

NO. A09-1388

---

State of Minnesota  
**In Supreme Court**

DAVID K. SEEHUS,

*Employee-Respondent,*

vs.

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 REPLY BRIEF**

---

McCOLLUM, CROWLEY, MOSCHET & MILLER, LTD.

Michael D. Miller, Esq. (#146687)

Jeffrey R. Homuth, Esq. (#0386762)

700 Wells Fargo Plaza

7900 Xerxes Avenue South

Minneapolis, MN 55431

(952) 831-4980

*Attorneys for Employer/Insurer-Relator*

*(Additional Counsel Listed on Following Page)*

PETERSON, LOGREN  
& KILBURY, P.A.  
Larry J. Peterson (#8606X)  
Brent Kleffman (#0386818)  
315 Wright Building  
2233 University Avenue West  
St. Paul, MN 55114-1629  
(651) 647-0506

*Attorneys for Employer/Insurer Respondent  
Bor-Son Construction, Inc. and CNA RSKCO*

LaCOURSE LAW OFFICE, P.A.  
Russell J. LaCourse, Esq. (#129161)  
600 Missabe Building  
227 West First Street  
Duluth, MN 55802-1994  
(218) 722-5766

*Attorneys for Employee-Respondent*

BLUE CROSS BLUE SHIELD OF MN  
Attn: Thomas F. Gilde, Esq. (#34782)  
P.O. Box 64560  
St. Paul, MN 55164  
(651) 662-2257

*Attorney for Intervenor-Respondent*

TWIN CITIES SPINE CENTER  
Attn: Amy Zamow  
913 East 26th Street, Suite 600  
Minneapolis, MN 55404  
(612) 775-6200

*Pro Se Intervenor-Respondent*

DR. CHRISTIAN A. AUDETTE  
438 North 57th Avenue West  
Duluth, MN 55807  
(218) 624-5759

*Pro Se Intervenor-Respondent*

DEPT. OF LABOR AND INDUSTRY  
VOCATIONAL REHAB UNIT  
Attn: Cheryl D. Eliason  
443 Lafayette Road  
St. Paul, MN 55155  
(651) 284-5038

*Pro Se Intervenor-Respondent*

CHIROPRACTIC HEALTH CENTER  
215 North Central Avenue  
Duluth, MN 55807  
(218) 628-0646

*Pro Se Intervenor-Respondent*

SMDC HEALTH SYSTEM  
Attn: Karen Sirois, Paralegal  
400 East Third Street  
Duluth, MN 55805  
(218) 786-3122

*Pro Se Intervenor-Respondent*

## TABLE OF CONTENTS

|   | Pages(s) |
|---|----------|
| Table of Authorities .....  | ii       |
| Argument.....   | 1        |
| I.    The Supreme Court’s decision in <u>Gerads</u> required dismissal of the claim against MIGA, since the WCCA lacked subject matter jurisdiction to interpret Chapter 60C.....         | 1        |
| A.    The Court’s decision in <u>Gerads</u> required dismissal of the claim against MIGA.....   | 1        |
| B.    The Respondents’ argument against joinder of Bor-Son and CNA has no basis in the law and is inconsistent with the <u>Gerads</u> decision.....                                       | 3        |
| C.    The compensation judge lacks the authority to assess the validity of a subject matter jurisdiction defense arising out of Chapter 60C, such as MIGA’s “covered claim” defense ..... | 5        |
| Conclusion.....   | 7        |
| Certificate of Brief Length .....   | 8        |

## TABLE OF AUTHORITIES

| <b>Minnesota Cases</b>   | <b>Page(s)</b>   |
|--|------------------|
| <u>Ast v. Har Ned Lumber</u> , 483 N.W.2d 66, 68 (Minn. 1992).....                               | 2, 6             |
| <u>Breimhorst v. Beckman</u> , 35 N.W.2d 719, 734 (Minn. 1949) .....                             | 6                |
| <u>Gerads v. Bernick’s Pepsi-Cola</u> , 486 N.W.2d 433 (Minn. 1992) .....                        | 1, 2, 3, 4, 5, 7 |
| <u>Goodyear Tire &amp; Rubber Co. v. Dynamic Air, Inc.</u> ,<br>702 N.W.2d 237 (Minn. 2005)..... | 6                |
| <u>Irwin v. Surdyks Liquor</u> , 599 N.W.2d 132, 140 (Minn. 1999).....                           | 6                |
| <u>Taft v. Advance United Expressways</u> ,<br>464 N.W.2d 725 (Minn. 1991).....                  | 2, 6             |
| <b>Minnesota Statutes and Rules</b>  |                  |
| Minn. R. 1420.1300, subp.1 .....   | 4                |
| Minn. R. 1420.2400, subd. 1.....   | 4                |
| MINN. STAT. § 60C.01-.22 (2008) .....  | 1, 2, 3, 5, 6    |
| MINN. STAT. §176 (2008) .....  | 2, 6             |

## ARGUMENT

### I. THE SUPREME COURT'S DECISION IN GERADS REQUIRED DISMISSAL OF THE CLAIM AGAINST MIGA, SINCE THE WCCA LACKED SUBJECT MATTER JURISDICTION TO INTERPRET CHAPTER 60C.

The Relators, Wesley Residence, Inc. ("Wesley") and the Minnesota Insurance Guaranty Association ("MIGA"), file this Reply Brief to specifically address assertions in the Respondent's Brief relating to the interpretation of Chapter 60C by workers' compensation courts. Wesley and MIGA contend, pursuant to Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433 (Minn. 1992), that the workers' compensation courts lacked subject matter jurisdiction after MIGA raised the defense that the Employee's claim was not a "covered claim" under the meaning of Chapter 60C.

#### A. The Court's decision in Gerads required dismissal of the claim against MIGA.

The Respondent's Brief properly cites the legal standards outlined in Gerads, but improperly applies those standards to the facts of this case (Resp't's Br. 14-16). The facts of Gerads involved MIGA's filing of a Petition for Contribution or Reimbursement against a solvent insurer, Western National Insurance Company. Gerads, 486 N.W.2d at 434. The compensation judge dismissed the Petition for Contribution or Reimbursement, finding that he did not have subject matter jurisdiction over the claim. *Id.* The Workers' Compensation Court of Appeals ("WCCA") reversed, reasoning that MIGA "stands in the shoes" of the insolvent insurer. *Id.* Subsequently, this Court reversed the WCCA, suggesting that its "assumption of jurisdiction" was predicated upon an interpretation of the MIGA Act, contained in Chapter 60C of Minnesota Statutes. The fundamental

holding in Gerads was that the workers' compensation courts lack subject matter jurisdiction to determine whether or not MIGA qualifies as an "insurer" for purposes of the Workers' Compensation Act, which is located in Chapter 176 of Minnesota Statutes. See Gerads, 486 N.W.2d at 434.

The reason that a workers' compensation court cannot determine MIGA's status as an "insurer" is that such a determination cannot be made without construing or interpreting statutory authorities outside of Chapter 176—a task for which the WCCA lacks subject matter jurisdiction. See Gerads, 486 N.W.2d at 434; Ast v. Har Ned Lumber, 483 N.W.2d 66 (Minn. 1992); Taft v. Advance United Expressways, 464 N.W.2d 725, 727 (Minn. 1991). As this Court previously stated: "[U]nlike the employer whose payment obligations and subrogation rights exist because of [C]hapter 176, MIGA's payments obligations exist because of [C]hapter 60C." Gerads, 486 N.W.2d at 434.

As the Respondents fully acknowledge, it makes no difference whether the remedy sought through workers' compensation law is sought initially by MIGA or by a solvent insurer or other party. In either case, the workers' compensation courts would not be able to treat MIGA as an "insurer" without first interpreting and applying provisions in Chapter 60C. This was particularly the case after MIGA's formal assertion that this claim was not a "covered claim," which it achieved at hearing (Relator's Br. 13; A. 23-24; Hr'g Br.).

Here, the compensation judge properly identified that the workers' compensation courts do not have jurisdiction to direct MIGA to make payments in a case where there is

a solvent insurer (Addendum 9; Memorandum of Findings & Order). While the compensation judge should have further noted that he lacked subject matter jurisdiction to determine MIGA's status as an "insurer" in the first place, his Findings & Order still achieved the result required by the law, which is that MIGA cannot be held responsible for an apportioned share of liability where a solvent insurer is also present. Therefore, the WCCA should not have reversed the compensation judge's Findings & Order, and MIGA should not be liable for any of the Employee's claimed benefits, under these circumstances.

**B. The Respondents' argument against joinder of Bor-Son and CNA has no basis in the law and is inconsistent with the Gerads decision.**

The Respondents' base their argument on two fundamentally conflicted interpretations of the decision in Gerads. First, they argue that the compensation judge's lack of subject matter jurisdiction prohibited MIGA from requesting joinder of Bor-Son and CNA as necessary parties (Resp't's Br. 14-16). Second, they argue that despite the complete lack of subject matter jurisdiction, the Employee's claim should have been allowed to proceed against MIGA—and only MIGA—irrespective of MIGA's defenses under Chapter 60C (Resp't's Br. 18-19). Unless this Court is prepared to overturn the Gerads decision, these two positions simply cannot be reconciled.

It is commonplace for an Employee in workers' compensation law to list only their most recent date of injury when filing a Claim Petition. At a later date, the Employee may amend the Claim Petition to include other dates of injury, or one of the employers and insurers already named in the case may file a Motion for Joinder. Joinder

is a procedural action allowing compensation judges to add “additional parties necessary for the full adjudication of the case.” Minn. R. 1420.1300, subp.1. A Motion for Joinder can be combined with a Petition for Contribution or Reimbursement. See Minn. R. 1420.2400, subd. 1. However, even had no party filed a Motion for Joinder in this case, the compensation judge could have ordered joinder of Bor-Son and CNA upon his own motion. Minn. R. 1420.1300, subp. 1. Thus, the right to join a necessary party does not belong to MIGA—it belongs to the administrative hearing process as a whole. The compensation judge’s Order for Joinder did not address contribution or reimbursement, and it did not require any analysis of Chapter 60C (A. 14-15; Order for Joinder).

It is important to note here what the Respondents are *not* arguing. Bor-Son and CNA never objected to joinder on factual grounds. Had the 2001 injury been covered by a solvent insurer, the Respondents offer no evidence that their admitted 1989 injury would not have required their involvement as a necessary party in litigation over the Employee’s Claim Petition. Despite the fact that they could have been joined into this matter by any party or the compensation judge himself, the Respondents object to joinder for no reason other than the fact that MIGA happened to be the first defense party identified by the Employee. However, there is no basis in Gerads or any other case to deny joinder of a necessary party simply because MIGA is involved in the case.

As for the Respondents’ argument that full payment by MIGA would have provided “quick and efficient delivery” of workers’ compensation benefits, this argument is disingenuous for two reasons. First, the Respondents offer no reason why full payment by the solvent insurer, CNA—as the compensation judge initially ordered—would not

have been equally “quick and efficient.” Second, if Bor-Son and CNA truly valued the interests of the Employee above all else, they would have issued immediate payment pursuant to the compensation judge’s Findings & Order, rather than appealing this necessary result to the WCCA.

As the sole remaining solvent insurer for the Employee’s work-related low back injuries, the only opportunity for Bor-Son and CNA avoid liability was to avoid becoming involved in the case in the first place. The Respondents’ interpretation of Gerads—a decision containing no discussion of the procedural remedy of joinder—has been reverse-engineered to achieve that purpose. Wesley and MIGA argue that joinder was necessary and appropriate, and object to any expansion or abrogation of the Gerads doctrine.

**C. The compensation judge lacks the authority to assess the validity of a subject matter jurisdiction defense arising out of Chapter 60C, such as MIGA’s “covered claim” defense.**

A point of emphasis in the Respondent’s Brief is their contention that MIGA’s “covered claim” defense lacks merit under Chapter 60C. Conceding that subject matter jurisdiction defenses can be raised at any time, the Respondents further suggest that the defense can only be raised if it is “true” (Resp’t’s Br. 22). Over the course of an argument several pages in length, counsel for the Respondents is essentially placing themselves in the shoes of a District Court judge, weighing the evidence against the statutory requirements of the MIGA Act.

Yet, a workers’ compensation judge does not have the same authorities as a District Court judge, and certainly does not have subject matter jurisdiction to interpret

and apply the procedures determining whether a claim is “covered” by MIGA. See Ast, 483 N.W.2d at 68 (citing Taft, 464 N.W.2d at 727); MINN. STAT. § 60C.09 (2008). Both the Office of Administrative Hearings and the WCCA are executive branch agencies, and compensation judges have no interpretive powers outside of the quasi-judicial function of interpreting and applying Chapter 176. See Irwin v. Surdyks Liquor, 599 N.W.2d 132, 140 (Minn. 1999) (citing Breimhorst v. Beckman, 35 N.W.2d 719, 734 (Minn. 1949)). From a constitutional standpoint, a workers’ compensation court has no more legal authority to determine what constitutes a “covered claim” than it would to render a decision in a criminal or civil case arising from another source of Minnesota law.

Just as the workers’ compensation courts are limited bodies with delegated authority, MIGA also has limitations as a “creature of statute.” Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237, 243 (Minn. 2005). MIGA does not take the place of an insolvent insurer for all of its contractual obligations, but only has such obligations as are imposed upon it by the MIGA Act. *Id.* It is immaterial whether the workers’ compensation courts believe that the present claim was “covered” by MIGA, since workers’ compensation judges cannot interpret or apply the provision in Chapter 60C controlling that definition. See MINN. STAT. § 60C.09 (2008). It is for this very reason that the workers’ compensation claim against MIGA should have been dismissed.

## CONCLUSION

The Respondents' Brief misinterprets the legal precedent established by Gerads and would require workers' compensation courts to make legal determinations in excess of their authority as administrative bodies. In conjunction with the arguments outlined in the Relator's Brief, Wesley Residence, Inc. and MIGA respectfully request that the decision of the Workers' Compensation Court of Appeals be reversed.

Respectfully submitted,

**McCOLLUM, CROWLEY,  
MOSCHET & MILLER, LTD.**

Dated: September 24, 2009

  
\_\_\_\_\_  
Michael D. Miller, #146687  
Jeffrey R. Homuth, # 0386762  
*Attorneys for Employer/Insurer - Relator*  
7900 Xerxes Avenue South, Suite 700  
Minneapolis, Minnesota 55431  
(952) 831-4980

## CERTIFICATE OF BRIEF LENGTH

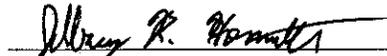
---

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 1,687 words. This brief was prepared using Microsoft Word with 13-point Times New Roman font.

Respectfully submitted,

**McCOLLUM, CROWLEY,  
MOSCHET & MILLER, LTD.**

Dated: September 24, 2009

  
\_\_\_\_\_  
Michael D. Miller, #146687  
Jeffrey R. Homuth, # 0386762  
*Attorneys for Employer/Insurer - Relator*  
7900 Xerxes Avenue South, Suite 700  
Minneapolis, Minnesota 55431  
(952) 831-4980