

NO. A09-1388

State of Minnesota
In Supreme Court

DAVID K. SEEHUS,
Employee-Respondent,

v.

BOR-SON CONSTRUCTION, INC. AND CNA RSKCO,
Employer/Insurer-Respondent,

and

WESLEY RESIDENCE, INC., and
MIGA by GAB ROBINS NORTH AMERICA,
Employer/Insurer-Relator,

and

TWIN CITIES SPINE CENTER,
BLUE CROSS BLUE SHIELD OF MINNESOTA & BLUE PLUS,
SMDC HEALTH SYSTEMS,
MINNESOTA DOLI/VOCATIONAL REHABILITATION UNIT,
DR. CHRISTIAN A. AUDETTE,
CHIROPRACTIC HEALTH CENTER,
Intervenors-Respondents.

EMPLOYER/INSURER-RELATOR'S BRIEF

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LEGAL ISSUES

- I. Did the WCCA have subject matter jurisdiction to order MIGA to pay medical benefits, in light of MIGA's assertion at hearing that the Employee's claim was not a covered claim under Chapter 60C?**

Answer: No

The Compensation Judge found that the Office of Administrative Hearings lacked the subject matter jurisdiction necessary to compel MIGA to pay the claimed benefits.

The WCCA reversed the Compensation Judge and found that Wesley and MIGA were responsible for the claimed medical benefits, since the Compensation Judge lacked the authority to issue the Motion for Joinder joining Bor-Son and CNA as parties.

- II. Did the compensation judge exercise proper subject matter jurisdiction over Bor-Son and CNA when issuing the Motion for Joinder?**

Answer: Yes

The Compensation Judge held that Bor-Son and CNA were properly joined as parties to the litigation.

The WCCA reversed, finding that the Compensation Judge lacked subject matter jurisdiction to order joinder of Bor-Son and CNA.

- III. Does the WCCA's decision violate Chapter 60C.13's requirement that all remedies through other insurers be exhausted prior to seeking payment from MIGA?**

Answer: Yes

Neither the Compensation Judge nor the WCCA ruled on this issue as it would have required interpretation of Chapter 60C, which is outside the scope of authority granted to the workers' compensation courts.

MOST APPOSITE CASES

Taft v. Advance United Expressways, 464 N.W.2d 725 (Minn. 1991)

Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433 (Minn. 1992)

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STATEMENT OF THE CASE

On or around June 12, 2007, David K. Seehus ("the Employee") filed a Claim Petition seeking workers' compensation benefits from Wesley Residence, Inc. ("Wesley") and Meadowbrook Insurance Group/GAB Robins for a low back injury suffered on March 19, 2001 (A. 8-10; Employee's Claim Pet.). Since Wesley's insurer had become insolvent by the time the Claim Petition was filed, the Minnesota Insurance Guaranty Association ("MIGA") administered the workers' compensation claims against Wesley. (A. 71; Resp't's Br.)

Wesley and MIGA filed a Motion for Joinder for the purpose of adding Bor-Son and CNA-RSKCO ("CNA") as necessary parties to the Employee's claim (A. 11-13; Mot. for Joinder). Bor-Son and CNA were formally joined to these proceedings pursuant to the Order for Joinder served and filed on November 1, 2007 (A. 14-15; Order for Joinder).

This case originated in the Office of Administrative Hearings, Workers' Compensation Section. Compensation Judge Gregory A. Bonovetz presided over a hearing on September 23, 2008 in Duluth, Minnesota (Addendum 1; Findings & Order). On or around January 30, 2009, Judge Bonovetz issued his Findings & Order, which

found Bor-Son and CNA to be 100 percent responsible for the claimed medical costs, as the Office of Administrative Hearings lacked jurisdiction regarding the subject matter jurisdiction defenses raised by Wesley and MIGA (*Id.*).

Bor-Son and CNA appealed to the Workers' Compensation Court of Appeals ("WCCA") and the case was considered *en banc* following oral argument on June 22, 2009 (A. 51-54; Notice of Appeal). On July 9, 2009, the WCCA served and filed its Opinion, which reversed the Findings & Order of the compensation judge (Addendum 10; WCCA Op.). Wesley and MIGA were ordered to pay the Employee's medical costs, as the WCCA found that the compensation judge lacked subject matter jurisdiction to grant joinder of Bor-Son and CNA (*Id.*) Wesley and MIGA appealed this result on July 29, 2009(A. 96; Pet. Writ Cert.). A Writ of Certiorari was issued on the same day (A. 98; Writ Cert.).

STATEMENT OF THE FACTS

David K. Seehus (“the Employee”) sustained a work-related low back injury on March 8, 1989 while employed as a carpenter by Bor-Son Construction, Inc (“Bor-Son”). (Addendum 11; WCCA Op.). Prior to that date, the Employee had never suffered from any previous low back symptoms (*Id.*).

The Employee began treating with physical therapy, but continued to experience pain (Addendum 3; Findings & Order, Finding 8). An MRI scan revealed severe bilateral subarticular and foraminal stenosis at L4-5 (*Id.*). There was also a herniated “free fragment disc” on the right side of L4-5, which was compromising the right S1 nerve root (*Id.*). The Employee was referred to Dr. Himango, who performed low back surgery on April 27, 1989 (*Id.*).

Initially following the surgery, the Employee noted that his right leg pain had subsided (Addendum 3; Findings & Order, Finding 8). However, he was participating in physical therapy with weights and suffered a re-injury (*Id.*). The Employee underwent a second laminectomy, which was again performed by Dr. Himango on October 6, 1989 (*Id.*).

The Employee was assessed an 11 percent permanent partial disability rating for his injury (Addendum 3; Findings & Order, Finding 9). Also, he was given a permanent lifting restriction of 25 pounds, and did not continue working as a carpenter (*Id.*). Instead, he began doing maintenance work with Wesley Residence, Inc. (“Wesley”) in 1990 (Addendum 3; Findings & Order, Finding 11). The Employee’s claim against Bor-Son and CNA was settled through a Stipulation for Settlement, which included a full,

final, and complete close-out of the Employee's claims, with the exception of future non-chiropractic medical benefits (A. 1-7; Stip for Sett.).

The Employee claimed that he suffered a new work-related injury to his low back on or around March 19, 2001 while employed by Wesley (A.8; Employee's Claim Pet.). He was in the process of cleaning a room when he lifted a suitcase and felt pain in his low back and right leg (Addendum 4; Findings & Order, Finding 13).

The Employee continued to work at Wesley, and visited Dr. Donley in May of 2001 for a surgical opinion (Addendum 4; Findings & Order, Finding 14). He opted not to pursue surgery at that time and proceeded with a conservative course of physical therapy, chiropractic care, and pain medication (*Id.*). In March of 2007, the Employee sought an MRI scan, which revealed lumbar spinal stenosis (Addendum 5; Findings & Order, Finding 20). Thus, Dr. Donley performed the Employee's third low back surgery on May 30, 2007 (Addendum 5; Findings & Order, Finding 21).

The Employee filed a Claim Petition on or around June 12, 2007, but the Claim Petition only named Wesley and Meadowbrook Insurance Group/GAB Robins as defense parties (A. 1; Employee's Claim Pet.). By this time, however, Wesley's workers' compensation insurer was no longer solvent (A. 71; Resp't's Br.). The Minnesota Insurance Guaranty Association ("MIGA"), therefore, administered the claim against Wesley (*Id.*). Thereafter, MIGA/GAB Robins filed a Motion for Joinder in October of 2007 (A. 11-13; Mot. for Joinder). Bor-Son Construction and Artex Insurance Company were formally joined to the claim through an Order for Joinder served and filed on November 1, 2007 (A. 14; Order for Joinder).

Dr. Larry Stern performed an independent medical examination at the request of Wesley and MIGA on July 17, 2007. (A. 75; Resp. Br.). Dr. Stern opined that the March 19, 2001 injury at Wesley was not a significant contributing factor to the Employee's need for treatment (*Id.*). In a follow-up report dated November 29, 2007, Dr. Stern reviewed some additional records, but reiterated his belief that only the Employee's 1989 injury at Bor-Son was a substantial contributing factor in his current need for low back treatment (*Id.*).

Bor-Son also obtained an independent medical examination report from Dr. Stephen Barron in January of 2008 (Addendum 6; Findings & Order, Finding 26). Dr. Barron opined that both the March 8, 1989 and March 19, 2001 injuries were substantial contributing factors to the Employee's present low back symptoms (*Id.*). He apportioned 50 percent of the liability to 1989 injury at Bor-Son injury and 50 percent to the 2001 injury at Wesley (*Id.*). None of the medical opinions relative to this claim assigned complete responsibility for the Employee's current symptoms and treatment to Wesley (A. 74-75; Resp. Br.).

In September of 2008, the Employee entered into a Partial Stipulation for Settlement with Wesley and MIGA (A. 31-50; Partial Stip. for Sett.). This Stipulation closed out all claims for benefits against Wesley and MIGA relative to the March 19, 2001 date of injury, with the exception of claims for reasonable and necessary non-chiropractic medical expenses causally related to that injury (*Id.*).

The Employee's claim eventually led to a hearing on September 23, 2008, and Compensation Judge Gregory A. Bonovetz issued a Findings & Order on or around

January 30, 2009 (Addendum 1; Findings & Order). In a brief prepared in advance of the hearing, counsel for MIGA asserted that the Employee's claim is not a "covered claim" within the meaning of Chapter 60C of the Minnesota Statutes. (A. 4-6; Hr'g Br.). Judge Bonovetz found that both the 1989 and 2001 injuries were substantial contributing causes to the Employee's condition (Addendum 6 ; Findings & Order, Finding 27). However, he further held that the Office of Administrative Hearings lacked subject matter jurisdiction to direct MIGA to make payments in a case where an alternative solvent insurer is present (Addendum 6; Findings & Order, Finding 28, 29). Therefore, Bor-Son and CNA/RSKCO were directed to pay 100 percent of the Employee's incurred medical costs (*Id.*).

Bor-Son and CNA appealed the Findings & Order to the Workers' Compensation Court of Appeals ("WCCA") and the case was considered *en banc* following oral argument on June 22, 2009. (Addendum 10; WCCA Op.). On July 9, 2009, the WCCA served and filed its Opinion, which reversed the Findings & Order of the compensation judge (*Id.*). In reversing the findings of the compensation judge, the WCCA held that the compensation judge lacked jurisdiction to order joinder of Bor-Son and CNA (*Id.*). As such, Wesley and MIGA were ordered to pay the Employee's medical costs, which the compensation judge had previously found to be the sole responsibility of Bor-Son and CAN (*Id.*).

Wesley and MIGA appealed the WCCA's decision to the Supreme Court of Minnesota by Petition for Writ of Certiorari served and filed on July 29, 2009 (A. 96; Writ. Cert.). A Writ of Certiorari was issued on the same day (A. 98; Writ Cert.).

STANDARD OF REVIEW

On review on certiorari, questions of law are considered under a *de novo* standard of review. Busch v. Advanced Maintenance, 659 N.W. 772 (Minn. 2003) (citing Owens v. Water Gremlin Co., 605 N.W.2d 733, 735 (Minn. 2000)). The determination of whether subject matter jurisdiction exists is a question of law. Hale v. Viking Trucking Co., 654 N.W.2d 119, 123 (Minn. 2002). Therefore, the issues in this case raise questions of law, and *de novo* review is appropriate.

ARGUMENT

I. WESLEY AND MIGA ASSERTED AT HEARING THAT THE EMPLOYEE'S CLAIM WAS NOT A "COVERED CLAIM" UNDER THE MEANING OF CHAPTER 60C AND, THEREFORE, THE WCCA LACKED SUBJECT MATTER JURISDICTION TO ORDER MIGA TO PAY BENEFITS.

Wesley and MIGA appealed the decision of the Workers' Compensation Court of Appeals ("WCCA") because the decision is substantially based upon misinterpretations of the law and critical misstatements of fact. Of these errors, perhaps the most critical is the WCCA's failure to acknowledge that MIGA's assertion at hearing that the Employee's claim was not a "covered claim" under Chapter 60C, which was an assertion placing this dispute outside the jurisdiction of the workers' compensation courts.

A. MIGA was created by the Minnesota Legislature and is funded by the insurance industry as a whole to ensure proper risk allocation and to mitigate the harm caused by insolvent insurers.

The Supreme Court of Minnesota reviewed the history and origins of MIGA in Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237 (Minn. 2005). MIGA's creation was part of a national effort by the National Association of Insurance Commissioners ("NAIC") to prevent failures of insurance companies from eroding public confidence in the insurance industry. Patrick J. O'Connor, Jr., Developments in Insurance Law, 525 PLI/Real 257 (Apr. 2006). In 1969, the NAIC proposed that each state create an insurance insolvency fund that would pay "covered claims" under certain insurance policies, while minimizing financial loss to claimants or policyholders due to the insolvency of an insurer, and create an association that would determine how to allocate the costs of this protection among insurers. Goodyear Tire & Rubber Co., 702

N.W.2d at 241.

The Minnesota Legislature enacted the Minnesota Insurance Guaranty Act in 1971 for the purpose of providing a “mechanism for the payment of covered claims” and to “minimize excessive delay in payment and to avoid financial loss to claimants or policyholders because of the liquidation of an insurer.” MINN. STAT. § 60C.02 (2008). The Act also establishes the body known as the Minnesota Insurance Guaranty Association (“MIGA”), which stands in place of the insolvent insurer, insofar as a claim has been deemed a “covered claim” within the meaning of Chapter 60C. MINN. STAT. § 60C.04 (2008). Funding for MIGA comes directly from assessments levied on the member insurers in proportion to their “net direct written premiums,” and indirectly from the costs passed on from member insurers to their policyholders. MINN. STAT. § 60C.06, subd. 1 (2008); see Goodyear Tire & Rubber Co., 702 N.W.2d at 241. Every insurer authorized to transact business in the State of Minnesota contributes to MIGA as a precondition of that authority. MINN. STAT. § 60C.04 (2008).

MIGA, therefore, is entirely a creature of statute and, therefore, has only such obligations as are imposed on it by Chapter 60C. Goodyear Tire & Rubber Co., 702 N.W.2d at 243. Since all Minnesota insurers contribute toward the funding of MIGA, the insurance industry and its policyholders are ultimately responsible for the costs of insurance payments, regardless of whether that obligation is borne by MIGA or by an individual insurer. However, in much the same manner that MIGA exists to protect the insurance industry from insolvency, the statutory requirements of Chapter 60C exist to protect MIGA by outlining specific circumstances for MIGA’s responsibility.

B. The workers' compensation courts lack subject matter jurisdiction to interpret and apply provisions of Chapter 60C.

Wesley and MIGA object to the WCCA's decision and believe that the compensation judge's decision—which imposed no responsibility for payment of the Employee's medical expenses—should have been affirmed. In this case, both the Office of Administrative hearings and the WCCA recognized that a compensation judge lacks subject matter jurisdiction to interpret and apply provisions for claims under the Minnesota Insurance Guaranty Act, which is found in Chapter 60C. Despite agreeing on this initial point, however, the WCCA proceeded to interpret its lack of jurisdiction in a manner completely inconsistent with the relevant case law.

The distinction over whether or not such a defense was raised has particular significance under these circumstances. In Taft v. Advance United Expressways, 464 N.W.2d 725, 727 (Minn. 1991), the Supreme Court of Minnesota held that the workers' compensation courts do not have subject matter jurisdiction to determine what constitutes a "covered claim" under Chapter 60C. The law also provides, specifically, that the WCCA has no subject matter jurisdiction over a case that does not arise under the workers' compensation laws of this state. MINN. STAT. § 175A.01, subd. 5 (2008). This Court has noted that "[t]he legislature has provided a specific mechanism for dealing with claims against insolvent insurers in this state," which is to file such claims with the Guaranty Association. Ast v. Har Ned Lumber, 483 N.W.2d 66, 68 (Minn. 1992) (citing Taft, 464 N.W.2d at 727).

Under Taft, a workers' compensation insurer has two options if it would like an

adjudication of what constitutes a “covered claim.” The claimant may either appeal the MIGA Board of Directors’ decision through the procedures outlined in Chapter 60C, or it may bring a declaratory judgment action in district court. Taft, 464 N.W.2d at 727. Neither of these procedures are appropriately conducted through the Office of Administrative Hearings or the WCCA.

Since Chapter 60C was based entirely on a model act adopted in many other states, it is useful to note how other jurisdictions have dealt with insurance guaranty associations in the workers’ compensation arena. The California Insurance Guaranty Association has been excused from liability on behalf of a liable but insolvent insurer, given the availability of insurance from other solvent carriers for a cumulative injury. See Industrial Indem. Co. v. W.C.A.B., 60 Cal. App. 4th 548 (4th Dist. 1997); see also 8 A.L.R. 1346 (2008) (noting that workers’ compensation award in California was not a covered claim where other solvent insurers were also involved).

C. MIGA did assert that the Employee’s claim was not a “covered claim” under Chapter 60C, and the WCCA’s factual assertions to the contrary are false.

The WCCA’s reliance on incorrect facts is revealed in the following excerpt from its decision:

Initially, we note that in neither Martagon nor this case did MIGA contend that the employee’s claim was not a covered claim under Minn. Stat. § 60C.09. Had it done so, this court would have no jurisdiction.

(Addendum 15; WCCA Op.).

However, MIGA did unequivocally assert at hearing that this was a not a “covered claim” under the meaning of Chapter 60C, and this act should have led either the Office

of Administrative Hearings or the WCCA to dismiss the claim against MIGA altogether for lack of subject matter jurisdiction. At the time of the hearing, MIGA was represented by attorney Thomas L. Cummings, who asserted the following argument in his Hearing Brief:

Whenever a case presents a collateral dispute between MIGA and a solvent carrier (such as CNA in this case) seeking to reduce its liability by apportionment in the workers' compensation system there is simply no jurisdiction to apportion liability to MIGA...As such, whether there is [a] direct claim by the Employee against MIGA and a solvent insurer, or a dispute between MIGA and a solvent insurer regarding the apportionment of liability for a claim, the result is the same. The workers' compensation courts lack subject matter jurisdiction and cannot address apportionment. Pursuant to Wiss, it simply does not matter how the parties were brought into the litigation. Any type of claim or defense that is an attempt by a solvent insurer to apportion some of the liability to MIGA is not a "covered claim."

In short, if there is a finding that the March 8, 1989 injury is a significant contributing factor to the non-chiropractic medical claims in this matter, then Wesley Residence, Inc./MIGA must be dismissed as to those claims. The workers' compensation courts lack jurisdiction to apportion part of the liability to MIGA.

(A. 23-24; Hr'g Br.). Counsel for MIGA, therefore, did convey MIGA's position that this was not a "covered claim," and explicitly outlined the lack of subject matter jurisdiction in this claim. Once this defense was raised, the claim against MIGA should not have continued through the workers' compensation courts. See Taft, 464 N.W.2d at 727. The WCCA was operating under the false assumption that MIGA had never asserted that this was not a "covered claim" under Chapter 60C. Had the WCCA recognized this fact, it should have arrived at the proper conclusion, which was that the Office of Administrative Hearings lacked subject matter jurisdiction to order payment by Wesley and MIGA.

D. Subject matter jurisdiction may be raised as a defense at any time.

It is well settled that subject matter jurisdiction may be raised at any time. See, e.g., Hemmesch v. Molitor, 328 N.W.2d 446 (Minn. 1983); Davidner v. Davidner, 232 N.W.2d 5, 7 (Minn. 1975). Therefore, if MIGA were able to identify any reason why the workers' compensation courts should not have subject matter jurisdiction, it could have objected raised such an objection at any point during the hearing or appellate process.

As argued above, MIGA did clearly raise its subject matter jurisdiction defense at the hearing level of this litigation (A. 23-24; Hr'g Br.). If, however, this Court is not convinced that jurisdiction defense was properly raised below, the subject matter jurisdiction defense can never be waived, and has now been formally reiterated in this brief.

II. THE COMPENSATION JUDGE HAD PROPER SUBJECT MATTER JURISDICTION TO JOIN BOR-SON AND CNA AS NECESSARY PARTIES TO THE EMPLOYEE'S CLAIM.

The WCCA decision also creates arbitrary distinctions based on the manner by which MIGA is brought into a claim for workers' compensation benefits. According to the WCCA, MIGA joined Bor-Son and CNA for no other reason than to reduce its own liability and, therefore, MIGA was actually seeking contribution or reimbursement, not joinder. Wesley and MIGA argue that this assertion is not supported by case law or by the facts of the case.

A. The procedural posture of the claim against MIGA has no impact on the subject matter jurisdiction defense.

In Wiss v. Advance United Expressway, 488 N.W.2d 802 (Minn. 1992), this Court

applied Taft and asserted that “petitions for contribution/reimbursement between insurance carriers and MIGA are beyond the jurisdiction of the workers’ compensation courts.” Also in 1992, the Court decided Gerads, which found that the workers’ compensation courts lacked subject matter jurisdiction to consider MIGA’s petition for contribution or reimbursement. 486 N.W.2d at 434. The Court held that MIGA’s payment obligations exist because of Chapter 60C, not because of the workers’ compensation laws in Chapter 176. *Id.* Since the WCCA lacked subject matter jurisdiction to construe or apply Chapter 60C, it did not have the authority to make a legal determination as to MIGA’s right to proceed with a petition for contribution or reimbursement. Rather, MIGA would first need to obtain a declaratory judgment clarifying their subrogation status, prior to seeking contribution or reimbursement from another insurer. *Id.* (citing Taft, 464 N.W.2d at 727).

The WCCA argued that the holding in Gerads required Wesley and MIGA’s “Motion for Joinder” to be dismissed because it could not have been filed for any other reason than to seek contribution or reimbursement from Bor-Son and CNA. This is a false assumption. First, it should be noted that insurance guaranty associations, such as MIGA, do have the right to pursue subrogation claims under the proper circumstances. See Wirth v. M.A. Morenson/Shal Assocs., 520 N.W.2d 173 (Minn. Ct. App. 1994). Therefore, any argument by the WCCA that MIGA’s Motion for Joinder would be futile because MIGA lacks subrogation rights altogether must fail, since the case law has determined otherwise.

Second, the WCCA misapplied the holding in Gerads, which had a set of facts

distinguishable from the present case. In Gerads, the Court merely held that MIGA could not pursue a claim for contribution or reimbursement for workers' compensation benefits it was already paying, since the workers' compensation courts lacked subject matter jurisdiction to determine the extent of MIGA's subrogation rights. By contrast, Wesley and MIGA denied the Employee's claim and paid no medical benefits at any point before or after the Motion for Joinder was filed.

Wesley and MIGA never sought the type of remedy that was sought in Gerads and, therefore, the analysis in Gerads pertaining to contribution and reimbursement has no relevance to MIGA's actions in this case. Wesley and MIGA filed a document titled "Motion for Joinder/Petition for Contribution and/or Reimbursement" in October of 2007 in response to the Employee's initial Claim Petition, which only listed the March 19, 2001 date of injury for Wesley and GAB Robins (A. 11; Mot. for Joinder). Recognizing that the genesis of the Employee's low back complaints was the March 8, 1989 injury with Bor-Son and CNA, Wesley and MIGA filed their motion to join Bor-Son and CNA as necessary parties for the Employee's claim for medical benefits related to a low back injury. Bor-Son and CNA were "necessary parties" not only because they were responsible for the initial onset of the Employee's low back symptoms, but also due to the fact that their injury was a substantial contributing factor to the current need for medical treatment.

The WCCA held that the "Motion for Joinder" filed by Wesley and MIGA was actually a "Petition for Contribution or Reimbursement," since it could have been filed for no other purpose than to reduce MIGA's own liability for the Employee's claim

(Addendum 15; WCCA Op.). This statement is a truism with no legal significance. There can be no doubt that a defense party to a workers' compensation claim frequently seeks to join other defense parties for the reason of partially or completely reducing its own liability. Yet, in the case of MIGA, if any solvent insurer is found to be liable for the Employee's need for medical treatment to any degree, the law dictates that the solvent insurer—not MIGA—will be responsible for those benefits. Therefore, there is no question that Bor-Son and CNA were necessary parties to the Employee's claim.

Wesley and MIGA's pleading was principally a Motion for Joinder, and was approved as such by an "Order for Joinder" served and filed on November 1, 2007 (A. 14; Order for Joinder). That Order did not address contribution or reimbursement, and, indeed, could not have addressed those remedies, since Wesley and MIGA did not pay any of the Employee's claimed medical benefits. Therefore, the WCCA decision is incorrect when it states that the "essential nature of the relief sought by MIGA was contribution and/or reimbursement." Those remedies are only available where an insurer has already made payments and seeks to recover part or all of those amounts from another insurer.

B. MIGA could not have been responsible for the claimed medical benefits, since no medical opinion placed full responsibility on the 2001 injury at Wesley.

As a practical matter, MIGA could not have been ordered by a compensation judge to make payments on behalf of the insolvent insurer unless there was a finding based upon medical support that the 2001 injury at Wesley was 100 percent responsible for the Employee's need for treatment. This is because equitable apportionment is a

predicate fact to the determination that this is a “covered claim” under Chapter 60C. Wiss, 488 N.W.2d at 804 (quoting Taft, 464 N.W.2d at 727).

There was no medical report suggesting that the 2001 injury at Wesley was entirely responsible for the Employee’s need for treatment. Once the compensation judge made the finding that the 1989 injury suffered at Bor-Son was a substantial and contributing factor in the Employee’s present need for medical treatment, the compensation judge had no choice but to order full payment of these charges by Bor-Son and CNA. This result should have been left undisturbed by the WCCA.

C. Joinder and contribution/reimbursement are not identical and require completely different analyses by a compensation judge with respect to the parties and the applicable law.

The WCCA should not have interpreted Gerads as prohibiting the workers’ compensation courts from issuing an Order for Joinder with respect to Bor-Son and CNA. Joinder and contribution/reimbursement are entirely separate actions with differing legal objectives and consequences. Joinder is a procedural remedy, which becomes necessary for reasons of legal efficiency and to avoid conflicting outcomes in parallel cases arising from the same set of facts. By requesting joinder, Wesley and MIGA were asking the Office of Administrative Hearings to do nothing more than to ensure that all necessary parties were involved in the litigation. Thus, the Order for Joinder depended on the compensation judge’s jurisdiction over Bor-Son and CNA—not over Wesley and MIGA.

The irony of the WCCA’s decision is that the same subject matter jurisdiction defense that should prohibit the workers’ compensation course from ordering MIGA to make payment was applied by the WCCA as a weapon preventing MIGA from joining

CNA, a solvent insurer that should be ultimately responsible for those payments. Moreover, the WCCA reached that decision because it believed that MIGA was seeking a contribution/reimbursement remedy that it could not possibly have sought, since Wesley and MIGA had not paid any of the claimed benefits.

Thus, the WCCA has misinterpreted and misapplied the case law relative to subject matter jurisdiction, and with harmful results. Gerads and its progeny were never intended to deny the workers' compensation courts simple procedural remedies, such as joinder. Ordering joinder of Bor-Son and CNA did not require the workers' compensation courts to interpret or construe Chapter 60C in any way. In fact, by imposing full liability on Wesley and MIGA for the Employee's medical charges, the WCCA effectively determined for itself that this was a "covered claim," which is precisely what the WCCA said it could not do, due to its lack of subject matter jurisdiction. Therefore, the WCCA's decision circumvents the principles of MIGA outlined in Chapter 60C, and should be reversed.

D. Subject matter jurisdiction over MIGA should not depend on which Employer and Insurer the Employee targets.

Perhaps the most bizarre result of the WCCA's decision is that the fate of MIGA is placed entirely in the hands of the Employee. Had the Employee merely decided to file a Claim Petition against Bor-Son and CNA in the first place, there is no dispute that the workers' compensation system would lack jurisdiction to determine a claim for apportionment, contribution, or reimbursement against MIGA. Yet, by interpreting the law as it did, the WCCA allows for a completely opposite result for no other reason than

that the Employee chose to initially name Wesley and MIGA in his Claim Petition.

If the WCCA's decision in this case were left undisturbed, it could produce wildly inconsistent results in future litigation involving MIGA. The WCCA lost sight of the original purpose for establishing an insurance guaranty association, which was to allow for swift and predictable allocation of risk. That purpose is not served by a case law standard where MIGA's ultimate liability is wholly dependent on the procedural technicality of how MIGA was joined into the claim.

III. THE WCCA'S DECISION VIOLATES CHAPTER 60C.13, WHICH REQUIRES EXHAUSTION OF OTHER INSURANCE COVERAGE.

The assertion by Wesley and MIGA at hearing that the Employee's claim was not a "covered claim" under the meaning of Chapter 60C should have required the workers' compensation courts to dismiss MIGA as a party for want of subject matter jurisdiction. Nevertheless, Wesley and MIGA also present the alternative argument that the WCCA's reversal of the compensation judge's order is in violation of Minn. Stat. §60C.13.

According to Chapter 60C, a claimant must exhaust their rights through any solvent insurance policy for any and all claims arising out of the same facts, prior to seeking payment from MIGA. MINN. STAT. § 60C.13, subd. 1 (2008). This principle is consistent with the underlying purpose of MIGA, which is to assist in properly allocating risk for insurance claims. Other states, such as Illinois, have also adopted and interpreted insurance guaranty law as requiring exhaustion of solvent insurers prior to proceeding against the guaranty association. See 215 ILL COMP. STAT. 5/546 (2009); Hasemann v. White, 177 Ill.2d 414, 686 N.E.2d 571 (Ill. 1997). Since CNA was a solvent insurer for

an injury that was a substantial and contributing factor to the Employee's need for medical treatment, CNA should have been responsible for the entirety of the medical expenses, as was the initial ruling by the compensation judge.

CONCLUSION

The compensation judge had proper subject matter jurisdiction over Bor-Son and CNA to join them as necessary parties in the Employee's claim. There is nothing inherent in the action of joinder that would have required interpretation of any statutory authority outside of workers' compensation law, and the Motion for Joinder should not have been disturbed on appeal. However, the Workers' Compensation Court of Appeals did lack subject matter jurisdiction to order the payment of medical benefits following MIGA's assertion that the Employee's claim was not a "covered claim" within the meaning of Chapter 60C. Accordingly, the Relators, Wesley and MIGA, respectfully request that the Supreme Court of Minnesota reverse the decision of the Workers' Compensation Court of Appeals.

Respectfully submitted,

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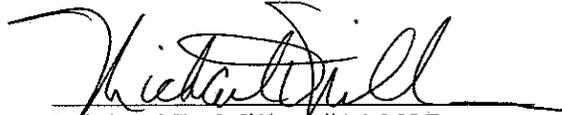
CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,247 words. This brief was prepared using Microsoft Word with 13-point Times New Roman font.

Respectfully submitted,

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