiction to determine coverage under the Act. Neb. Rev. Stat. §48-161 was amended in 1990 to grant the Workers'

Compensation Court jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits. The Supreme Court had previously explained that the 1990 amendment did not destroy the district court's jurisdiction over coverage disputes because the district court's general jurisdiction emanates from article V, §9 of the Nebraska Constitution and therefore the legislature cannot limit or control the jurisdiction of the district court. Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 591 N.W.2d 524 (1991). The Court stated that the underlying claim in this case was breach of an insurance contract. Because the district court had the constitutional authority to decide common-law actions for breach of contract, the district court had the power to decide the insurance coverage dispute.

The Court held that the district court erred in granting summary judgment and remanded the case to resolve the numerous factual issues that may have to be addressed.

**3. Nerison v. National Fire Ins. Co. of Hartford, 17 Neb. App 161, 757 N.W.2d 21 (2008)**

JURISDICTION

ELECTION OF COVERAGE

NOTICE TO INSURER

STATUTORY CONSTRUCTION

The Court of Appeals affirmed the trial court's dismissal of plaintiff's claim.

Plaintiff was a self-employed truck driver who purchased workers' compensation insurance from a non-profit association formed to provide insurance brokerage services for independent truck drivers. Plaintiff believed that he was purchasing insurance from the association to cover himself, and he sent them his premiums along with a statement that he was self-employed and that he elected to be covered under the Nebraska Workers' Compensation Act (Act).

The association purchased insurance through a client company and sent the client company monthly premiums and a list of association members. The association also sent a copy of plaintiff's election statement to the client company who maintained it in their records. The client company in turn had entered into a leasing agreement with a professional employer organization (PEO), whereby employees of the client company were co-employees of the PEO and covered under the PEO's workers' compensation policy. The client company did not forward plaintiff's election statement to the PEO or its insurer. Plaintiff did receive an insurance certificate showing workers' compensation coverage under the policy issued to the PEO by its insurer.

As part of the leasing agreement, the client company was to send a list of owner operators each month to the PEO along with payments due under the agreement. For June and July 2002, the client company did not send payments or a list of owner-operators to the PEO due under the agreement. Plaintiff sustained a work-related injury on June 14, 2002.

Plaintiff filed suit in the Workers' Compensation Court against the PEO, its insurer, and the client company for workers' compensation benefits. Plaintiff set forth four theories of liability. The trial court concluded that it generally had jurisdiction to determine the existence of workers' compensation coverage, so therefore had jurisdiction to decide the claim against the insurer. The trial court then dismissed the plaintiff's claim against the insurer, finding that plaintiff was not covered by workers' compensation insurance as he failed to provide the insurer with proper notice of his election to bring himself within the provisions of the Act as required by §48-115(10). In regard to the claims brought against the PEO and the client company, the trial court found that these claims were not within the jurisdiction of the Workers' Compensation Court as they were breach of contract claims and negligence claims. The review panel affirmed.

Plaintiff appealed, arguing that pursuant to the staffing agreement he was a co-employee of the PEO and the client company for workers' compensation purposes, and that therefore the trial court erred in applying §48-115(10) to bar his claim.

The Court of Appeals began by agreeing with the trial court's conclusion that the Workers' Compensation Court did not have jurisdiction for the claims brought against the PEO and the client company as they were claims for negligence, breach of contract, and equitable claims.

The Court of Appeals then found that plaintiff's petition contained a judicial admission that he was a self-employed truck driver. The Court stated that §48-115(10) sets forth the requirement that self-employed individuals need to provide notice to the workers' compensation insurer of

their election to bring themselves within the provisions of the Act. The Court noted that that the client company hadn't made the required payments to the PEO under the staff leasing agreement for two months including the date of injury so plaintiff's status as a co-employee was in question on the date of injury. The Court noted further that the election document signed by plaintiff was never forwarded to the PEO or the insurer, so the insurer received no notice showing that plaintiff elected to bring himself within the provisions of the Act.

Therefore, the Court held that there was sufficient evidence to support the trial court's conclusion that plaintiff was self-employed and did not comply with §48-115(10).

**4. Zitterkopf v. Aulick Industries and the United Fire Group, 16 Neb. App. 829, 753 N.W.2d 370 (2008)**

PRESCRIPTION MEDICATION — MEDICAL NECESSITY

CONFLICTING MEDICAL EVIDENCE

PROXIMATE CAUSE

The Court of Appeals affirmed the order of the review panel which affirmed the order of the trial judge.

In 1999, plaintiff was injured in a work-related explosion. In 2006, the trial court found the plaintiff to be permanently and totally disabled and awarded future medical care. The court also determined that plaintiff's sleep apnea was not related to his employment and denied medical expenses for that condition. No appeal was taken from the original award.

Plaintiff later filed a motion to compel defendant to pay for the prescription for Provigil. The trial court found that Provigil was prescribed to treat the unrelated sleep apnea and to treat drowsiness caused by the pain medication required to treat the work-related injuries. The trial judge concluded that plaintiff need not prove that the sole cause of the prescription for Provigil was due to the side effects of pain medication. The employee only needed to prove that one of the reasons for the prescription was to reduce the side-effects of injury-related pain medication. The trial court relied on Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 461 N.W.2d 565 (1990) where the court held that an employee is entitled to benefits when an injury combines with a preexisting condition to produce disability. The trial court reasoned that the same would hold true where the necessity of prescribed medication is caused by pain medication used to treat the injury arising out of and in the course of the employee's employment, but also is used to treat a preexisting condition or condition unrelated to the compensable accident. The review panel affirmed.

The Court first answered whether the evidence was sufficient to support the trial court's findings. In testing the sufficiency of the evidence to support the findings of fact, the evidence must be viewed in the light most favorable to the successful party. Murphy v. City of Grand Island, 274 Neb. 670, 742 N.W.2d 506 (2007). Viewed in that light, the evidence showed that Provigil was medically necessary for at least two purposes: (1) to treat the side effects of pain medication necessitated by the compensable injury and (2) to treat the unrelated sleep apnea. The trial court relied upon expert testimony in finding Provigil compensable. Defendants preferred the evidence of another physician, but when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. Lowe v. Drivers Mgmt., Inc. 274 Neb. 732, 743 N.W.2d 82 (2007). The Court stated that they would not substitute their judgment for that of the trial court.

The Court then addressed whether defendant was required to pay for Provigil under the original award. Neb. Rev. Stat. §48-120(1)(a) authorizes an award of future medical expenses, including necessary medication. However, there must be a causal connection between the compensable injury and the future medical care. The Court stated that requiring the employee to prove that the unrelated condition was not the sole cause for the treatment merely restated the necessity of a causal connection between the original compensable injury and the medical treatment. The Court agreed that the employer would not be liable where treating the unrelated condition was the sole purpose of Provigil. Under the analogy to Heiliger, plaintiff had the burden of proving that the sleep apnea was not the sole reason for Provigil. Plaintiff met this burden by proving that both the side effects and sleep apnea necessitated the medication.

In the instant case, the trial judge’s finding that plaintiff met this burden was not clearly wrong. The Court also determined that the trial judge’s decision correctly applied the law requiring a causal connection between the original work-related injury and the subsequent medical treatment.