

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-RESPONDENT'S BRIEF AND APPENDIX

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
(Additional Counsel Listed on Following Page)*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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

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

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

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STATEMENT OF ISSUES

1. Did the WCCA correctly determine that the compensation judge improperly exercised subject matter jurisdiction over Bor-Son/CNA when he issued the Order for Joinder based on MIGA’s Motion for Joinder/Petition for Contribution and/or Reimbursement?

Answer: Yes

List of most apposite authorities:

- Gerads v. Bernick’s Pepsi-Cola, 486 N.W.2d 433, 434 (Minn. 1992)
- 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)
- Wiss v. Advance United Expressway, 488 N.W.2d 802, 804 (Minn. 1992)

2. Did the WCCA correctly determine that there is no evidence in the record that MIGA ever asserted that the employee’s claim was not a “covered claim”?

Answer: Yes

List of most apposite authorities:

- Minn. Stat. § 60C.10

3. Does the WCCA’s decision violate Minn. Stat. § 60C.13?

Answer: No

List of most apposite authorities:

- Minn. Stat. § 60C.13

4. Under the principles set forth in Pearson v. Foot Transfer Co., 221 N.W.2d 710 (Minn. 1974), can Bor-Son/CNA, the employer/insurer on risk for the employee's first injury, ever be held liable for the portion of disability attributable to the second work injury with Wesley Residence/MIGA?

Answer: No

List of most apposite authorities:

- Pearson v. Foot Transfer Co., 221 N.W.2d 710 (Minn. 1974)
- Ast v. Har Ned Lumber, 46 W.C.D. 490 (W.C.C.A. 1991)

STATEMENT OF FACTS

A. Employee's March 8, 1989 Injury with Bor-Son/CNA

On March 8, 1989 the employee sustained an injury to his low back arising out of and in the course and scope of his employment with Bor-Son as insured by CNA.

(Relator's Addendum 3; Findings and Order, Finding 8) Bor-Son/CNA accepted liability for the injury and paid the employee workers' compensation benefits. (Id., Finding 10)

An MRI determined that the employee had a herniated disk at L4-5. (Id., Finding 8) In April 1989 the employee underwent a right L5 laminectomy for the herniated disk. (Id.)

The employee had marked improvement from this surgery but later experienced increasing pain in his right lower extremity. (Id.) In October 1989, the employee underwent a second surgery involving the removal of a large free fragment. (Id.)

Approximately one year after this injury the employee's treating neurosurgeon, Dr. Himango, determined the employee had reached maximum medical improvement and assigned the employee with an 11% permanent partial disability rating with permanent weight restrictions of 25 lbs. (Id., Finding 9) In September of 1990, Bor-Son/CNA entered into a settlement whereby the employee was paid \$86,500.00 in exchange for a full, final and complete settlement, leaving open future non-chiropractic medical expenses. (A. 57; Appellant's Brief)

B. Time Period of 1990 through March 19, 2001

For the next ten years (1990—March 2001) the employee performed maintenance

work for the Wesley Residence, Inc. (Relator's Addendum 3; Findings and Order, Finding 11) His work duties included remodeling, construction, electric work, cabinet building and other maintenance-type duties. (Id.)

Between 1990 and March 2001, the employee did not seek any medical care or treatment for low back complaints, lost no time from work as a result of any low back complaints and was physically able to perform all his assigned duties. (Relator's Addendum 4; Findings and Order, Finding 12) At no time during this period did the employee experience pain in his right leg and it was never suggested by any physician that the employee would need to undergo any additional surgical care or treatment. (Id.) The only notable fact was that the employee did experience occasional low back pain and some numbness in the right leg. (Id.)

C. Employee's March 19, 2001 Injury with Wesley Residence/MIGA

On March 19, 2001 while in the course and scope of his employment with the Wesley Residence, the employee picked up a suitcase weighing approximately 25 lbs. (Id., Finding 13) Immediately the employee had knife-like pain in his low back with shooting pain down the right leg. (Id.) On April 5, 2001, the employee saw Dr. H. Chris Chapman for his back and leg pain. (Id.) Dr. Chapman found right sided lumbosacral pain and leg pain with numbness in the right leg along with weakness and possible L5 radiculopathy. (Id.) An MRI was ordered and the employee was referred to Dr. Robert Donley, a neurosurgeon. (Id.) On May 10, 2001 the employee was examined by Dr.

Donley for chronic low back pain with bilateral leg pain in the L4 and L5 nerve root distribution. (Id., Finding 14) In reviewing the April 6, 2001 MRI, Dr. Donley noted spinal stenosis at L3-4 and L4-5 levels with L4-5 being most severe. (Id.) The diagnosis was lumbar spondylosis with degenerative changes and lumbar stenosis at L4-5 and L3-4. (Id.) The employee was given various treatment options including surgical decompression. (Id.) The employee decided to avoid surgical intervention as long as possible. (Id., Finding 15)

D. Time Period of March 19, 2001 through 2007

After March 19, 2001, the employee's right leg pain never disappeared. (Id., Finding 16) Between March 2001 and 2007 the employee began to experience "jolts" down his right leg and into his testicles. (Id.) On those occasions the employee would also experience pain into his left leg. (Id.) The employee also experienced a marked increase in the numbness into his right leg. (Id.) Because the low back and right leg symptoms progressively worsened during these years, the employee attempted to obtain some relief through chiropractic care, physical therapy, epidural steroid injections, use of a TENS units and Celebrex. (Id., Finding 17)

By the Spring of 2007 the employee's right leg and low back deteriorated to the point where the ongoing symptoms were affecting his quality of life both on and off the job. (Id., Finding 19) In May of 2007 the employee decided to have surgery and Dr. Donley performed a decompressive laminectomy at the transverse lower one half of L2,

all of L3, L4, and L5 with medial L2-3, L3-4 and L4-5 partial facetectomies and decompression of the thecal sac. (Id., Finding 20)

E. Litigation

On June 12, 2007, the employee filed a Claim Petition against Wesley Residence, Inc. for claims arising out of his March 19, 2001 injury. (A. 1; Employee's Claim Petition) At the time the Claim Petition was filed, workers' compensation claims against the Wesley Residence were being administered by the Minnesota Insurance Guaranty Association, c/o GAB Robins North America ("MIGA"). (A. 71; Respondent's Brief).

MIGA filed an Answer to Employee's Claim Petition. (RA.1; Answer to Employee's Claim Petition) **The Answer admitted the March 19, 2001 injury to the employee's back but denied the nature and extent of the injury and alleged that it was a temporary aggravation of a pre-existing injury.** (RA. 2) (emphasis added) **MIGA's Answer did not assert that the employee's claims were not "covered claims".** (RA. 1-3) (emphasis added)

Later, MIGA brought a Motion for Joinder/Petition for Contribution and/or Reimbursement against Bor-Son/CNA. (A. 11-12) Bor-Son/CNA responded by filing a Response which denied that they were liable for the employee's medical expenses and denied that they were necessary parties. (A. 16-17) Bor-Son/CNA requested an Order dismissing the Motion for Joinder/Petition for Contribution and/or Reimbursement. (A. 17) However, a compensation judge issued an Order for Joinder formally joining Bor-

Son/CNA to the claim. (A. 14)

F. Medical Opinions

Dr. Larry Stern performed an independent medical examination for MIGA. (A. 75) Dr. Stern opined that the March 19, 2001 injury was not a significant contributing factor to the employee's need for treatment. (Id.)

Dr. Stephen Barron performed an independent medical examination for Bor-Son/CNA. (Relator's Addendum ; Findings and 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% of liability to the 1989 injury and 50% to the 2001 injury. (Id.)

The employee's treating neurosurgeon, Dr. Donley, issued an opinion on June 13, 2007 where he indicated that the March 19, 2001 injury was a substantial contributing factor for the employee's medical treatment. (TT. 29-30; Hearing Transcript) Dr. Chapman, the employee's treating physician in 2003, issued an opinion on June 5, 2003 that did not state the 1989 injury was a substantial contributing factor. (TT. 30; Hearing Transcript) Therefore, it was both Bor-Son/CNA's and the employee's position that the compensation judge could find MIGA 100% responsible for the employee's medical treatment. (TT. 30, 36; Hearing Transcript)

G. The Employee's and MIGA's Partial Stipulation for Settlement

On September 23, 2008, immediately prior to the commencement of the hearing on

this matter, the employee and MIGA entered into a Partial Stipulation for Settlement. (A. 31-50) In the settlement, it was agreed that in exchange for \$55,000.00, the employee would settle all of his claims for workers' compensation benefits arising out of the March 19, 2001 injury, **except** past, present and future non-chiropractic medical expenses related to the low back, provided they are reasonable and necessary costs of medical care causally related to the March 19, 2001 injury. (Id.) MIGA did agree to pay the chiropractic bills. (Id.) Future attorney fees and costs associated with such claims for future medical benefits were left open. (Id.) Bor-Son/CNA was not a party to this settlement. (Id.)

H. Findings and Order of the Compensation Judge at Hearing

The Compensation Judge adopted the opinion of Bor-Son/CNA's expert, Dr. Stephen Barron, who apportioned liability for the employee's condition, the need for medical care and treatment, the surgical intervention in 2007 and potential future medical treatment at 50% on the March 8, 1989 injury and 50% on the March 19, 2001 injury. (Relator's Addendum ; Findings and Order, Finding 26)

The Compensation Judge then found that although the Workers' Compensation Court can determine liability and can apportion liability, in a case where MIGA and a solvent insurer are both liable the Court had no jurisdiction to direct MIGA to make payments under the provisions of the Minnesota Workers' Compensation Act. (Id., Finding 28) The Compensation Judge found that since MIGA could not be directed to make payment for its proportionate share of liability, the remaining solvent insurer (CNA)

was legally responsible for 100% of the amounts found payable to the medical providers/intervenors—even though the Court found CNA to be only 50% responsible. (Id., Finding 29)

Finally, the Compensation Judge found that even though CNA was obligated to pay/reimburse the medical costs and had no reimbursement remedy against MIGA in the Worker’s Compensation Court, CNA could avail itself of legal remedies provided under the provisions of Chapter 60C of the Minnesota Statutes. (Id., Finding 30)

I. WCCA Appeal

Bor-Son/CNA appealed the Findings & Order to the Workers’ Compensation Court of Appeals (“WCCA”) and the case was considered *en banc* following oral arguments on June 22, 2009. (Relator’s Addendum 10) On July 9, 2009, the WCCA served and filed its Opinion, which reversed the decision of the compensation judge and ordered MIGA to pay the employee’s medical costs. (Relator’s Addendum 15)

J. Minnesota Supreme Court Appeal

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) A Writ of Certiorari was issued the same day. (A. 98)

STANDARD OF REVIEW

On review on certiorari, questions of law are considered under a de novo standard. Busch v. Advanced Maintenance, 659 N.W.2d 772, 776 (Minn. 2003). A 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). Since the issues in this case raise questions of law a de novo review is appropriate.

ARGUMENT

I. THE WORKERS' COMPENSATION JUDGE DID NOT HAVE SUBJECT MATTER JURISDICTION OVER MIGA'S MOTION FOR JOINDER / PETITION FOR CONTRIBUTION AND/OR REIMBURSEMENT.

A. The compensation judge improperly ordered the joinder of Bor-Son/CNA because subject matter jurisdiction was lacking.

This Court has held time and time again that the workers' compensation courts lack subject matter jurisdiction to decide petitions for contribution and/or reimbursement involving MIGA. See Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433, 434 (Minn. 1992); 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); Wiss v. Advance United Expressway, 488 N.W.2d 802, 804 (Minn. 1992).

The workers' compensation courts lack jurisdiction because a petition for contribution and/or reimbursement between MIGA and a solvent insurer necessarily requires an interpretation and application of chapter 60C. See Gerads, 486 N.W.2d at 434; Wiss, 488 N.W.2d at 804. It does not matter whether the petition for contribution

and/or reimbursement is made by or against MIGA. *See Id.* Either way, chapter 60C must be invoked.

If a solvent insurer brings a claim for contribution and/or reimbursement against MIGA in the workers' compensation courts, then jurisdiction fails because such a claim requires application of Minn. Stat. § 60C.09, subd. 2 to determine whether it is a "covered claim." *See Taft*, 464 N.W.2d at 726-727. Further, such a claim has been held not to be a "covered claim". *Anderson Trucking Service, Inc. v. Minnesota Insurance Guaranty Association*, 492 N.W.2d 281 (Minn. App. 1993). As such, solvent workers' compensation insurers have absolutely no right to reimbursement from MIGA in any forum. *Id.*

If MIGA brings a claim for contribution and/or reimbursement against a solvent insurer before a workers' compensation court, jurisdiction also fails because MIGA's rights against solvent insurers rests in chapter 60C. *See Gerads*, 488 N.W.2d at 803. Chapter 60C expressly grants subrogation rights to MIGA while the Workers' Compensation Act does not address the subrogation rights of insurance guaranty associations. *See Wirth v. M.A. Mortenson/Shal Associates*, 520 N.W.2d 173, 175-176 (Minn. App. 1984); Minn. Stat. § 60C.11, subd. 1 ("The rights under the policy of a person recovering under this chapter shall be deemed to have been assigned by the person to the association to the extent of the recovery."). Therefore, if MIGA seeks reimbursement or contribution they must follow the procedures set forth under Chapter

60C. *See Gerads*, 488 N.W.2d at 803.

Because there was no jurisdiction for MIGA's Motion for Joinder/Petition for Contribution and/or Reimbursement, the compensation judge should not have joined Bor-Son/CNA.

B. MIGA's arguments to supply a basis for subject matter jurisdiction for its Motion for Joinder/Petition for Contribution and/or Reimbursement are incorrect and unavailing.

MIGA incorrectly argues that there must be a jurisdictional basis for its "Motion for Joinder" because MIGA has a statutory right to pursue subrogation. (*See Relator's Brief*, p. 15). This argument is incorrect because MIGA fails to realize that the source of its right to subrogation comes from Chapter 60C. *See Minn. Stat. § 60C.11, subd. 1.* Thus, while there is no uncertainty that MIGA has a right to subrogation, it requires application of Chapter 60C, which is outside the jurisdiction of the workers' compensation court. The workers' compensation court can only interpret Chapter 176.

MIGA's attempt to distinguish *Gerads* and evade this Court's on-point holding is also unconvincing. First, MIGA attempts to alter this Court's holding in *Gerads*. In MIGA's opinion, this "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." (*Relator's Brief*, p. 16 (emphasis added)). No where in the *Gerads* decision did this Court rely, consider, or even mention that its

holding was based upon the presumption that MIGA was already paying workers' compensation benefits to the employee. Indeed, while that fact could be inferred from reading that case, it is not even mentioned in the facts. Nor should it have been. It is irrelevant. What matters, as this Court did state in Gerads, is that MIGA's payment obligations and rights against other insurers exist in chapter 60C. *See Gerads*, 488 N.W.2d at 803.

Second, MIGA cannot attempt to side-step the Gerads holding by recasting its Motion for Joinder/Petition for Contribution and/or Reimbursement as primarily to join "necessary parties" and that equitable apportionment was only a byproduct. It is the true nature of that claim that is important. *See Wiss v. Advanced United Expressway*, 54 W.C.D. 218, 222 (WCCA Feb. 15, 1996). In Wiss, this Court noted that the fact that an employee filed a claim for benefits naming MIGA and a solvent insurer did not change what was primarily a collateral dispute between MIGA and the solvent insurer seeking to reduce their liability through the workers' compensation system. Wiss, 488 N.W.2d at 804. Equitable apportionment was simply a predicate fact to the insurer's allegation that there was a "covered claim". Id.

In this case, the WCCA correctly recognized that the primary purpose of MIGA's Motion for Joinder/Petition for Contribution and/or Reimbursement was to create equitable apportionment of the employee's claims for medical benefits. Joining Bor-Son/CNA to the case was part of the necessary procedure; an obvious prerequisite to

equitable apportionment of liability and subsequent requirement that Bor-Son/CNA pay 100% of the medical expenses. MIGA knew what it had to do to shirk all responsibility for its share of liability. Indeed, in its motion/petition, MIGA requested that the compensation judge direct Bor-Son/CNA to pay Bor-Son/CNA's proportionate share of medical expenses. If MIGA wanted only to join a necessary party it could have done so under Minn. R. 1420.1300. But instead MIGA chose to petition for contribution/reimbursement along with joinder under Minn. R. 1420.2400. It is disingenuous to now claim that tactic was for anything but contribution/reimbursement and absolving all liability.

C. The WCCA decision was procedurally and equitably correct.

The employee is entitled to quick and efficient delivery of indemnity and medical benefits and Bor-Son/CNA and MIGA should be required to pay no more than their proportionate share of liability. The WCCA decision produces all of these results.

By ordering MIGA to pay all of the employee's medical expenses, the employee receives quick and efficient delivery of these benefits. Furthermore, MIGA is not without remedy. It can pursue subrogation against Bor-Son/CNA in district court under chapter 60C to obtain reimbursement of Bor-Son/CNA's 50% share of liability for the employee's medical benefits. *See* Minn. Stat. § 60C.11, subd. 1. Had the compensation judge's decision been upheld, Bor-Son/CNA would have been "stuck" with 100% of liability for the employee's medical benefits with no right in district court to contribution or

reimbursement from MIGA. *See Anderson Trucking Service, Inc.*, 492 N.W.2d 281.

Certainly MIGA was not created to place undue burden on the insurers who fund it and thereby increase the risk of future insolvencies.

D. There was medical support at the hearing for the position that MIGA was fully responsible for the employee's need for treatment.

At the hearing, medical support was submitted that could have led to a finding that the employee's 2001 injury at Wesley residence was 100% responsible for the employee's need for treatment. Dr. Donley and Dr. Chapman, the employee's treating physicians, both opined that the March 2001 injury was a substantial contributing cause for the employee's need for treatment but did not indicate in any way that the 1989 injury was a substantial contributing cause. At the hearing Bor-Son/CNA and the employee adopted the opinions of Dr. Donley and Dr. Chapman and argued those opinions could lead to a finding that MIGA was 100% responsible. (TT. 30, 36).

II. THERE IS NO EVIDENCE IN THE RECORD THAT MIGA ASSERTED THE EMPLOYEE'S CLAIM WAS NOT A "COVERED CLAIM"

MIGA's assertion that the employee's claim was not a "covered claim" under the meaning of chapter 60C is unsupported by the record. This case has been through discovery and motions, a hearing before the compensation judge and in front of the WCCA. For the first time, MIGA now asserts that the employee's claim was not a "covered claim". A thorough vetting of the record reveals no such support. Rather, MIGA is now desperately attempting to morph its prior position that "[a]ny 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’” (Relator’s Brief, p. 13 (emphasis added)) into the posture that it never considered *the employee’s claims* to be a “covered claim”.

MIGA never raised this affirmative defense in its Answer to the Employee’s Claim Petition. The employee started this matter by bringing a Claim Petition solely against MIGA. Nowhere in its Answer did MIGA ever assert that the employee’s claims were not “covered claims”. In fact, it did admit the March 19, 2001 injury to the employee’s back but denied the nature and extent of the injury and alleged that it was a temporary aggravation of a pre-existing injury.

MIGA never brought a motion prior to the hearing requesting dismissal based on lack of jurisdiction because the employee’s claims were not “covered claims”. That fact was not raised in MIGA’s Motion for Joinder/Petition for Contribution and/or Reimbursement. One must wonder why MIGA would even bother to join Bor-Son/CNA if it was MIGA’s position that the workers’ compensation court had no jurisdiction over MIGA anyway.

Perhaps most glaring is that just prior to the hearing, MIGA paid the employee \$55,000 to settle all of his workers’ compensation claims, with the exception of certain future medical treatment. If the employee’s claims were not a “covered claim” then why pay \$55,000 to settle claims for which the workers’ compensation court allegedly had no jurisdiction? Indeed, the Partial Stipulation for Settlement, including MIGA’s

contentions in paragraph XIII, is completely silent on any assertion that the employee's claims are not a "covered claim".

At the hearing before the compensation judge and on brief before the WCCA it was MIGA's position that if a solvent insurer makes a claim for contribution or reimbursement against MIGA based on apportionment of liability that is not a covered claim. (TT. 22-23) (Relator's Brief, p. 13) The thrust of MIGA's argument has always been that there is no jurisdiction within the workers' compensation courts to apportion a part of liability to MIGA when there's another solvent insurer that is liable for benefits. (TT. 21, A-82) Never was it MIGA's argument that the employee's claims were not "covered claims". In fact, MIGA stated in its brief to the WCCA that their denial of liability was based on the opinions of Dr. Larry Stern who opined that the March 2001 injury was not a significant contributing factor to the employee's need for treatment since March 2001. Denial of liability was not based on the lack of a "covered claim". At the hearing it was the employee and not MIGA who was petitioning to have his medical bills paid. That is clearly a "covered claim" under Chapter 60C.

Finally, and most importantly, the record before this Court is completely void of any evidence that MIGA's board of directors ever determined that the employee's claims were not "covered claims". Minn. Stat. § 60C.04 and Minn. Stat. § 60C.08 indicate that MIGA conducts its operations through a nine-member board of directors. *See Taft*, 464 N.W.2d at 727. The board of directors "shall determine whether claims submitted for

payment are covered claims.” Minn. Stat. § 60C.10, subd. 1. “If the board finds that a claim for which the claimant has requested payment out of the fund is not a covered claim . . . the board *shall notify the claimant in writing* of the rights the claimant has under section 60C.12.” Minn. Stat. § 60C.10, subd. 2 (emphasis added). Absent from the record is any such written denial from the board of directors indicating the employee’s claims are not “covered claims.”

MIGA may be correct that subject matter jurisdiction can be raised as a defense at any time, but it has to be true to assert it. Therefore, the WCCA had subject matter jurisdiction to order MIGA to make payment.

III. THE WCCA’S DECISION DOES NOT VIOLATE MINN. STAT. § 60C.13 BECAUSE THAT PROVISION DOES NOT APPLY IN THIS CASE.

The exhaustion of other coverage provision found in Minn. Stat. § 60C.13, subd. 1 does not apply if the other policy is a workers’ compensation policy. This provision states in full:

Other policy coverage

Any person having a claim under another policy whether or not the policy is a policy of a member insurer, which claim arises out of the same facts which give rise to the covered claim, shall be first required to exhaust the person’s right under the other policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy. For purposes of this subdivision, another insurance policy does not include a workers’ compensation policy.

Minn. Stat. § 60C.13, subd. 1 (emphasis added). The last sentence clearly states that “another insurance policy” does not include a workers’ compensation policy. The

employee's claims in this case are workers' compensation claims which would fall under Bor-Son's workers' compensation policy through CNA. Therefore, this statute and requirement that a claimant first exhaust their rights through a solvent insurance policy prior to seeking payment from MIGA does not apply.

IV. BOR-SON/CNA, WHO IS ON RISK FOR THE EMPLOYEE'S FIRST INJURY, CANNOT BE HELD LIABLE FOR THE PORTION OF DISABILITY ATTRIBUTABLE TO A SECOND INJURY WITH MIGA.

When an employee's claims against a second employer are barred due to a legal defense, the first employer is liable only for its apportioned share of benefits. *See Pearson v. Foot Transfer Co.*, 221 N.W.2d 710 (Minn. 1974). In Pearson, this Court held that the employer/insurer on risk for the employee's first work injury could not be held liable for the portion of disability attributable to a second work injury, where the second injury was not compensable because the employee had not given timely notice of injury. Id. Thus, the principle laid down in the Pearson case is that the first employer should not be held liable for all benefits if a percentage of it was caused by a later accident. Id.

Here, Bor-Son/CNA, on risk for the employee's first injury in 1989, was found to be only 50% liable for the employee's benefits. Since the other 50% of liability was apportioned to MIGA for the injury in 2001, Bor-Son/CNA should not be held liable for all of the employee's benefits.

The principle in Pearson has been applied to cases where liability is apportioned to MIGA but they have a legal defense for their portion of liability under Minn. Stat. § 60C.

In Ast v. Har Ned Lumber, 46 W.C.D. 490 (W.C.C.A. 1991), Lumbermen's Inter-Insurance ("Lumbermen's") paid various workers' compensation benefits pursuant to a temporary order and eventually sought reimbursement from American Mutual Liability Company ("American Mutual") and American Motorist Insurance Company ("American Motorist"). Following a hearing, a compensation judge determined that Lumbermen's was not responsible for any of the benefits it had paid, and the judge ordered American Mutual to reimburse Lumbermen's for 75% of those benefits and American Motorist to reimburse the remaining 25%. However, American Mutual was declared insolvent after the hearing and MIGA stepped in to administer claims against American Mutual under chapter 60C.

There were two issues in Ast, on appeal before the WCCA. The first issue was whether Lumbermen's could obtain reimbursement from MIGA for liability that had been attributed to American Mutual's injury. The WCCA held that pursuant to Taft subject matter jurisdiction over Lumbermen's reimbursement claim was lacking. Ast, 46 W.C.D. 495.

The second issue was whether American Motorist, the solvent insurer responsible for a portion of the employee's disability, should be held responsible for "the full amount of reimbursement ordered, including those amounts that the compensation judge directed [the now insolvent] American Mutual to pay." Ast, 46 W.C.D. at 493-94. Finding "no authority that would allow [the Court] to order the requested relief," the WCCA rejected

Lumbermen's argument. Id. at 494. Notably, in its discussion, the WCCA in Ast found no compelling reason to require American Motorist to absorb the loss for payment of benefits that it did not owe. Id.

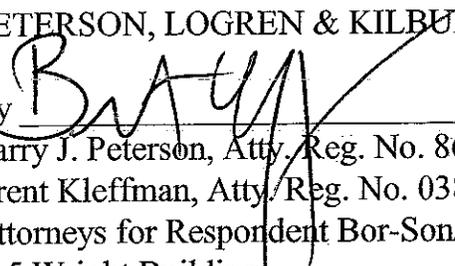
In this case, like Pearson and Ast, since the compensation judge apportioned liability between Bor-Son/CNA and MIGA, and if MIGA is not ordered to pay its portion of liability because it is not a covered claim, then Bor-Son/CNA should only be held responsible for its equitably apportioned responsibility for the medical expenses. As stated in Ast, the Court should not make Bor-Son/CNA pay for MIGA's share of the benefits owed to the employee. Put simply, Bor-Son/CNA should not be held liable for more than their fair share.

CONCLUSION

Bor-Son/CNA respectfully requests that the Supreme Court of Minnesota affirm the decision of the Workers' Compensation Court of Appeals.

Dated this 15 day of September, 2009.

PETERSON, LOGREN & KILBURY, P.A.

By 

Larry J. Peterson, Atty. Reg. No. 8606X

Brent Kleffman, Atty. Reg. No. 0386818

Attorneys for Respondent Bor-Son/CNA

315 Wright Building

2233 University Avenue West

St. Paul, MN 55114-1629

Phone: (651) 647-0506

E-Mail: ljp@plklaw.net;

bkleffman@plklaw.net

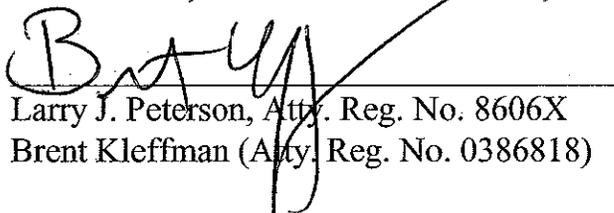
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, subd. 3 because this brief contains 4,533 number of words, excluding the parts of the brief excluded by Minn. R. Civ. App. P. 132.01, subd. 3.

2. This brief complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and the type style requirements of Minn. R. Civ. App. P. 132.01, subd. 1 because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in 13 point font using Times New Roman print.

Dated: 9-15-09

PETERSON, LOGREN & KILBURY, P.A


Larry J. Peterson, Atty. Reg. No. 8606X
Brent Kleffman (Atty. Reg. No. 0386818)

ATTORNEYS FOR RESPONDENT BOR-SON/CNA