

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

Fiscal Year 1999: July 1, 1998 to June 30, 1999

Supreme Court Cases:

1. Jackson v. Branick Indus., 254 Neb. 950, 581 N.W.2d 53 (1998).

SUBROGATION

SUBSTANTIVE VS. PROCEDURAL

The Supreme Court reversed and remanded with directions a district court's decision to make an equitable distribution of a settlement.

The defendant-insurer had a subrogation interest and joined the plaintiff in a product liability suit against the manufacturer of the tire dolly that injured plaintiff. Before trial, a settlement agreement was reached. At the time of plaintiff's accident, the defendants were entitled to the dollar amount of any compensation paid to or on behalf of the employee pursuant to §48-118. However, at the time of settlement, §48-118 had been amended to allow the court to make an equitable distribution of the settlement between the employee and the employer or its insurer. After attorney fees were deducted from the settlement amount, plaintiff requested a hearing to equitably divide the remaining settlement proceeds. The defendants argued that the amendment was not applicable to the settlement and they should receive a dollar-for-dollar recovery of their subrogation interest.

The district court found the changes in §48-118 were procedural in nature and therefore should be applied to this case because the lawsuit and the settlement came into being after the effective date of the legislation. The district court gave an equitable share to the defendants of 85 percent and 15 percent to the plaintiff.

The Supreme Court disagreed and relied on *Cosse v. Allen-Bradley Co.*, 625 So.2d 486 (La.1993) to find that the amendment change in the instant case essentially called for the application of the law of equity to the statutory right of subrogation, much as the change in *Cosse* called for the application of the law of comparative negligence to the statutory right of subrogation, thus changing the nature of the subrogation interest itself. The Supreme Court found that the defendants' subrogation interest became vested as soon as the injury occurred as it is a well-established general principle that statutes covering a substantive matter in effect at the time of the occurrence govern, not later enacted statutes.

The Court rejected plaintiff's argument that the law of equity has always been applied to §48-118. The Court clarified that statutory and equitable subrogation coexist. Section 48-118 simply gave the right of legal subrogation to the employer without depriving the employer of the right to equitable subrogation under circumstances requiring its application. See *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949) and *Burks v. Packer*, 145 Neb. 373, 9 N.W.2d 471 (1943).

2. Anderson v. Omaha Pub. Sch. Dist., 254 Neb. 1007, 581 N.W.2d 424 (1998).

SUSPENSION OF BENEFIT PAYMENTS

PERMANENT PARTIAL DISABILITY

TEMPORARY TOTAL DISABILITY

MAXIMUM WEEKLY BENEFIT

The Supreme Court reversed and remanded the compensation court's decision which awarded plaintiff temporary total disability benefits but reduced her weekly temporary benefit by the amount of a prior award for permanent partial disability.

The compensation court awarded plaintiff a 10 percent permanent partial disability for her first back injury in 1991 and awarded her the sum of \$56.30 for 300 weeks. In 1995, plaintiff suffered a second injury and the compensation court determined she suffered temporary total disability as a result, subject to a maximum weekly income benefit amount of \$350.00. The compensation court ordered the temporary total disability benefit be reduced by the permanent partial disability amount based upon the provisions of §48-121.01(1)(a)(iii) that an employee's maximum weekly compensation benefit may not exceed the statutory maximum amount.

The Supreme Court disagreed with the reduction. The Court held that payments arising from claimant's prior permanent partial disability award were to be suspended rather than act as a credit toward her temporary total disability payments. The Court agreed with plaintiff that the reduction was in effect causing plaintiff to subsidize her employer's obligation to provide workers' compensation benefits, and quoted the compensation court's dissenting opinion that the Nebraska Workers' Compensation Act should be liberally construed to accomplish beneficent purposes. The Court stated that plaintiff had distinguished her facts from the rule pronounced in *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992) that neither subsection (1) nor subsection (2) of §48-121 states that an injured employee cannot receive the two types of disability at the same time.

However, the dissenting opinion stated that if the Legislature had intended the periods of benefits payable as a result of separate injuries to run consecutively it could have so provided as it did in §48-121(3) where the benefits for each member injury are to run consecutively.

3. La Croix v. Omaha Public Schools, 254 Neb. 1014, 582 N.W.2d 283 (1998)

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

GOING AND COMING RULE

PREMISES RULE

The Supreme Court reversed the compensation court's dismissal of plaintiff's petition and remanded the case for further proceedings.

Plaintiff sustained injuries to her left leg when she fell in a parking lot which was not owned by her employer. The employer encouraged her to park there and provided shuttle bus transportation between the parking lot and workplace. In dismissing plaintiff's petition, the compensation court stated it was bound by the bright-line premises rule adopted by the Supreme Court majority in Johnson, which established that an employee must be injured on employer-owned premises in order to receive workers' compensation benefits. See Johnson v. Holdrege Med. Clinic, 249 Neb. 77, 541 N.W.2d 399 (1996).

The Supreme Court, however, disagreed and distinguished the two cases by pointing out that Johnson involved an employee who was injured while walking to work on public property from a public parking lot. The majority in Johnson held that the employee was not entitled to workers' compensation benefits because the injury did not occur on the employer's premises. A concurring judge in Johnson would have analyzed similar cases involving going to and coming from work by determining whether a "distinct causal connection exists between an employer-created condition and the occurrence of an injury." In the present case, the Supreme Court chose the analysis suggested in the Johnson concurrence. The Court explained that the employer provided transportation from the workplace to the lot, thereby creating a condition under which its employees would necessarily encounter hazards while traveling to the premises where they worked. Thus, a distinct causal connection was established between the employer's sponsoring of the parking lot and the occurrence of plaintiff's injury. The Court therefore concluded that the injury to plaintiff arose out of and in the course of her employment and remanded the cause for further proceedings.

4. Crouch v. Goodyear Tire & Rubber Co., 255 Neb. 128, 582 N.W.2d 356 (1998).

SECOND INJURY FUND

PERMANENT TOTAL DISABILITY

COMBINED DISABILITY

The Supreme Court affirmed the compensation court's finding that plaintiff's bilateral carpal tunnel impairment had combined with her preexisting impairment to render her permanently totally disabled and upheld the finding that the Second Injury Fund (Fund) was liable for its apportioned share.

Plaintiff filed a petition for three work-related accidents and the trial court found she was entitled to benefits for her 1993 right knee and 1994 bilateral carpal tunnel, and combined her impairment of 20 percent to each hand with the preexisting 15 percent left arm impairment and 30 percent right leg impairment, concluding she was permanently totally disabled. The single judge further found that the defendant-employer had met the burden to establish apportionment of benefits with the Fund under §48-128. Defendant-employer was ordered to pay for plaintiff's hand impairments plus past and future medical expenses, and the Fund was ordered to pay for all permanent indemnity after September 21, 1996. The review panel affirmed the decision of the trial court.

On appeal, the Fund argued that its liability is not triggered unless the worker is entitled to compensation from the combined disabilities of the last compensable injury and a preexisting permanent partial disability. The Fund contended plaintiff was not entitled to receive compensation except for the bilateral carpal tunnel. It argued the requirement of §48-128 that the employee must be "entitled to receive compensation on the basis of the combined disabilities," i.e., last and preexisting, was not met because the last injury was to plaintiff's hands only, thus it was compensable under §48-121(3). That section states "the total loss or permanent total loss of use of both hands . . . in one accident, shall constitute total and permanent disability and be compensated for according to subdivision (1) of this section. In all other cases involving a loss or loss of use of both hands, both arms . . . total and permanent disability shall be determined in accordance with the facts." (Emphasis supplied.) In *Rodriguez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988), the Supreme Court held that the "in one accident" requirement in the first sentence quoted above applied to the second sentence as well. In the instant case, however, the compensation court made a specific finding that the last accident occurred in 1994 when plaintiff's bilateral carpal tunnel symptoms were aggravated to the degree that she interrupted her employment and sought medical assistance.

The Court concluded that this finding was not clearly erroneous and that plaintiff sustained an injury to multiple members in one accident entitling her to permanent total disability benefits under §48-121(3). The plaintiff's hand and right leg impairments presented the rare circumstance where the employee's benefits under §48-121(3) were to be determined by the facts, as opposed to the compensation schedule contained in §48-121(1). The Court concluded there was uncontroverted evidence that plaintiff's first two injuries resulted in a loss of earning power of more than 25 percent and constituted a preexisting disability. The degree of disability from the preexisting condition and the last injury in 1994 was greater than she would have sustained from the 1994 injury alone, therefore, plaintiff was entitled to compensation on the basis of her combined disabilities.

5. Gibson v. Kurt Mfg., 255 Neb. 255, 583 N.W.2d 767 (1998).

LOSS OF EARNING POWER EVALUATION

VOCATIONAL REHABILITATION PLAN

The Supreme Court reversed a portion of the Court of Appeals decision resulting in a remand for the immediate determination of plaintiff's loss of earning power.

Plaintiff sustained an injury to his back arising out of the scope and course of his employment as a screw-machine operator. As a result of his injuries, plaintiff could not return to work and filed a petition requesting workers' compensation benefits, specifically, vocational rehabilitation and a determination of loss of earning power. The trial court found that it was not appropriate to determine plaintiff's loss of earning power until he completed vocational rehabilitation. The review panel found that the trial judge was clearly wrong in not assessing plaintiff's loss of earning power as he had reached maximum medical improvement and had received an impairment rating with restrictions at the time of trial. The review panel remanded for a determination of permanent loss of earning power. The Court of Appeals held that plaintiff was entitled to vocational rehabilitation, but that a determination as to his loss of earning power should be postponed until after he completed rehabilitation. Plaintiff petitioned for further review.

In its analysis, the Supreme Court reviewed the holdings in *Thom v. Lutheran Med Center*, 226 Neb. 737, 414 N.W.2d 810 (1987) and *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990), which the Court of Appeals had relied on in making its decision. The Supreme Court, however, did not interpret those cases to require that a loss of earning power evaluation be postponed until after completion of a court-awarded vocational rehabilitation plan. The Court held that upon a determination that plaintiff had reached maximum medical improvement, absent a valid reason for not making such a determination, the trial judge was obligated to make a determination of plaintiff's loss of earning power and stated, "to hold otherwise would impose an unfair hardship on employees with permanent partial disability to the body as a whole who have been granted vocational rehabilitation." The Court pointed out that employees who are not awarded vocational rehabilitation and employees who suffer specific member injuries, as opposed to a whole-body impairment, receive benefits during appeal. Also, where there has been an award of benefits, the employee is not to be left without those benefits during appeal pursuant to §48-644 which provides that "benefits shall be promptly paid in accordance with a determination or redetermination," "regardless of any appeal," and that "the commencement of a proceeding for judicial review . . . shall not operate as a supersedeas or stay." The Court added that although a loss of earning power evaluation should not be postponed, defendants cannot later modify the award based on the grounds that vocational rehabilitation was successful in decreasing plaintiff's loss of earning power based on *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942) and the intent of the Legislature.

6. Miller v. Meister & Segrist, 255 Neb. 805, 587 N.W.2d 399 (1998).

SECOND INJURY FUND

PERMANENT DISABILITY

APPORTIONING RESPONSIBILITY FOR PAYMENT

The Supreme Court reversed the compensation court's finding that the Second Injury Fund (the Fund) was liable but affirmed its award of attorney fees based on an action that seeks to apportion responsibility for payment rather than a reduction in the award.

Plaintiff was originally injured in 1985 and underwent surgeries due to a back injury and incurred additional injuries in 1992 to his back and neck. Plaintiff fell again in 1996 and injured his back and leg. USF&G was the employer's insurer for the 1985 and 1992 injuries and GRE was the employer's insurer for the 1996 injury.

The compensation court found that plaintiff's fall in 1996 aggravated his back condition from the previous injuries and he was now temporarily totally disabled. The court found the Fund was liable but the extent of the Fund's liability could not yet be determined because plaintiff's disability was still considered temporary as a surgery had yet to be performed.

The Supreme Court reversed the compensation court's decision and held that the Fund cannot be held liable unless a permanent disability rating has been awarded. The Supreme Court stated that GRE's arguments were misplaced regarding *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987) and *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). The Court discussed that these two cases only suggest that the Fund may be held liable absent a permanent disability rating because it was undisputed that the employees were permanently disabled. In *Pollard*, medical treatment was completed and the only issue was whether pain management would reduce the permanent disability some time in the future. In *Parker*, the court used the term "temporary" although it was clear the disability was permanent due to preexisting polio and the work related injury.

The Supreme Court affirmed the compensation court's award of attorney fees as a reduction in the award had not been obtained by GRE. The Court relied on *Pollard* here as well stating that a reduction in the amount of such award from §48-125 (1) refers to the total amount of the award to the employee and not to a reduction in the amount to be paid by a specific defendant who is liable to pay a portion of the award.

7. *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998).

LOSS OF EARNING CAPACITY

OCCUPATIONAL DISEASE

The Supreme Court reversed the compensation court's finding that plaintiff was not entitled to a loss of earning capacity as a result of his occupational disease.

Plaintiff's treating physicians opined that he suffered from reactive airways dysfunction syndrome due to long-term exposure to "hog dust". Although he was only symptomatic when exposed to hog dust, doctors stated that plaintiff's continued exposure would likely result in his respiratory symptoms reoccurring. Plaintiff's treating physicians recommended that plaintiff permanently avoid this type of working environment and opined that there was no evidence for permanent impairment. The trial court found that plaintiff suffered from an occupational disease which arose out of and in the course and scope of his employment. However, in accordance with the Supreme Court's opinion in *Snyder v. IBP*, 222 Neb. 534, 385 N.W.2d 424 (1986), the trial court found plaintiff was not entitled to a loss of earning capacity as he did not sustain any permanent functional impairment.

The Supreme Court reversed the workers' compensation court and found that the facts in this case were distinguishable from *Snyder, supra*. In *Snyder*, plaintiff sustained an injury to his shoulder which resulted in no permanent physical impairment and thus, no loss of earning capacity. Unlike *Snyder*, the instant case involved an occupational disease which permanently restricted plaintiff from returning to his former occupation. The Court stated that occupational diseases are different from scheduled member injuries because an occupational disease can result in a loss of earning capacity even after the disease is no longer symptomatic.

The Court restated that "earning power" is not synonymous with wages, but involves an employee's ability to obtain and maintain employment, the capacity to perform the work, and the worker's ability to earn wages in employment for which he or she is engaged. See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). Therefore, the Court determined that an employee who sustains an occupational disease in the course and scope of his or her employment, which permanently restricts the return to his or her prior type of employment, may recover for proven loss of earning power or capacity without establishing a permanent physical impairment to the body as a whole. Such a holding is also recognized in several other jurisdictions including Ohio, Florida, Iowa and North Carolina.

In the present case the Court ordered that a determination be made as to whether plaintiff would qualify for vocational rehabilitation. If plaintiff did qualify, the trial court was ordered to determine the extent of plaintiff's loss of earning capacity following any such rehabilitation. The Court explained that a reduction of loss of earning power would not depend upon whether there had been a decrease of plaintiff's whole-body impairment since none was assessed. In the event that plaintiff did not qualify for vocational rehabilitation, the trial court was instructed to proceed with a determination of whether plaintiff sustained any loss earning power.

8. McBee v. Goodyear Tire & Rubber Co., 255 Neb. 903, 587 N.W.2d 687 (1999).

REASONABLE CONTROVERSY

ATTORNEY FEES

The Supreme Court affirmed the Court of Appeals finding that there was a reasonable controversy regarding medical causation, therefore the trial court's award of a 50 percent penalty payment, attorney fees, interest and costs should be reversed.

Plaintiff sustained an injury to his right elbow arising out of the scope and course of his employment on September 30, 1992 and was diagnosed with epicondylitis of the right elbow. The parties agreed that plaintiff was entitled to certain periods of temporary total disability which defendant voluntarily paid. On June 6, 1995, plaintiff went to see his treating orthopedic physician, and mentioned in that visit that he had jammed his right elbow while playing basketball. After this visit, he was also diagnosed with ulnar nerve irritation on the right elbow. Based on these records, defendant ceased payment of temporary total disability benefits to plaintiff and plaintiff then filed a petition. In September 1996, plaintiff's attorney took the deposition of the physician and on direct examination, he related the ulnar nerve irritation to the 1992 injury, but on cross-examination, indicated the injury to the ulnar nerve might be from the basketball incident.

The trial court concluded that there was no reasonable controversy regarding medical causation after June 6, 1995, and awarded plaintiff past temporary total disability plus a 50 percent penalty payment for previously unpaid benefits, attorneys fees, interest and costs. In addition, the trial court found that defendant had a duty to inquire and to investigate the compensability of plaintiff's claim, which it failed to do. The review panel, however, found that there was a reasonable controversy regarding medical causation, reversed the waiting time penalty, and further found that defendant did not have a duty to inquire and to investigate plaintiff's claim.

The Supreme Court first noted that the issue of whether a reasonable controversy exists is a question of fact. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). Citing the guidelines set out in *Mendoza vs. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987), the Court stated that when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court, thus indicating the presence of a reasonable controversy. In the instant case, the Supreme Court observed that until an employee presents the employer with competent medical evidence that he or she is entitled to workers' compensation benefits, a reasonable controversy may exist notwithstanding the fact that the employer has voluntarily paid benefits to the employee. As plaintiff did not meet his burden of establishing evidence to show a causal relationship between his injury and his employment, a reasonable controversy existed prior to the physician's deposition. The Court agreed with the review panel's conclusion that because defendant paid temporary total disability benefits to plaintiff within 30 days of the physician's deposition, a waiting time penalty should not have been imposed. The Court added, however, that an employer's voluntary payment of workers' compensation benefits does not in all cases permit the employer to cease payment of benefits without being subject to penalties if the cessation of benefits was not justified. Finally, as for the duty to investigate, the Court looked to the facts of the case and concluded that where payments are voluntary, the defendant did not have an affirmative duty to investigate.

9. Kaiser v. Millard Lumber, 255 Neb. 943, 587 N.W.2d 875 (1999).

SUMMARY JUDGMENT

EXCLUSIVE REMEDY

TEMPORARY EMPLOYMENT

The Supreme Court affirmed the district court's decision to grant defendant's motion for summary judgment finding that the plaintiff was an employee of defendant and that workers' compensation was his exclusive remedy.

Plaintiff accepted an assignment by a temporary agency (general employer) to perform work for defendant, a lumberyard (special employer). While working there, plaintiff partially amputated three fingers and his thumb of his right hand with a saw blade. Plaintiff recovered workers compensation benefits against the temporary agency and then brought suit against defendant lumberyard in district court for negligence. Defendant moved for summary judgment claiming that workers' compensation was the exclusive remedy for plaintiff since there was an implied contract of hire between the plaintiff and defendant. The district court relied on the three-prong test of *Daniels v. Pamida, Inc.*, 251 Neb. 921, 561 N.W.2d 568 (1997) in granting defendant's motion for summary judgment. That test states that a special employer becomes liable for worker's compensation only if: 1) the employee has made a contract of hire, express or implied, with the special employer; 2) the work being done is essentially that of the special employer; and 3) the special employer has the right to control the details of the work. The district court found that plaintiff entered into at least an implied contract of hire as an employee of defendant because he voluntarily accepted and attempted to perform the assigned temporary work with defendant.

On review, the Supreme Court looked to the ultimate issue of whether an issue of material fact was raised as to whether plaintiff became an employee of defendant. The plaintiff argued that the district court erred when it found plaintiff had entered into at least an implied contract of hire with defendant. Even though the temporary agency paid plaintiff, provided benefits and intended to remain plaintiff's sole employer and plaintiff paid for his own hardhat and did not receive safety training unlike defendant's regular employees, the Court found that plaintiff's evidence was insufficient to show he was treated differently from defendant's regular employees; therefore, the district court's finding of an implied contract of hire was left undisturbed. Plaintiff had also argued that the district court erred in finding that the defendant had the right to control the details of plaintiff's work. The Supreme Court disagreed, citing evidence that defendant's personnel were plaintiff's sole supervisors and solely controlled every detail of his work on the premises including where or to whom he was to report each day, what work needed to be done, and the times he could take breaks. Because plaintiff was found to be an employee of defendant lumberyard, the Workers' Compensation Act was his exclusive remedy and his tort action against defendant was properly dismissed.

10. Variano v. Dial Corp., 256 Neb. 318, 589 N.W.2d 845 (1999).

LOSS OF EARNING POWER EVALUATION

REBUTTABLE PRESUMPTION OF CORRECTNESS

The Supreme Court reversed and remanded the decision by the compensation court which disregarded a subsequent loss-of-earning-power opinion in the form of a letter by a court-appointed vocational rehabilitation counselor.

A loss-of-earning-power report was completed by the counselor in September of 1996 which stated that the plaintiff sustained a loss of earning power of 25 to 30 percent. After submitting the initial report, the counselor continued working with the plaintiff to identify a vocational goal and also received clarification of plaintiff's functional impairments and restrictions. The counselor wrote a letter in 1997, hereinafter the March letter, stating that vocational rehabilitation would not do much, if anything, to improve plaintiff's situation as he could only obtain trivial occasional employment under rare conditions and at small remuneration. The trial court relied on the September report and found that the plaintiff sustained a 25 to 30 percent loss of earning power.

The defendants argued that because the counselor stated in the March letter that he could not reevaluate his prior loss-of-earning-power assessment unless the plaintiff or defendant was willing to assume the expense, a reevaluation was not done. They also argued that the September report was the report to which the court should afford the rebuttable presumption of correctness required by §48-162.01(3) as subsequent evidence was inconsistent and could not rebut the presumption.

The Supreme Court disagreed and construed the phrase "loss-of-earning-power evaluation" in §48-162.01(3) to refer to a process as opposed to a single document. The Court held that when the opinions of the counselor were considered together in their chronological sequence, the trial judge was required to afford the opinion expressed by the counselor in the March letter the rebuttable presumption. Although the March letter was not entitled "Loss of Earning Power Evaluation", the substance was not altered as part of the process; the September report simply did not contain the evaluation of the plaintiff's potential for employment.

11. Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 591 N.W.2d 524 (1999).

SUBJECT MATTER JURISDICTION

INSURANCE COVERAGE

EMPLOYEE STATUS

The Supreme Court reversed and remanded the district court's decision that it lacked subject matter jurisdiction to decide the issue of the existence of workers' compensation insurance.

The Supreme Court reviewed the 1990 amendment to §48-161 which created authority for the compensation court to determine all issues ancillary to a workers' compensation claim before it, including insurance coverage disputes. The Court emphasized that the amendment does not specify that the compensation court is the exclusive forum that may make such a determination. See *Curtice v. Baldwin Filters Co.*, 4 Neb. App. 351, 543 N.W.2d 474 (1996). The Court held that absent such statutory expression, it could not presume that the district court was without jurisdiction to determine a workers' compensation insurance issue when that issue was, by statute, determinative of whether a negligence suit properly before it could be pursued in district court.

The Supreme Court also stated that although a determination of employee status is ordinarily sufficient for the district court to dismiss a purported negligence suit, in the instant case, the record regarding plaintiff's employment status was in conflict. If the Court were to treat plaintiff as an employee, the insurance coverage issue was dispositive of whether the compensation court had exclusive jurisdiction based upon §48-145(3) which provides that an uninsured employer shall be required to respond in damages to an employee for personal injuries. Because the district court had jurisdiction to decide the insurance issue and because there was a genuine issue of material fact as to the existence of workers' compensation insurance, the Supreme Court remanded the cause to the district court for further proceedings.

12. Crabb v. Bishop Clarkson Mem. Hosp., 256 Neb. 636, 591 N.W.2d 756 (1999).

SUBJECT MATTER JURISDICTION

MODIFICATION OF AWARD

The Supreme Court upheld the review panel's determination that the trial court's prior order of dismissal should not be set aside.

In January 1990, plaintiff sustained a needle stick injury while employed in the dialysis-transplant floor of defendant. Plaintiff learned in 1992 that she had contracted hepatitis C, and in 1993 she filed a petition in the compensation court. At trial plaintiff testified that she was not in any of the risk categories for hepatitis C, and never had a blood transfusion. Plaintiff's medical records, however, revealed plaintiff had multiple blood transfusions and the trial court dismissed plaintiff's petition for failure to prove that the hepatitis C arose out of the course and scope of her employment. The review panel affirmed the trial court's dismissal. The Court of Appeals affirmed the compensation court's decision, and her motion for rehearing was overruled.

In 1996, plaintiff filed another petition which referenced the same docket and page number, alleging the trial court's prior ruling was tainted by fraud. The defendant argued the trial court did not have jurisdiction to modify the prior dismissal. The trial court granted defendant's motion to dismiss and plaintiff then appealed to the review panel, which reversed the dismissal stating that the trial court lacked the authority to grant a motion for summary judgment or judgment on the pleadings. Plaintiff again appealed, alleging that both the trial judge and the review panel erred by failing to set aside the trial court's prior order of dismissal, and the Supreme Court removed the case to its docket.

The Supreme Court explained that there are two statutory provisions which allow the compensation court, on its own motion, to modify an award. First, the court may modify an award within 10 days of the opinion to correct an error pursuant to §48-170. Second, a party may appeal an award within 14 days as provided in §48-180. See *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997), *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997), *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996). The Supreme Court reiterated the rule that the compensation court is a statutorily created court with powers expressly limited to those delineated in the Act. See *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995). Because plaintiff asked the court to vacate its prior ruling nearly eight months after the ruling had become final, the compensation court lacked the authority to modify the award.

Plaintiff also alleged that the trial court had no authority to grant a motion for summary judgment. The review panel, relying on the Supreme Court's holding in *Buckingham*, had reversed the dismissal and remanded the cause for a hearing on the merits. The Supreme Court distinguished between summary determination of a case on its merits, and summary determination regarding subject matter jurisdiction. While the workers' compensation court may be a tribunal of limited jurisdiction, it does have the inherent power to summarily dismiss a case for lack of proper jurisdiction. Therefore, the trial court correctly determined that it lacked jurisdiction when it dismissed plaintiff's 1996 petition.

13. Frank v. A & L Insulation, 256 Neb. 898, 594 N.W.2d 586 (1999).

ACCIDENT

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

EXPERT OPINIONS

The Supreme Court reversed the Court of Appeals and remanded the cause with directions to reinstate the compensation court's finding that plaintiff did establish medical causation and that his injuries arose out and in the course of his employment.

Plaintiff was employed as a carpenter for a total of 25 years, the last five of which were spent working for defendant. Plaintiff sustained a left rotator cuff tear and right-hand carpal tunnel syndrome, among other injuries, from the cumulative effects of repeated work-related trauma. Defendant refused to pay for plaintiff to have a rerepair of the rotator cuff or for carpal tunnel release surgery. The Court of Appeals found plaintiff's injuries were not compensable due to insufficient evidence of causation.

Plaintiff argued that the Court of Appeals erred in its determination that the expert opinion upon which plaintiff relied lacked sufficient foundation because the doctor was unaware that plaintiff only worked for defendant for five years out of his 25 years as a carpenter. The doctor had opined that plaintiff's symptoms were consistent with an individual who performed heavy labor for 25 years, but she was unable to say whether plaintiff's injuries were caused by plaintiff's work for defendant. However, after being informed that plaintiff only worked for defendant for five years, the doctor stated, "My opinions as to his problems are still the same." Also, the exhibit in which the doctor related plaintiff's need for treatment to his work for defendant was received into evidence during the trial without objection.

On appeal, the Supreme Court examined the sufficiency of the doctor's testimony, looked to the record as a whole and found that the doctor possessed sufficient facts to express a reasonably accurate opinion; therefore, the compensation court's determination of sufficient medical causation was not clearly wrong.

Additionally, plaintiff argued that the Court of Appeals erred in determining there was no evidence that the trauma sustained by plaintiff was any greater than ordinary wear and tear suffered by carpenters generally, thus there was no "accident" warranting a workers' compensation award. The Supreme Court cited *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992) for the proposition that the compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the statutory definition of an accident. The Court reviewed the three specifications of §48-151(2) regarding the definition of an accident. Because plaintiff had no complaints about his wrists, elbows, or shoulders until 1995, he testified he was doing stucco work in the spring of 1995 when the problems began and he "clearly manifested [his] symptoms when he found he could not continue to work," the facts of the case were sufficient to support the compensation court's finding that plaintiff suffered a work-related accident.

A one-judge dissent stated that "there is no satisfactory rationale, statutory or otherwise, for pigeonholing repetitive-stress injuries into the 'accident' category and disallowing any showing that such an injury is an 'occupational disease.'" That judge suggested that *Schlup* be overruled.

14. Ideen v. American Signature Graphics, 257 Neb. 82, 595 N.W.2d 233 (1999).

SCHEDULED MEMBER VS. WHOLE BODY INJURIES

RESIDUAL IMPAIRMENT TEST

EXPERT OPINIONS

The Supreme Court affirmed the compensation court's holding that plaintiff was entitled to benefits for a scheduled member injury for her right arm and not a body-as-a-whole injury.

The parties stipulated that plaintiff's injury occurred in the course and scope of her employment which involved repetitive motions of feeding paper and forms into a printing machine. In 1995, plaintiff's treating physician determined plaintiff sustained a permanent impairment to her right arm. Although plaintiff had reached maximum medical improvement for her right arm injury, she continued to complain of neck and thoracic back pain associated with the injury. In 1997, plaintiff was examined by another doctor who concurred that plaintiff had sustained permanent impairment to her right arm, but he also assigned a body-as-a-whole impairment rating due to plaintiff's cervical spine problem. Based on plaintiff's testimony at trial, medical records, and correspondence from the multiple doctors who had treated her, the compensation court found plaintiff had sustained a permanent partial impairment to her right arm.

Plaintiff appealed, arguing the compensation court erred in finding her injury involved a scheduled member rather than the body as a whole. Plaintiff further argued that the residual impairment test as set forth in *Snyder v. IBP, inc.*, 235 Neb. 319, 455, N.W.2d 157 (1990) and *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983) should be abandoned. Those cases state that the test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury. Plaintiff argued that application of the residual impairment test produces differing results depending on whether the injury is to the upper or lower extremity.

The Supreme Court agreed with the compensation court that there was sufficient medical evidence to support a finding of either a scheduled member or a body as a whole injury. The Court went on to state, however, that the compensation court is granted a great deal of discretion in determining factual issues and was not clearly wrong when it chose to credit one expert opinion over another, particularly when the expert with whom the compensation court agreed was plaintiff's primary caregiver. In reaffirming its previous holdings which utilized the residual impairment test, the Court explained that it was not inclined to "embroil this Court in comparative anatomy."

15. Miller v. M.F.S. York/Stormor, 257 Neb. 100, 595 N.W.2d 878 (1999).

SUBROGATION

JURISDICTION

The Supreme Court granted plaintiff's petition for further review from the Court of Appeals finding that the compensation court had jurisdiction under §48-118 to determine the amount of credit to which defendant employer was entitled on plaintiff's present and future workers' compensation benefits. The Supreme Court reversed and remanded the cause with directions to dismiss for lack of jurisdiction.

Plaintiff was attempting to repair a punch press in the scope of his employment with defendant-employer in 1990. The punch press had been modified by third-party defendant by installment of safety guards which failed, resulting in a crush injury to plaintiff's hand and arm. Plaintiff sued the third-party defendant in U. S. District Court for personal injury. Defendant employer joined suit against third-party defendant as required by §48-118. The third-party defendant settled with plaintiff before trial in 1995 for \$400,000.00 after which defendant-employer asked the federal court to resolve the issue of its subrogation claim. The federal court entered an order finding that an award of 50 percent of the subrogation claim would be a "fair and equitable" allocation under §48-118. Thereafter, plaintiff filed a petition in the compensation court for benefits and medical expenses incurred after the federal court's final order and for a determination of the amount of credit to which defendant-employer was entitled for current and future workers' compensation benefits.

The Court first noted that §48-118 states plaintiff and defendant-employer "shall have an equal voice in the claim [against third-party defendant] and the prosecution of such suit and any dispute arising [between plaintiff and defendant-employer] shall be passed upon the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." The Supreme Court found that "such action" means the underlying third-party action for personal injury. 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. *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998). Pursuant to §48-152 the compensation court can only resolve disputes arising from the provisions of the Nebraska Workers' Compensation Act. The Supreme Court thus held that compensation court has no jurisdiction to hear personal injury suits against nonemployers and remanded the matter with directions to dismiss the action. Defendant-employer had argued that federal court is the only forum with jurisdiction to determine the amount of credit to which it was entitled citing *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982). The Supreme Court disagreed and found that the state district court would have jurisdiction over the subject matter of the present case as the federal court is in no better position to adjust the credit to which defendant employer is entitled.

Court of Appeals Cases (Designated for Permanent Publication):

1. Lounnaphanh v. Monfort, Inc., 7 Neb.App. 452, 583 N.W.2d 783 (1998).

CAUSATION

MEDICAL EVIDENCE

EXTENT OF DISABILITY

ENGLISH AS A SECOND LANGUAGE

The Supreme Court affirmed the compensation court's finding of permanent total disability based on the totality of the medical evidence presented, plaintiff's constant pain, and his inability to speak or learn English.

Plaintiff, age 48 at the time of trial, was born in Laos and had only a fifth grade education. Various doctors' reports discussed plaintiff's history of lifting a box while on the job that caused the back pain to begin. All the doctors' slips submitted to the employer indicated plaintiff's complaints were occupational rather than nonoccupational. One doctor's note that contradicted the other evidence discussed that plaintiff's complaints had begun five months before and became progressively more severe at the time of the alleged injury.

Defendants argued that if the trial court based its decision of causation on the totality of the evidence, if one part of the totality is discredited, the totality is destroyed. The Supreme Court disagreed and stated that the probable meaning of the doctors' various statements that were in evidence must be judged in the "larger context". See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). Except for a slight inconsistency in one doctor's record, there was no suggestion by any medical evidence from several doctors that plaintiff injured his back other than while at work. The evidence also contained several instances where the doctors and therapists treating the plaintiff assumed the medical history given by the plaintiff was correct and significant in their treatment of a serious medical condition.

Defendants also argued that the only premise for the trial court finding that the plaintiff was unable to attend ESL courses was one doctor's opinion that stated plaintiff was unable to attend ESL classes until further notice because of pain, and since there were more recent contradictory reports, the trial court erred in relying on the first opinion. The Supreme Court disagreed because the trial court is the sole judge of the credibility of witnesses and the weight to be given their testimony. The plaintiff had testified before the trial judge that his pain had not decreased and if the trial judge chose to believe the plaintiff, the one doctor's opinion should not be viewed as stale.

2. Bennett v. J. C. Robinson Seed Co., 7 Neb.App. 525, 583 N.W.2d 370 (1998).

INCREASE IN INCAPACITY

TEMPORARY TOTAL DISABILITY BENEFITS

STATUTORY INTERPRETATION

The Court of Appeals affirmed the compensation court's decision that plaintiff had failed to meet his burden of proving a material and substantial increase in his incapacity, but reversed and remanded with instructions the portion which ordered that plaintiff's permanent partial disability benefits be computed on the basis of a 40 percent rather than a 100 percent impairment.

In August 1989, plaintiff was awarded a 40 percent loss of earning capacity for a work-related injury to his back in 1987. In September 1992, the court modified the award and increased plaintiff's impairment rating to 60 percent. In May 1996, plaintiff filed a petition to modify alleging he had suffered a material and substantial increase in incapacity and asking the court to declare him permanently and totally disabled. The trial court determined that plaintiff had failed to prove an increase in incapacity, but found that plaintiff was entitled to an additional 2 4/7 weeks of temporary total disability. Although the entire temporary total disability period occurred after plaintiff's 300 weeks expired, the trial court gave defendant credit for previously paid partial disability benefits based on the 60 percent impairment rating and ordered it to pay the 2 4/7 weeks of temporary total disability at the 40 percent rating, rather than 100 percent impairment.

On appeal, plaintiff assigned two errors. First, that the trial court erred in finding he had failed to prove a material and substantial increase in incapacity. Second, plaintiff argued the court erred in giving defendant credit for past partial disability benefits when computing his entitlement to temporary total disability. The Court of Appeals found that the record contained competent evidence to support the compensation court's conclusion that plaintiff failed to demonstrate a material and substantial increase in his incapacity. The Court explained that the medical records only contained evidence of plaintiff's reported increase in pain, but no evidence that his physical condition had worsened.

Regarding the second assignment of error, the Court found that the compensation court erred in its application of §48-121(2). The Court explained that the section limits the number of partial disability payments which may be received by a plaintiff to 300 weeks. The statute further provides that if a period of temporary total disability is followed by partial disability, then the 300 week period is to be reduced by the number of weeks for which temporary total disability benefits were paid. Plaintiff argued on appeal that the section does not apply when the period of temporary total disability occurs after the conclusion of partial disability payments but only applies where the period of temporary total disability occurs before a portion of the partial disability period. The Court held that the statute is plain and unambiguous in providing that a reduction is to be done when "total disability is followed by partial disability." To hold otherwise would render the above quoted section meaningless and contrary to statutory interpretation. Therefore, plaintiff was entitled to 2 4/7 weeks of temporary total disability based on a 100 percent impairment.

3. Bryson v. Vickers, Inc., 7 Neb.App. 595, 584 N.W.2d 44 (1998).

SECOND INJURY FUND

WRITTEN RECORDS

REIMBURSEMENT TO EMPLOYER

ATTORNEY FEES

The Court of Appeals affirmed the workers' compensation court's order that the Second Injury Fund pay workers' compensation benefits, but reversed that portion of the opinion which ordered defendants to pay attorney fees.

Plaintiff injured his back in 1991 and again in 1994 while working for the same employer. The trial court found plaintiff permanently and totally disabled as a result of his combined injuries with the 1991 injury resulting in a loss of earning capacity in the "range of 30 percent" and a loss of earning capacity of 30 percent for the 1994 injury. The trial court found the statutory requirements of §48-128 had been met and ordered the Second Injury Fund (the Fund) to pay plaintiff benefits from and after 1994. The Fund appealed to the review panel which affirmed and ordered defendants to pay plaintiff attorneys fees incurred as a result of the application for review.

The Fund again appealed arguing that the workers' compensation court erred in assigning a 30 percent disability for the second injury as there was no evidence which specifically apportioned the disability to each injury or to the combination thereof. The defendant-employer cross-appealed contending that the party who filed the application for review should have to pay the attorney fees. The Court of Appeals upheld the 30 percent disability citing medical testimony which could support it, and explaining that the workers' compensation court may rely on the testimony of the claimant in assigning a degree of disability rather than on expert testimony. The Fund next argued that the written records requirement of §48-128(23) was not met because Vickers did not know the precise extent of plaintiff's pre-existing condition. In determining that the written records were sufficient to put defendants on notice of plaintiff's permanent preexisting condition, the Court reiterated that the Workers' Compensation Act is to be liberally construed, and that to require more would defeat the purpose of the Workers' Compensation Court.

In its cross-appeal Vickers assigned two errors: 1) that the compensation court erred when it failed to order the Fund to reimburse Vickers, and 2) by assessing attorney fees against Vickers when the Fund filed the application for review. Regarding the first assignment of error, Vickers argued that it was entitled to reimbursement for the difference between what it paid prior to the compensation court's award and what it was ultimately found to owe. In support thereof, Vickers relied on either §48-178.01 or, in the alternative, the argument that the compensation court has the inherent authority to order reimbursement. The Court of Appeals found, as did the compensation court, that the statute was inapplicable because it applies only where the claimant's right to recovery is not in issue and the compensation court has entered an order of immediate payment. In the instant case, Vickers contested the plaintiff's right to compensation; therefore, the statute was found to be irrelevant. In rejecting Vickers second argument, the Court of Appeals restated that the compensation court's powers are those specifically delineated in the statute, and the compensation court has no inherent authority to order that an employer be reimbursed by the Fund.

Vickers also argued that the compensation court erred in assessing attorney fees against it when the Fund filed an application for review. The Court of Appeals agreed, restating that for

purposes of §48-125, the Fund is an employer and attorney fees should be assessed against an employer who brings an application for review and fails to obtain any reduction.

4. Xayaseng v. Chief Indus., 7 Neb.App. 911, 586 N.W.2d 472 (1998).

PERMANENT TOTAL DISABILITY

EXPERT OPINIONS

The Court of Appeals reversed and remanded the decision of the review panel of the compensation court which had held that the trial court erred in considering the loss of physical function in plaintiff's thumb to determine plaintiff was permanently totally disabled.

The trial court found that plaintiff suffered from permanent impairment in each leg, had substantial loss of function to his hand due to his thumb injury, and therefore was permanently and totally disabled. The review panel concluded that this was improper under *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 127 N.W.2d 186 (1964) and remanded the cause to the trial court with directions to determine whether or not the alleged injuries to plaintiff's legs produced permanent and total disability without regard to the thumb injury. It also ordered the trial court to provide a reasoned decision identifying the expert opinion relied on in determining the extent of the injuries plaintiff incurred.

Plaintiff argued that the review panel erred by finding that the trial court incorrectly considered plaintiff's injury to his thumb in determining the degree of disability suffered. The Court of Appeals found that *Runyan* was distinct from this case in that it involved only injuries to fingers on both hands, and no other injury to the body; meanwhile, evidence in this case clearly supported the finding that plaintiff had injury to two members, namely, his legs. The Court of Appeals cited *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984) and held that Neb. Rev. Stat. §48-121(3) means that "if a worker has a two-member injury, compensation shall be determined by the facts, and the existing or concurrent injury to another part of the body is one of these facts, even if that injury is not to a member as defined in that same subdivision." The Court also held that expert opinions are required to establish causation between an incident and an injury, but are not required to establish the degree of disability once causation has been developed. Expert medical testimony in this case did establish causation between the injury to plaintiff's thumb and the accident. Therefore, the trial judge, as the sole judge of the witnesses' credibility was not clearly erroneous in relying on the testimony of the plaintiff to determine the extent of the injuries.

5. Darnell v. KN Energy, Inc., 7 Neb.App. 929, 586 N.W.2d 484 (1998).

ARISING OUT OF COURSE AND SCOPE OF EMPLOYMENT

DUAL PURPOSE DOCTRINE

The Court of Appeals affirmed the trial court's dismissal of plaintiff's petition finding that plaintiff's injuries did not arise out of and in the course and scope of his employment because he deviated from a business trip to conduct a personal errand.

On the day of the accident, plaintiff left his employer's office to make a business deposit at the employer's bank located approximately three blocks west of the office. Plaintiff then began to drive an additional five blocks north to make a personal deposit in his own bank, but was struck by another vehicle on the way. The trial court held that trip involved both a personal and business purpose and plaintiff's accident occurred during a deviation from the business purpose; therefore the resulting injuries were not within the course and scope of his employment. Plaintiff timely appealed.

The Appeals Court restated the dual purpose doctrine adopted by the Supreme Court in *Jacobs v. Consolidated Tel. Co.*, 237 Neb. 772, (1991) as follows: "[I]f an employee is injured in an accident while on a trip which services both a business and a personal purpose, the injuries are compensable as arising out of the course and scope of employment provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey . . ." (*Jacobs* at 932). The parties in the present case agreed that plaintiff's trip involved both a business and a personal purpose; however, the Appeals Court stated that the inquiry does not end there. Once the trip is labeled as serving a business purpose, it must be determined whether the accident occurred during a deviation from the business purpose. See *Kraus v. Jones Automotive, Inc.*, 3 Neb. App. 577, 529 N.W.2d 108 (1995).

In arguing that his deviation was "minor," plaintiff relied heavily on the language in *Jacobs* which involved an employee who was injured while traveling from his home to conduct personal business in another city. The Supreme Court in that case held that "while plaintiff did plan to stop in Grand Island with the intention of looking at trucks for his employer, as well as to run a personal errand, this cannot be characterized as a wide departure." In the instant case, the plaintiff also argued that because he did not always take the most direct route back to the office his deviation was not a "wide departure" from the business purpose.

After a review of *Jacobs*, the Appeals Court stated it could not find in the Supreme Court's analysis any express or implicit language that would overrule the general principal that once an employee deviates from the business route, the employee is outside the course and scope of his or her employment. The Appeals Court stated the record supported the trial court's findings that the route plaintiff took in order to make his personal deposit was nearly four blocks north of the most direct route to the office and therefore was outside the scope and course of his employment.

6. Baughman v. United-A. G. Co-op, 7 Neb. App. 936, 586 N.W.2d 836 (1998).

SECOND INJURY FUND

WRITTEN RECORDS REQUIREMENT

EMPLOYER KNOWLEDGE

The Court of Appeals reversed and remanded the compensation court's order that the Second Injury Fund (the Fund) pay a portion of the benefits due to plaintiff.

Plaintiff suffered a back injury, a recurrence and then a separate back injury six months later. The employer had copies of medical records regarding plaintiff's treatment of all his injuries and return-to-work releases, but did not have possession of a written record which reflected the permanency of the original or recurrent injury. The insurer obtained written medical records documenting the plaintiff's permanent impairment and although the insurer discussed them with the employer, the insurer never gave a copy to the employer.

The Court of Appeals found that the plain language of §48-128(1)(b) requires the employer to establish actual knowledge of a permanent disability injury by written records and therefore rejected all of the employer's arguments. Defendant argued that 1) the insurer's knowledge should be imputed to the employer through their oral communications and 2) a reasonable inference of permanency could be gained from the records of the employer.

Regarding imputing the insurer's knowledge to the employer, the Appeals Court discussed that the clear purpose of the Fund was to encourage employers to hire those with permanent preexisting disabilities. An insurer is not a hirer of the employer's workers and thus what it knows about an employer's potential employee and his previous back injuries is not part of the equation as to whether the worker is hired or retained. Although the Court took note that those with experience could infer a permanent impairment from the type of injury and treatment of this plaintiff, the plain language of the statute prevents it. The Court discussed that although this may not be a fair result as this employer did the right thing by employing the permanently disabled, the Court is not free to ignore the Legislature's mandate of evidence of a written record. The Court also refused to extend the undisputed actual knowledge exception, such as the loss of an arm or leg, to back injuries. See *Akins v. Happy Hour*, 209 Neb., 236, 306 N.W.2d 914 (1981). Therefore, the Court of Appeals held that the trial judge was clearly wrong in finding employer knowledge and directed that the award be modified to make the insurance carrier solely liable for plaintiff's benefits.

7. Yarpe v. Lawless Distrib. Co., 7 Neb.App. 957, 587 N.W.2d 417 (1998).

ACCIDENT

CORROBORATING TESTIMONY

FAILURE TO CALL WITNESS

The Court of Appeals affirmed the compensation court's dismissal of plaintiff's petition for benefits due to failure to establish the occurrence of an accident.

In 1992, plaintiff received a lump sum settlement award based on a work-related injury to his lower back. Plaintiff returned to his employment with a permanent lifting restriction and claimed he suffered another work-related accident to his lower back while lifting cases of beer in September 1995. Plaintiff filed a petition and was the only witness called to testify at trial. The trial court dismissed his case, noting that the lump sum settlement plaintiff entered into in 1992 barred recovery for any disability or expenses arising out of a degeneration of his lower back condition and that plaintiff failed to call any corroborating witnesses to verify a new injury in 1995. The review panel affirmed and plaintiff timely appealed.

Based on its review of the evidence, the Court of Appeals agreed with the compensation court's conclusion that plaintiff did not suffer an accident, but rather, was experiencing the effects of the continued degeneration resulting from the original injury in 1992. In regard to the lack of corroboration, the compensation court noted that plaintiff was not obliged to call any of his co-workers to whom he allegedly reported the injury in September 1995, but "his failure to do so allows the Court to conclude that perhaps these witnesses would not corroborate the plaintiff's testimony with respect to his reporting of his accident." Plaintiff asserted that the compensation court improperly based its conclusion and dismissal on this fact. The Court of Appeals cited *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981) and *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960) for the proposition of law that the trier of fact is the sole judge of what probative force to give to the fact that a party has failed to call a witness or produce evidence. Therefore, the compensation court committed no error in deciding the weight to be given to plaintiff's testimony and his failure to call an apparently available witness who plaintiff suggested at trial would possess corroborating testimony.

8. Siliphet v. IBP, Inc., 8 Neb.App. 48, 587 N.W.2d 895 (1999).

PERMANENT TOTAL DISABILITY

SECOND INJURY FUND LIABILITY

AVERAGE WEEKLY WAGE

TEMPORARY TOTAL DISABILITY

The Court of Appeals affirmed the compensation court's award of permanent total disability benefits but remanded the decision to clarify whether the compensation court should find the Second Injury Fund (the Fund) liable. It also remanded to recalculate the average weekly wage for temporary total disability.

The plaintiff incurred three work related accidents in 1993. The compensation court found that prior to the third injury, a 25 percent permanent impairment existed based on a functional disability to the plaintiff's left knee and her inability to read, write or speak English.

The Court of Appeals stated that the trial court misread the two standards for Fund liability in §48-128(3) by reading them as conjunctive rather than separate and thus finding the Fund not liable. The Court of Appeals clarified the standards within §48-128(3) as follows: 1) if the preexisting permanent condition is to the body as a whole, or if a preexisting scheduled member injury falls under the unusual or extraordinary condition exception, the Fund is liable only if that permanent preexisting condition would have resulted in a 25 percent or more loss of earning capacity. See *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991); and 2) if the preexisting permanent condition was to a scheduled member, the Fund would be liable only if that permanent preexisting condition would result in compensation payable for a period of 90 weeks or more for permanent disability. The Court of Appeals was clear that only if the trial court found the preexisting left knee member disability rose to the level of an unusual or extraordinary condition could the trial court measure the extent of preexisting disability in terms of lost earning capacity. Only then could plaintiff's lack of English language skills become relevant in determining her lost earning capacity.

The Court of Appeals also remanded the cause for a recalculation of the average weekly wage for temporary total disability. The trial court calculated two-thirds of the average weekly wage from each of the last two injuries and awarded her the sum of the two, reduced to the maximum of \$265.00. Each injury alone would not have reached the maximum. The Court of Appeals found that this matter appeared to be one of first impression in Nebraska and the net result of this finding was that the plaintiff had been treated as though she suffered two episodes of temporary total disability. The Court relied on *Matney v. Newberg*, 849 S.W.2d 529 (Kentucky 1993) in finding that to receive an award for more than 100 percent occupational disability is contrary to the long-standing principle that a claimant may not, at one time, be compensated for more than total occupational disability because no one can be no more than totally, occupationally disabled.

9. Haake v. American Tool Cos., 8 Neb.App. 59, 588 N.W.2d 839 (1999).

REASONABLE CONTROVERSY

ATTORNEY FEES

WAITING-TIME PENALTIES

The Appeals Court reversed the review panel and thereby upheld the trial court's award of attorney's fees finding that the employer had no basis for refusing to pay workers' compensation benefits.

Plaintiff experienced pain in her right forearm, neck and back after using a large hammer to pound Vise-Grips at work. On Sunday plaintiff was taken to the hospital and diagnosed with right sacral ileitis. The emergency room doctor noted that plaintiff had been working in her garden and reported having a history of back discomfort. On Monday plaintiff sought treatment from her family physician who filled out a "Work Related Injury Data" form provided by defendants, describing the injury as a back strain with spasms. The doctor filled out additional forms advising plaintiff could not return to work. Plaintiff also filled out a "Statement for Disability Income Claim" and checked the appropriate marks that indicated her injury was work-related.

The trial court found plaintiff's injuries arose out of and in the course and scope of her employment. Further, the trial court found that no reasonable controversy existed and the defendants had wrongfully refused to pay indemnity benefits. The trial court awarded plaintiff waiting-time penalties and attorneys fees. In reversing the trial court's award regarding attorney fees and waiting-time penalties, the review panel found plaintiff failed to prove that she communicated to the defendant a medical opinion establishing a causal connection between the accident and the injury.

The Court of Appeals reversed the review panel award with respect to attorney fees and waiting-time penalties. The Appeals Court stated the issue was whether an employer may claim that a reasonable controversy exists on the ground that it has not been presented with documentation that definitively establishes the injured employee's right to compensation. A reasonable controversy exists if there is neither a question of law or fact previously unanswered by the Supreme Court or if the properly adduced evidence would support reasonable but opposite conclusions by the workers' compensation court. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 787, 408 N.W.2d 280, 290 (1987). The Court also cited *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d at 786 (1998), which states that the only legitimate excuse for delay in the payment of compensation benefits is the existence of a genuine dispute from a medical or legal standpoint.

The Appeals Court found that the defendants did not have an actual basis for opposing plaintiff's claim. Defendants had argued that a certain exhibit did not definitively establish causation and that without such evidence, a reasonable controversy existed. The Appeals Court disagreed and explained that to construe §48-125 as providing that an employer is liable for sanctions only if the injured employee has provided that employer with evidence sufficient to prevail at trial would improperly shift the burden of seeing that a claim is fully investigated, and of obtaining proper documentation, from the employer and its insurer onto the employee. The Court stated that an employer cannot avoid sanctions merely because it suspects or believes that a claim is unfounded.