

NO. A04-709

State of Minnesota
In Supreme Court

OFFICE OF
APPELLATE COURTS

FEB 15 2006

FILED

Zurich American Insurance Company,

Respondent,

vs.

Donald A. Bjelland,

Appellant.

**PETITION FOR REHEARING IN THE SUPREME COURT PURSUANT TO
RULE 140 OF THE MINNESOTA RULES OF APPELLATE PROCEDURE**

Scott P. Drawe(#148325)
Drawe & Maland
7650 Edinborough Way, Suite 640,
Minneapolis, MN 55435
952/841-2130

Michael D. Barrett(#202194)
Cousineau, McGuire & Anderson
1550 Utica Avenue South, Suite 600,
Minneapolis, MN 55416-5318
952/546-8400

Attorneys for Respondent
Zurich American Insurance Co.

Attorneys for Appellant
Donald A. Bjelland

PURSUANT TO RULE 140.01 OF THE MINNESOTA RULES OF APPELLATE PROCEDURE THE PETITION FOR REHEARING TO THE SUPREME COURT SHALL SET FORTH WITH PARTICULARITY: (A) ANY CONTROLLING STATUTE, DECISION OR PRINCIPLE OF LAW; OR (B) ANY MATERIAL FACT; OR (C) ANY MATERIAL QUESTION IN THE CASE WHICH, IN THE OPINION OF THE PETITIONER, THE SUPREME COURT HAS OVERLOOKED, FAILED TO CONSIDER, MISAPPLIED OR MISCONCEIVED.

The Decision of the Minnesota Supreme Court issued on February 2, 2006 directly addresses the intent of the 2000 amendment to Minn. Stat. §176.061. The portion of those amendments that was addressed in this case involved Minn. Stat. §176.061, subs. 3, 5, 7, and 10 in 2000 and the clarifying language that confirmed an employers' right to recover all workers' compensation benefits paid and payable *"regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute."* It appears that the holding of the Supreme Court is that an employers' right to recover all workers' compensation benefits paid and payable is limited to what the employee or the employee's dependants could recover *"at common law or by statute"* despite the added amendment language.

Respondent Zurich suspects that the Supreme Court failed to consider that this amendment was part of a bill submitted to the legislature after being adopted by the Minnesota Workers' Compensation Advisory Council. The Minnesota Legislature created the Workers' Compensation Advisory Council for the following purposes:

The advisory council shall advise the department in carrying out the purposes of chapter 176. The council shall submit its recommendations with respect to

amendments to chapter 176 by February 1 of each year to each regular session of the legislature and shall report its views upon any pending bill relating to chapter 176 to the proper legislative committee. A recommendation may not be made by the council unless it is supported by a majority of the employer members and a majority of the labor members. At the request of the chairs of the senate and house of representatives committees that hear workers' compensation matters, the department shall schedule a meeting of the council with the members of the committees to discuss matters of legislative concern arising under chapter 176.

Minn. Stat. §175.007 (1992) (emphasis added). The Department of Labor and Industry on its web page <http://www.doli.state.mn.us/wcac.html> specifically states that the Legislature created the Workers' Compensation Advisory Council for the purpose of submitting "recommendations for proposed changes to the workers' compensation statutes to the proper legislative committees." The Department of Labor and Industry describes that role of the Council as follows :

The Workers' Compensation Advisory Council (WCAC) was created by Minnesota Statutes §175.007, in 1992, as a permanent council on workers' compensation.

The WCAC consists of 12 voting members (six representing organized labor and six representing Minnesota businesses), 10 of which are appointed by the governor, the majority and minority leaders of the Senate, and by the speaker and minority leader of the House of Representatives. The other two members are the presidents of the largest statewide Minnesota business organization and the largest organized labor association.

The WCAC advises the commissioner of the Department of Labor and Industry about matters of workers' compensation and submits its recommendations for proposed changes to the workers' compensation statutes to the proper legislative committees. The WCAC's recommendations must be supported by a majority of business and labor members.

It appears that the Supreme Court was unaware of the role of the Workers' Compensation Advisory Council in the 2000 Amendments. The rationale of the Workers' Compensation Advisory Council for the 2000 Amendments is attached as Exhibit A to the Affidavit of Michael D. Carr, who was the primary drafter of the both the 2000 Amendments and Exhibit A. The intention of the amendments addressed in this case are clearly laid out in section III. of Exhibit A:

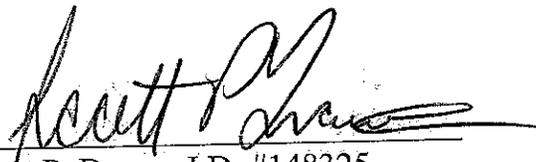
III. The Employer's "Separate Additional Cause of Action"

The employer, by statute, has its own "separate additional cause of action against the third party to recover amounts payable for medical treatment or for other compensation payable under this section resulting from the negligence of the third party." Minn. Stat. §176.061, subd. 7. This right of the employer is also discussed in Minn. Stat. §176.061, subds. 3, 5 and 10. In 1983, the word "indemnity" was added to all of these provisions to make certain that the employer's statutorily created right was not limited in any way. However, the Supreme Court has held that the statutory right of indemnity only grants the employer a right to share in the worker's common law negligence action. *Tyroll v. Private Label Chemicals*, 505 N.W.2d, 54 (Minn. 1993); *M.W. Ettinger Transfer v. Shaper Manufacturing Mfg.*, 494 N.W.2d, 29 (Minn. 1992).

Under the reasoning of these Supreme Court decisions, some payments are not recoverable, such as a payment required under the Workers' Compensation Act for supplementary benefits, which are purely a statutory creation of supplemental wages to bring a low-wage earner who is injured up to a state average minimum wage. Thus, since this statutorily-created wage supplement would never be recoverable at common law, a completely-innocent employer cannot recover it from the fully-at-fault third party. Clearly, this was not the intent of the legislature when it created an all-encompassing statutory right for the employer and the Special Compensation Fund. Thus, language has been added to Minn. Stat. §176.061, subds. 3, 5, 7 and 10 to clarify the unlimited right of the employer as intended by the legislature.

We suspect that the analysis of the Supreme Court would change its decision if they took into account that the sole purpose of the amendment was to overrule the suggestion in *Tyroll* and *M.W. Ettinger* "that the statutory right of indemnity only grants the employer a right to share in the worker's common law negligence action." Therefore, Respondent Zurich respectfully requests the Supreme Court to reconsider this case in light of the clear intent of the statute as outlined in the complete legislative history of the amendments. If allowed to stand, the decision of this Court will thwart the clear intent of the Minnesota Legislature in amending §176.061 as set-forth in this legislative history, and render these amendments a nullity.

DRAWE & MALAND



Scott P. Drawe, I.D. #148325
Attorney for Respondent Zurich American
Insurance Company
7650 Edinborough Way #640
Minneapolis, MN 55435
Phone: (952) 841-2130
Fax: (952) 841-2149

Dated: February 13, 2006.

FURTHER YOUR AFFIANT SAYETH NOT



Michael D Carr

Subscribed and sworn to before me
this 13th day of February, 2006


Notary Public

**THE RATIONALE FOR PROPOSED REVISIONS TO
MINN. STAT. §176.061 SIMPLIFYING WORKERS' COMPENSATION
SUBROGATION AND EMPLOYER LIABILITY**

I Introduction

Every time a worker is injured at work, there are at least two parties for purposes of workers' compensation litigation, the worker and the employer. However, whenever the worker is injured through a third party, who is not an agent of his employer, issues of workers' compensation subrogation and of employer liability apply

Workers' compensation subrogation has to do with the right of the employer and its workers' compensation insurer to recover benefits it is required to pay from the negligent third party. Employer liability arises from the right of the third party to sue the employer to obtain contribution owed as a result of the employer's negligence that is limited to the amount of workers' compensation benefits paid and payable. These situations typically arise in automobile accidents, construction accidents, product liability accidents, premises accidents, and medical malpractice claims.

The proposal to revise Minn. Stat. §176.061 is made to address some confusion generated by several interpretive decisions of the Minnesota Supreme Court

The proposal is intended as a reasonable clarification balancing the interests of injured workers and their employers and has been endorsed by both the Minnesota Self-Insurers Association and the Minnesota Trial Lawyers Association

II Understanding Workers' Compensation Subrogation And Employer Liability In A Historical Context

To fully understand this proposed legislation, it is helpful to look at it in the historical context of why we have a Workers' Compensation Act. Prior to passage of the first Workers' Compensation Act, a worker injured on the job could only get his wages and medical bills reimbursed if the injuries were the fault of someone other than himself, such as a co-worker or a non-employer negligent third party. Further, an injured worker may have waited years before fault was determined and reimbursement was provided. Consequently, a worker who caused his own injury was completely out of luck, and a worker who was completely innocent was forced to wait for justice or accept a lessor settlement in order to keep his family fed.

The Workers' Compensation Act was passed to shift this burden to the employers. Therefore, regardless of whether an injury was caused by the worker's own fault or the fault of someone else, the employer was obligated to pay for wages and medical expenses. In fairness to the employers who were legislatively forced to accept this new burden regardless of fault, the Workers' Compensation Act was made an exclusive remedy. Therefore, an employer would pay for medical expenses and wages regardless of whether the worker was 100% at fault, and the worker could not sue the employer for additional damages for pain and suffering regardless of whether the employer, through a co-worker, was 100% at fault.

However, there are cases where a worker is injured due to the fault of a non-employer third party. For example, if a worker is rear-ended by a third party, the innocent worker is not prevented by the Workers' Compensation Act from recovering all the worker's damages, including medical and wage loss, from the third party who is 100% at fault for the worker's injury. Out of the recovery from the non-employer tortfeasor, the worker would reimburse the innocent employer for the wage loss and medical expenses it had paid under the Workers' Compensation Act.

Under Minn. Stat. §176.061, subd. 1 and subd. 4, an injured worker can only sue his employer for workers' compensation benefits. Similarly, an injured worker can only sue a co-worker, from a work injury if that co-worker had a duty that was independent of his employer's duty to keep a safe work place and that co-worker was either grossly negligent or intentionally inflicted the injury. Minn. Stat. §176.061, subd. 5(c). Less than a handful of states have allowed an exception to this exclusive remedy, however, Minnesota is one of them. Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977)

Again, it is helpful to look at the creation of this remedy in a historical context. The admittedly simplified explanation of the rights of workers and employers, as outlined above, becomes slightly more complicated when you take into account that not every accident involves 100% of the fault being placed on only one of the parties: the worker, the employer, or the third party.

For example, in Minnesota, if a worker has less fault than the non-employer tort-feasor, the worker will recover all of his damages including workers' compensation, less the worker's percentage of fault. If the worker is more at fault than the non-employer tort-feasor, there is no recovery for either the worker or his employer who is standing in his shoes pursuant to Minn. Stat. §604.01. Therefore, a completely innocent employer could be forced to bear the entire burden of the workers' compensation if the worker has 51% of the fault, even though a negligent third party has 49% of the fault.

On the other hand, up until the Lambertson case in 1977, an employer was always protected from any liability due to the exclusive remedy. Unfairly, sometimes an employer's burden for workers' compensation could be shifted to a non-employer third party despite the fact that the employer had the majority of the fault. It was for this reason that when Linder Lambertson got his hand caught in a punch-press due, primarily, to his employer's failure to obtain safety devices offered by the manufacturer and his co-worker's double-cycling of the machine, the Court created a right of contribution. Specifically, in Lambertson the employer was 60% at fault and was going to be completely reimbursed for the workers' compensation it paid by the manufacturer who had 25% of the fault. Thus, the Court held that there ought to be a right of contribution to the extent of workers' compensation benefits paid and the present value of workers' compensation benefits payable. The intent was to offset the workers' compensation subrogation with the new contribution while preserving the intent of the exclusive remedy against the employer.

Unfortunately for employers, the Lambertson decision which was intended, merely, to prevent an employer from benefitting from its own fault, became grounds for new money exposure to employers over and above the workers' compensation benefits that had been paid. This is based upon the interpretation of Lambertson after the 1979 change to the statutory formula requiring the employer's subrogation interest to be discounted by the cost

of collection percentage of the total recovery. See, Wilkin v. International Harvester Co., 363 N.W.2d 763 (Minn 1985). For example, in the Lambertson case, the employer paid, in contribution, the identical amount it received back in workers' compensation subrogation. However, under the change in the statute, the employer still would pay out the amount of workers' compensation benefits paid and payable in contribution, however, they would receive back only two-thirds, or less, of that amount because of the cost of collection discount incurred to pay for the plaintiff attorney and the expenses. Thus, the addition of subd. 11 to §176.061 is proposed to clarify the substantial confusion that has been created and to eliminate the new money exposure that was not anticipated by the Lambertson court.

Further, the addition of subd. 11 is also intended to codify the right of the employer to remove its right to recover workers' compensation benefits from the lawsuit to avoid this contribution liability. The Supreme Court has already indicated in the case of Folstad v. Eder, 467 N.W.2d 608 (Minn 1991), that the waiver of this workers' compensation right removes those workers' compensation damages from the lawsuit. Similarly, the Supreme Court held in Kempa v. E. W. Coons, Co., 370 N.W.2d 414, 417-418 (Minn 1985), that there is no right of contribution against the non-workers' compensation damages since the right of contribution was created merely to offset the right to recover workers' compensation damages.

Subd. 11. To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any non-employer third party liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault, but not to exceed the net amount the employer recovered pursuant to Minn. Stat. §176.061, subd. 6(c) and (d). The employer may avoid contribution exposure by affirmatively waiving the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third party.

Procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid and payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages whether they are recoverable under the Workers' Compensation Act or not. Following the verdict, the trial court will deduct any awarded damages that are duplicative of workers' compensation benefits paid or payable.

III. The Employer's "Separate Additional Cause of Action"

The employer, by statute, has its own "separate additional cause of action against the third party to recover amounts payable for medical treatment or for other compensation payable under this section resulting from the negligence of the third party." Minn. Stat. §176.061, subd. 7. This right of the employer is also discussed in Minn. Stat. §176.061, subs. 3, 5 and 10. In 1983, the word "indemnity" was added to all of these provisions to make certain that the employer's statutorily created right was not limited in any way. However, the Supreme Court has held that the statutory right of indemnity only grants the employer a right to share in the worker's common law negligence action. Tyroll v. Private Label Chemicals, 505 N.W.2d, 54 (Minn. 1993); M.W. Ettinger Transfer v. Shaper Manufacturing Mfg., 494 N.W.2d, 29 (Minn. 1992).

Under the reasoning of these Supreme Court decisions, some payments are not recoverable, such as a payment required under the Workers' Compensation Act for supplementary benefits, which are purely a statutory creation of supplemental wages to bring a low-wage earner who is injured up to a state average minimum wage. Thus, since this statutorily-created wage supplement would never be recoverable at common law, a completely-innocent employer cannot recover it from the fully-at-fault third party. Clearly, this was not the intent of the legislature when it created an all-encompassing statutory right for the employer and the Special Compensation Fund. Thus, language has been added to Minn. Stat. §176.061, subds 3, 5, 7 and 10 to clarify the unlimited right of the employer as intended by the legislature

Subd. 3. The employer, or the attorney general on behalf of the Special Compensation Fund, may bring legal proceedings against the party and recover the aggregate amount of benefits payable to or on behalf of the employee or the employee's dependents, regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute together with costs, disbursements, and reasonable attorney's fees of the action...

Subd. 5 If the injured employee or the employee's dependents or any party on their behalf receives benefits from the employer or the Special Compensation Fund or institutes proceedings to recover benefits or accepts from the employer or the Special Compensation Fund any payment on account of the benefits, the employer or the Special Compensation Fund is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute.

Subd. 7. Medical treatment. The liability of an employer or the Special Compensation Fund for medical treatment or payment of any other compensation under this chapter is not affected by the fact that the employee was injured through the fault or negligence of a third party, against whom the employee may have a cause of action which may be sued under this chapter, but the employer, or the attorney general on behalf of the Special Compensation Fund, has a separate additional cause of action against the third party to recover any amounts paid for medical treatment or for other compensation payable under this section resulting from the negligence of the third party regardless of whether such other compensation is recoverable by the employee or the employee's dependents at common law or by statute.

Subd. 10. Indemnity Notwithstanding the provisions of chapter 65B or any other law to the contrary, an employer has a right of indemnity for any compensation paid or payable pursuant to this chapter, regardless of whether such compensation is recoverable by the employee or the employee's dependents at common law or by statute, including temporary total compensation, temporary partial compensation, permanent partial disability, economic recovery compensation, impairment compensation, medical compensation, rehabilitation, death, and permanent total compensation.

IV. Conclusion

The proposal is intended as a clarification that simplifies the existing law while lifting some of the confusion caused by interpretive decisions of the Minnesota Supreme Court. It would certainly be simpler for everyone, and to the benefit of negligent tortfeasors to wipe out all subrogation and, thus, all litigation of these issues. However, this leads to some substantial unfairness to employers. For example, if a young worker is rear-ended in a work-related motor vehicle accident and is forced to live in a nursing home for the rest of his life due to a brain injury, the innocent employer may be forced to pay over a million dollars with no recovery, while the person whose negligence caused the accident, would receive a one-million-dollar windfall

On the other hand, it would be in the best interest of employers to turn back the clock on these interpretive appellate decisions and return to the original intent of the legislature as is mirrored in the handling of similar statutes in border states (See Alternative Proposal, Appendix B). For example, Minnesota's border states do not have any contribution or liability exposure. Minnesota is one of only three to five states in the nation that allows an exception to the exclusive remedy of the Workers' Compensation Act that creates contribution or liability exposure to employers Lambertson v. Cincinnati Corp., N W 2d, 679 (Minn 1977).

Employers also would benefit from the elimination of the rights of the worker to settle his claim for all damages that are not compensated by the Workers' Compensation Act as created in the case of Naig v. Bloomington Sanitation, 258 N.W 2d 81 (Minn 1977). Employers would also love to have its workers' compensation interest be defined as a lien, similar to the Medical Assistance Liens created in Minn. Stat. §256.015 (Appendix C) Under this statute, the attorney is paid first, then Medical Assistance is paid 100% of its money as long as the recipient of medical assistance receives one-third of the remainder after the attorney is paid

Therefore, this proposed revision will not wipe out all subrogation, nor will it wipe out all interpretive decisions, and is merely intended to clarify and simplify the employer's right of subrogation and the employer's potential contribution exposure in a manner that would allow an employer to avoid being dragged through substantial and complicated litigation

NOTE: THESE PROPOSED CHANGES ARE TO CLARIFY THE LAW AND SHOULD BE DEEMED RETROACTIVE WITH RESPECT TO EXISTING UNRESOLVED CLAIMS.