

State of Minnesota  
In Supreme Court

ZURICH AMERICAN INSURANCE COMPANY,

*Respondent.*

vs.

DONALD A. BJELLAND,

*Appellant.*

BRIEF AND APPENDIX OF RESPONDENT  
ZURICH AMERICAN INSURANCE COMPANY

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF CASE AND FACTS .....	1
LEGAL ANALYSIS .....	4
I.    The Plain Language of the 2000 Amendments to Minn. Stat. §176.061 Provides that Zurich is Entitled to Recover Workers' Compensation Benefits Regardless of Whether those Benefits are Recoverable Under the Wrongful Death Act.....	4
II.   The Legislative History Demonstrates a Clear Intent to Eliminate Common Law or Other Statutory Limitations on Recovery of Workers' Compensation Benefits .....	15
III.  Neither Common Law Principles of Subrogation nor the Pre-Amendment Balance Between the Interests of the Employee, Employer and Tortfeasors Justify Ignoring the Plain Language of the 2000 Amendments to Minn. Stat. §176.061 ... .....	17
IV.  The 2000 Amendments to Minn. Stat. §176.061 did not Deprive Appellant of any Procedural Protections .....	24
CONCLUSION.....	27
APPENDIX OF ZURICH AMERICAN INSURANCE COMPANY.....	29

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE:</u>
<i>Baune v. Farmers Ins. Exchange</i> , 283 Minn. 54, 166 N.W.2d 335 (1969) .....	16
<i>Geldert v. Am. Nat'l Bank</i> , 506 N.W.2d 22 (Minn. Ct. App. 1993).....	16
<i>General Cas. Co. v. Consolidated Freightways Corp.</i> , 413 N.W.2d 157 (Minn. Ct. App. 1987).....	7
<i>Lambertson v. Cincinnati Corp.</i> , 257 N.W.2d 679 (Minn. 1977).....	21
<i>Leary v. Smith</i> , 272 Minn. 34, 136 N.W.2d 552 (1965) .....	27
<i>M. W. Ettinger Transfer Co. v. Schaper Mfg., Inc.</i> , 494 N.W.2d 29 (Minn. 1992).....	8, 12, 17, 19, 26
<i>Naig v. Bloomington Sanitation</i> , 258 N.W.2d 891 (Minn. 1977).....	1, 7
<i>Toddalen v. U. S. Chemical Co.</i> , 424 N.W.2d 73 (Minn. App. 1988), <i>rev. den.</i> (Minn. June 29, 1988).....	6, 7, 8, 9
<i>Tyroll v. Private Label Chemicals, Inc.</i> , 505 N.W.2d 54 (Minn. 1993) .....	<i>passim</i>
<i>Zurich American Ins. Co. v. Bjelland</i> , 690 N.W.2d 352 (Minn. Ct. App. 2004).....	3, 4, 10, 16, 23
 <u>STATUTES:</u>	
Minn. Stat. §176.001 .....	5
Minn. Stat. §176.061, Subds. 3, 5, 7 and 10 .....	1, 3, 5, 6, 9, 11, 13, 15, 18, 19, 21-28
Minn. Stat. §176.111, Subd. 6.....	2
Minn. Stat. §573.02 .....	2
Minn. Stat. §645.16.....	9, 16

## STATEMENT OF CASE AND FACTS

This appeal arises out of a November 6, 2001, two-vehicle accident at the intersection of Minnesota State Highway 65 and Kanabec County Road 3. Eugene Bodeker was southbound on Highway 65. Donald Bjelland was westbound on County Road 3. Mr. Bjelland ran a Stop sign and struck Mr. Bodeker's vehicle. Mr. Bodeker died because of injuries sustained in this accident. At the time of this accident, Mr. Bodeker was an employee of Associated Milk Producers, Inc. ("AMPI") acting in the course of his employment. Zurich American Insurance Company, the workers' compensation insurer for AMPI, paid workers' compensation benefits of \$104,319.00 on behalf of Mr. Bodeker; consisting of funeral expenses of \$8,255.83, medical expenses of \$3,680.22, and dependency benefits of \$92,382.95.

Zurich commenced this action to recover workers' compensation benefits.<sup>1</sup> The issue in dispute was, and remains, the proper measure of damages. In 2000, the Minnesota Legislature amended Minn. Stat. §176.061 to allow recovery of any 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...." Minn. Stat. §176.061, Subds. 3, 5, 7 and 10 (2000). Zurich argued to the trial court that these statutory amendments overturned *Tyroll*

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<sup>1</sup> Angeline Bodeker, the widow of Eugene Bodeker, as trustee for the heirs of Eugene Bodeker, commenced a separate action. Mrs. Bodeker settled her claim for non-workers' compensation benefits on the basis of *Naig v Bloomington Sanitation Co.*, 258 N.W 2d 891 (Minn. 1977). Zurich subsequently commenced this action for workers' compensation benefits pursuant to Minn. Stat. §176.061

*v Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993), which had limited the recovery of a workers' compensation insurer to common law or other statutory damages. Appellant argued that the 2000 amendments did not affect the measure of damages, asserting that *Tyroll* still limits Zurich's recovery to damages recoverable under the Wrongful Death Act. Minn. Stat. §573.02. Damages for funeral and medical expenses are identical under the Workers' Compensation Act and the Wrongful Death Act. Although dependency benefits under the Workers' Compensation Act and lost economic support under the Wrongful Death Act both provide lost economic support, there is a significant disparity between the measure of dependency benefits under the Workers' Compensation Act and the measure of lost economic support under the Wrongful Death Act. The Workers' Compensation Act required Zurich to pay dependency benefits for 10 years from the date of death even if Zurich could demonstrate that Mr. Bodeker was on the verge of retirement, which, in fact, he was. Minn. Stat. §176.111, Subd. 6. In contrast, under the Wrongful Death Act, retirement is a factor in determining economic losses. Because Mr. Bodeker was substantially less than ten years from retirement, damages for the loss of future economic support recoverable under the Wrongful Death Act were lower than the dependency benefits Zurich was statutorily required to pay under the Workers' Compensation Act. This disparity is at the core of the issue before this Court.

The parties brought cross-motions for summary judgment on the proper measure of damages. The trial court denied the motion of Zurich and granted the

motion of appellant. The trial court held that the 2000 amendments to §176.061 did not overrule *Tyroll* and that the Minnesota Wrongful Death Act limited damages recoverable in this action. App. 11-18.<sup>2</sup>

The parties then stipulated to the following facts:

1. Donald Bjelland was negligent and that his negligence was a direct cause of this automobile accident.
2. The fair and reasonable value of workers' compensation benefits for medical expenses, funeral expenses, and dependency benefits was \$104,319.
3. Under the Wrongful Death Act, the fair and reasonable damages for medical expenses, funeral expenses, and lost economic support to Angeline Bodeker was \$48,336.05.

App. 19-20. The trial court applied its holding that Zurich's recovery was limited to damages recoverable under the Wrongful Death Act to these stipulated facts and entered judgment in favor of Zurich for \$48,336.05. App. 21-23.<sup>3</sup>

Zurich appealed and the Court of Appeals reversed. The Court of Appeals held that the 2000 amendments to §176.061 redefined the measure of damages in actions to recover workers' compensation benefits, that Zurich was entitled to

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<sup>2</sup> References to "App \_\_\_" are to Appellant Donald S. Bjelland's Appendix. References to "Zurich App \_\_\_" are to Zurich American Insurance Company's Appendix.

<sup>3</sup> The Court of Appeals incorrectly stated that the parties "stipulated" that the Wrongful Death Act limited Zurich's recovery. *Zurich American Ins Co v. Bjelland*, 690 N.W.2d 352, 354 (Minn. Ct. App. 2004). In its December 3, 2003 Order, the trial court held that the Wrongful Death Act limited Zurich's recovery. App. 15. The parties asked the trial court to apply this ruling to the stipulated facts. Zurich App. 5-6. The Court of Appeals was also incorrect in asserting that Zurich did not seek review of the December 3, 2003 Order. In its Statement of the Case, Zurich specifically stated that it was appealing the December 3, 2003 Order. Zurich App. 1. The Court of Appeals was correct in stating that Zurich did not dispute the right of Bjelland to a jury determination on issues of negligence, causation, and damages. Zurich appealed only the proper measure of damages. This misunderstanding regarding the procedural posture of the case did not affect the result before the Court of Appeals.

recover the full amount of provable workers' compensation benefits, and that the Wrongful Death Act did not limit Zurich's recovery. The Court of Appeals remanded the case for entry of judgment in favor of Zurich for \$104,319. *Zurich American Ins. Co. v. Bjelland*, 690 N.W.2d 352 (Minn. Ct. App. 2004).

### LEGAL ANALYSIS

**I. The Plain Language of the 2000 Amendments to Minn. Stat. §176.061 Provides that Zurich is Entitled to Recover Workers' Compensation Benefits Regardless of Whether those Benefits are Recoverable Under the Wrongful Death Act.**

Before 2000, the recovery of an employer or workers' compensation insurer in the position of Zurich was limited to the common law or, in a wrongful death case, statutory measure of damages.<sup>4</sup> *Tyroll*, 505 N.W.2d at 54. In 2000, the Minnesota Legislature amended the Workers' Compensation Act to provide that a workers' compensation insurer is entitled to recover all workers' compensation benefits "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute ...." Minn. Stat. § 176.061, Subds. 3, 5, 7, and 10. The language of the amendments, the Legislative history, and rules of statutory construction demonstrate that the 2000 amendments overruled *Tyroll*, and common law or other statutory measures of damages no longer limit a workers' compensation insurer's recovery.

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<sup>4</sup> Employers generally procure workers' compensation insurance or establish self-insurance programs to provide workers' compensation benefits for their employees. The rights of an employer and workers' compensation insurer are identical, and "employer" and "workers' compensation insurer" will be used interchangeably in this Brief

The purpose of the Workers' Compensation Act, Minn. Stat. §176.001, *et seq.*, is to provide compensation to injured workers and their dependents for medical expenses and lost income. An injured worker has a right to recover benefits under the Act regardless of fault. In addition to benefits recoverable under the Act, where a worker is injured due to the fault of a third party to the employment relationship, the worker can maintain a tort action against that third party. Minn. Stat. §176.061, Subd. 5. In such cases, the employer or the insurer may intervene in the employee's action, Minn. Stat. §176.061, Subd. 5, or maintain an independent action, Minn. Stat. §176.061, Subds. 3, 5, 7 and 10, to recover workers' compensation benefits paid and payable.

The ability of a workers' compensation insurer to recover benefits from a third party to the workers' compensation system, and the incongruity between the measures of tort damages and workers' compensation benefits have generated analytical problems. Some categories of workers' compensation benefits either are not recoverable in tort or exceed comparable elements of tort damages. This raises the question of whether tort law or the Workers' Compensation Act provides the measure of damages in an insurer's claim for recovery of workers' compensation benefits.

The facts of this case illustrate this problem. At the time of his death, Mr. Bodeker was 66 years old. He was earning \$381.10 per week. Mr. Bodeker intended to work less than two years before retirement, thereby minimizing the lost economic support claim of his surviving spouse. However, under the Workers'

Compensation Act, Zurich was required to pay Mrs. Bodeker ten years of dependency benefits. In this case, dependency benefits payable under the Workers' Compensation Act exceeded lost economic support damages recoverable under the Wrongful Death Act. *See Statement of Case and Facts.*

The pre-2000 wording of the Workers' Compensation Act supports a conclusion that the Workers' Compensation Act provided the measure of damages in a lawsuit to recover workers' compensation benefits. Throughout §176.061, the Legislature indicates that the employer or insurer is entitled to recover the full amount of benefits paid. Subdivision 3 authorizes recovery of the "aggregate" amount of benefits payable; Subdivision 7 grants a right to recover "any amounts paid for medical treatment or for other compensation"; and Subdivision 10 provides that an employer or insurer have a right to indemnity "for any compensation paid or payable pursuant to this chapter". Minn. Stat §176.061, Subdivisions 3, 7, and 10. These provisions seem to indicate that the Minnesota Legislature meant that an employer or workers' compensation insurer can recover the "aggregate" or "any" workers' compensation benefits paid regardless of whether such benefits are recoverable at common law.

The first case considering a conflict between the measure of damages under the Workers' Compensation Act and under the common held that the employer or workers' compensation insurer was entitled to recover all benefits paid or payable regardless of whether such benefits were recoverable at common law. *Todalen v. U. S. Chemical Co.*, 424 N.W.2d 73 (Minn. Ct. App. 1988), *rev. denied* (Minn.

June 29, 1988). In *Todalen*, the injured employee entered into a separate settlement with the tortfeasor settling all claims for non-workers' compensation benefits as authorized under *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977). The employer maintained a separate action to recover workers' compensation benefits. The claimed damages included future wage loss benefits payable under the Workers' Compensation Act. At trial, the jury found that the injured employee had not suffered any lost future earning capacity. 424 N.W.2d at 81. Based on this finding, the tortfeasor argued the employer had no right to recover these benefits. The Minnesota court of Appeals rejected this argument. The court reasoned that the subrogation provisions of the Act reflected an intent to reduce the cost to employers of providing workers' compensation benefits, and not an intent to benefit tortfeasors at the expense of employers. 424 N.W.2d at 81 (citing *General Cas. Co. v. Consolidated Freightways Corp.*, 413 N.W.2d 157, 160 (Minn. Ct. App. 1987)). The court held that the employer was entitled to recover all benefits it would be required to pay in the future regardless of whether those benefits were recoverable at common law, stating:

The intent of the statute is to allow subrogation to the amount of benefits paid or payable. Hormel is entitled to recover for all benefits which it will be required to pay in the future.

424 N.W.2d at 81. Under *Todalen*, a workers' compensation insurer was entitled to recover the full amount of workers' compensation benefit payments regardless of whether those benefits, or the parallel element of common law damages, were recoverable in a tort action.

The next significant case addressing the interplay between tort damages and workers' compensation benefits was *M. W. Ettinger Transfer Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29 (Minn. 1992). In *M. W. Ettinger*, the employer paid workers' compensation benefits on behalf of its injured employee. The employer commenced a lawsuit against Schaper to recover workers' compensation benefits. The employer argued that it need only prove the amount of workers' compensation benefits paid and payable to prove its damages. The trial court agreed. On appeal, the Minnesota Supreme Court reversed the trial court and held that the employer "must prove the nature and extent of its employee's injury in its subrogation action ...." 494 N.W.2d at 34. *M. W. Ettinger* did not expressly overrule *Todalen*.

One year later, in *Tyroll*, the Supreme Court expressly overruled *Todalen*, holding that the common law measure of damages limits the recovery of a workers' compensation insurer. As was the case in *Todalen*, the injured employee in *Tyroll* settled his claim for non-workers' compensation benefits with the tortfeasor on a *Naig* basis. The employer and its workers' compensation insurer proceeded with the lawsuit to recover workers' compensation benefits payments. The issue in *Tyroll* was whether damages recoverable at common law limited recovery of workers' compensation benefits. The *Tyroll* court addressed the same issue as had been addressed in *Todalen*--whether the recovery of an employer or workers' compensation insurer is limited to common law damages. Addressing this issue, the Minnesota Supreme Court held:

We believe, therefore, that the employer's subrogation action should be limited to recovery of common law damages for past and future wage loss, loss of earning capacity, and similar damages if any. . . . [A]ny such tort damages recovered shall apply to payment of benefits paid and payable and judgment so entered. If the tort damages exceed benefits paid and payable, the excess is moot, deemed settled under the *Naig* release; if less, the employer's ultimate recovery is less by that amount.

505 N.W.2d at 60-61. After *Tyroll*, damages recoverable in a workers' compensation subrogation action were limited to damages recoverable in a tort action. Thus, the common law, or a statute such as the Wrongful Death Act, provided the measure of damages in action to recover workers' compensation benefits.

In response to *Tyroll*, the Minnesota Legislature amended §176.061 to provide that an employer or workers' compensation insurer is entitled to recover all 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." Minn. Stat. §176.061, Subds. 3, 5, 7, and 10. Before this Court is the proper interpretation and construction of these statutory amendments.

The object of statutory interpretation and construction is to ascertain and implement the intent of the legislature. When the words of a statute are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit. Minn. Stat. §645.16. The plain language of the amendments at issue here demonstrates the intent of the Legislature to allow an employer or workers' compensation insurer to recover the full amount of benefits

paid and payable regardless of whether such benefits would be recoverable by the employee or the employee's dependents at common law or by statute.

The phrase "regardless of whether such benefits are recoverable by the employee or the employee's dependants at common law or by statute" now modifies the legislative grant of a right to recover the "aggregate" or "any" workers' compensation benefits paid and payable. This phrase clearly indicates an intent to allow recovery of any benefits even if the benefits would not be recoverable at common law or by statute. Common law or other statutory measures of damages no longer limit the recovery of an employer or workers' compensation insurer.

Addressing this language, the Court of Appeals observed:

The language added by the 2000 amendments, repeated four times in four subdivisions addressing the same issue, is unambiguous. Its unmistakable intent is to permit an employer who had paid workers' compensation benefits to seek to recover all of those benefits without being limited by the common law or any statute. Any statutory or case law limitation on the types of damages recoverable under the Wrongful Death Act is thus eliminated by the new language.

*Zurich American Ins. Co. v. Bjelland*, 690 N.W.3d at 356.

Juxtaposing the language of the 2000 amendments against the backdrop of the *Tyroll* decision reinforces the conclusion of the Court of Appeals that the Minnesota Legislature intended to overrule the *Tyroll* limitation on the recovery of an employer or insurer. The *Tyroll* court held that the employer's recovery could only be made "out of the common law tort damages" and that the recovery "should be limited to recovery of common law damages." 505 N.W.2d at 60-61. Under *Tyroll*, an employer or insurer is entitled to recover workers' compensation benefits only when

such benefits are recoverable at common law or by statute. The 2000 amendments use language that parallels the *Tyroll* formulation -- thereby emphasizing the intent to remove these limitations on recovery -- providing that an employer or insurer is entitled to recover workers' compensation benefits "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute." Minn. Stat. §176.061 (emphasis added).

It should not be lost on this Court that appellant has avoided analysis of this unambiguous language. Perhaps this is because appellant is asking this Court to rewrite the amendments and reverse the unambiguous will of the Minnesota Legislature. The 2000 amendments to §176.061 allow recovery of 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." Minn. Stat. §176.061 (emphasis added). Zurich paid workers' compensation benefits to the dependents of Mr. Bodeker, and seeks recovery of those benefits in this lawsuit. Appellant now asks this Court to deprive Zurich of a right to recover those benefits because those benefits are not recoverable "at common law or by statute." In essence, appellant asks this Court to rewrite the 2000 amendments to allow recovery of workers' compensation benefits paid and payable "only when such benefits are recoverable by the employee or the employee's dependents at common law or by statute." Such a result would be inconsistent with the unambiguous language of the Act, and the clear will of the Minnesota Legislature.

Appellant reaches to find meaning in a void by arguing that the purpose of the 2000 amendments was to clarify that an employer and insurer are entitled to recover "elements" of workers' compensation benefits for which there is no common law equivalent. Appellant's Brief at 14. Appellant bases this assertion on the following passage from an article by Michael D. Carr, the author of the 2000 amendments to §176.061:

Under the reasoning of these Supreme Court decisions [referring to *Tyroll*, and *M. W. Ettinger*], some payments are not recoverable, such as 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.

Carr, Michael D., *Workers' Compensation Subrogation and Employer Liability Statutory Changes for the New Millennium*, Minnesota Defense (Summer 2000). App. 54-55.

Supplemental wage loss benefits referenced in this article correlate to an element of common law damages – lost earnings. Under *Tyroll*, the employer would be entitled to recover actual lost earnings. However, the employer would not be entitled to recover supplemental benefits because supplemental benefits exceed the actual lost earnings of the injured employee. That is, even though the Workers' Compensation Act required the employer to pay benefits in excess of the employee's actual lost earnings, under *Tyroll* the innocent employer would not be able to recover these benefits from the negligent tortfeasor.

Appellant concedes that the 2000 amendments would reverse this transparently inequitable result. Appellant's Brief at 14. This effectively concedes that Zurich is entitled to recover the full amount of dependency benefits paid to the dependents of Mr. Bodeker. Supplementary wage loss benefits are indistinguishable from dependency benefits. Like the hypothetical employer in Mr. Carr's example, which was required to pay supplementary wages to bring a low-wage earner up to the average minimum wage even though the employee did not actually lose those earnings, Zurich was statutorily required to pay dependency benefits for 10 years even though the surviving dependents did not actually lose 10 years of economic support. The plain intent of the Minnesota Legislature in amending §176.061 was to reverse the transparently inequitable result that would follow from *Tyroll* and require that the negligent tortfeasor rather than the blameless employer pay this loss. *Id.*

The argument that the 2000 amendments were intended to clarify that an employer and insurer are entitled to recover "elements" of workers' compensation benefits for which there is no common law equivalent also fails because it is inconsistent with the language of the 2000 amendments. The 2000 amendments provide that an employer and insurer are entitled to recover all workers' compensation benefits "regardless of whether such benefits are recoverable by employee or the employee's dependents at common law or by statute . . . ." Minn. Stat. §176.061, Subds. 3, 5, 7, and 10. This language draws no distinction between elements of damages and the measure of damages. It simply refers to

workers' compensation "benefits", expressly providing that all such "benefits" are recoverable. The plain language demonstrates an intent to allow recovery of all benefits, not simply those for which there is no common law damage equivalent.

Finally, appellant's attempt to find meaning to the 2000 amendments short of an intent to overturn *Tyroll* and establish that common law or other statutory measures of damages do not limit recovery of workers' compensation benefits fails due to its own internal inconsistency. Appellant asserts that the sole purpose of the 2000 amendments was to clarify that an employer and workers' compensation insurer is entitled to recover "elements" of workers' compensation benefits for which there is no common law equivalent, but that the common law still provides the measure of damages. Following this argument to its necessary, but absurd, conclusion, if the common law establishes the measure of damages for workers' compensation benefits for which there is no common law equivalent, there cannot be any recoverable damages because the common law does not provide a right to recover any damages. The Legislature could not have intended such an absurd and pointless result. If the 2000 amendments create a right to recover "elements" of benefits compensable under the Workers' Compensation Act but not recoverable at common law, then the Workers' Compensation Act must also provide the measure of damages. The "element" of benefits at issue here is dependency benefits, an "element" of benefits found not in the common law or Wrongful Death Act. Therefore, the Workers' Compensation Act must provide the measure of recoverable dependency benefits. That the Workers'

Compensation Act provides the measure of damages in this action has, of course, been Zurich's position all along.

**II. The Legislative History Demonstrates a Clear Intent to Eliminate Common Law or Other Statutory Limitations on Recovery of Workers' Compensation Benefits.**

The plain language of the amendments to §176.061 demonstrates that the Legislature intended to overrule *Tyroll* to the extent that this decision limited the recovery of an employer or workers' compensation insurer. Even if the plain language of the amendments did not support this result, principles of statutory interpretation and construction lead to the same conclusion.

When the statute is clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit. When the words of a statute are not explicit, a court may ascertain the intent of the Legislature by considering, among other matters:

1. The occasion and necessity for the law;
2. The circumstances under which it was enacted;
3. The mischief to be remedied;
4. The object to be attained;
5. The former law, if any, including other laws upon the same or similar subjects;
6. The consequences of a particular interpretation;
7. The contemporaneous legislative history; and
8. Legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16. Application of these principles of statutory interpretation likewise indicates the Legislature intended to overrule *Tyroll*.

The first six factors cited above focus on the context of the legislative enactment. Before this Court is the interpretation and construction of a statutory amendment. The general rule is that a change in phraseology persuasively demonstrates an intent to depart from the old law. As the Court of Appeals correctly noted, a statutory amendment is presumed to effect a change in the law, particularly where the wording of the statute is radically different. *Zurich American Ins. Co. v. Bjelland*, 690 N.W.2d at 356 (citing *Geldert v. Am. Nat'l Bank*, 506 N.W.2d 22, 26 (Minn. Ct. App. 1993)); see also *Baune v. Farmers Ins. Exchange*, 283 Minn. 54, 56, 166 N.W.2d 335, 337 (1969). Any assertion that the 2000 amendments did not remove common law or other statutory limitations on the recovery of workers' compensation benefits is inconsistent with this principle of statutory construction.

The Legislature expressly stated its intent in the Legislative History. The Senate Jobs, Energy, and Community Development Committee hearing transcript states:

...[L]anguage is added which will allow an employer who is required to pay workers' compensation benefits as a result of negligence of a third party the right to recover all benefits it has paid because of that negligence, regardless of whether those benefits were recoverable at common law or not.

App. 24, 36 (emphasis added).

Lest there be any doubt regarding the intent of the Legislature, the author of this legislation has written:

Third, language is included to avoid any confusion that the statute's original intent was to allow an employer, who is required to pay Workers' Compensation benefits as a result of a negligence of a third party, the right to recover *all* benefits it has had to pay, due to that negligence, regardless of whether those benefits were recoverable at common law or not. This overrules the Supreme Court holdings that the subrogation right was limited to the amounts the employee could recover at common law. See *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993); *M. W. Ettinger Transfer v. Shaper Mfg.*, 494 N.W.2d 29 (Minn. 1992).

*Carr, supra*; App. 52.

**III. Neither Common Law Principles of Subrogation nor the Pre-Amendment Balance Between the Interests of the Employee, Employer and Tortfeasors Justify Ignoring the Plain Language of the 2000 Amendments to Minn. Stat. §176.061.**

Lacking any textual argument grounded in the language of the 2000 amendments, appellant asserts that applying these statutory amendments as written is inconsistent with principles of common law subrogation and will change the pre-amendment balance between the interests of the employee, employer and tortfeasors. Appellant's Brief at 16-20. The issue before this Court does not involve common law subrogation, or whether the 2000 amendments will change the balance of interests between the employee, employer and tortfeasors. Establishing the terms of a statutory right and balancing the of interests of those affected by a statute is the prerogative of the Legislature. The issue before this Court is to apply the will of the Legislature as stated in the unambiguous language of the 2000 statutory amendments.

Appellant first ventures outside the statute that creates the rights of the employer and insurer to the common law definition of subrogation. Appellant argues that because the workers' compensation insurer "stands in the shoes" of the injured employee, its recovery is limited to common law or other statutory damages available to the injured employee. This argument ignores the statutory basis for the claim of the employer and workers' compensation insurer.

As the Court of Appeals correctly noted, an employer's right to recover workers' compensation benefits from a negligent tortfeasor is entirely statutory and is derived solely from the Workers' Compensation Act. 690 N.W.2d at 356. This right is not strictly a right of subrogation. The right to recover workers' compensation benefits paid and payable is variously described in §176.061 as a right to recovery, subrogation or indemnity. Minn. Stat. §176.061, Subds. 3, 5, 7, and 10. Regardless of the label attached to this right, a workers' compensation insurer's right to recover is not a common law right of subrogation. Workers' compensation benefits are not payable at common law. A workers' compensation insurers' right to recover benefits paid and payable is wholly a creature of statute. Although courts and practitioners speak in terms of subrogation, the Minnesota Legislature does not limit the right of an employer or workers' compensation insurer to damages recoverable by the employee. In Subdivision 3, the Legislature states that an employer "may bring legal proceedings against the party and recover the aggregate amount of benefits payable." In Subdivision 7, the Legislature

provides that the employer "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." In Subdivision 10, the Legislature states that "an employer has a right of indemnity for any compensation paid or payable pursuant to this chapter." Minn. Stat. §176.061, Subds. 3, 7, and 10.

In *M. W. Ettinger*, 494 N.W.2d at 29, and *Tyroll*, 505 N.W.2d at 54, the Minnesota Supreme Court held that the workers' compensation insurer's recovery was limited to compensation recoverable by the employee or the employee's dependent's at common law or by statute. However, the rights of an employer and insurer remain statutorily created rights. Irrespective of whether *M.W. Ettinger* and *Tyroll* correctly determined the intent of the Legislature before the 2000 amendments, the 2000 amendments to §176.061 directly addressed and overruled these decisions.<sup>5</sup> The 2000 amendments to §176.061 uncoupled the workers' compensation insurer's right to recovery from common law or other statutory limitations on the recovery of the employee. In effect, the 2000 amendments to §176.061 substitute workers' compensation benefits as the measure of damages. Having provided a workers' compensation insurer a right to recover workers'

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<sup>5</sup> It is clearly the view of the drafter of the 2000 amendments to §176.061 that *M W Ettinger* and *Tyroll* were wrongly decided. In his article discussing these statutory amendments, Michael Carr stated that the results in *M W Ettinger* and *Tyroll* were "not the intent of the legislature when it created an all-encompassing statutory right for the employer and Special Compensation Fund." Carr, Michael D., *Workers' Compensation Subrogation and Employer Liability Statutory Changes for the New Millennium*, Minnesota Defense (Summer 2000) App. 54-55.

compensation benefits from negligent tortfeasors, it is the prerogative of the Legislature--not the parties or even this Court--to establish the measure of damages on such claims. Insertion of language providing that a workers' compensation insurer is entitled to recover all benefits paid "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute," demonstrates a clear intent to grant a workers' compensation insurer different rights than are available to an employee. This greatly simplifies the handling of these cases, eliminating the need to determine the employee's tort recovery. The amendment also eliminates the inequity of placing the rights of the negligent tortfeasor above the rights of the blameless employer.

Appellant further asserts that the 2000 amendments will change the balance between the employee, employer, and tortfeasor. Appellants Brief at 16-20. This is unquestionably true, just as it unquestionably misses the point of statutory interpretation. Having created the right to recovery, it is the right of the Legislature to establish the scope of that right. It is the role of this Court to apply the plain language of the statute, not to substitute its policy preferences for those of the Legislature. Zurich views this argument as a sideshow intended to deflect this Court's attention from the plain language of the 2000 amendments. However, even in their attempt to create a sideshow, appellant misconstrues the effect of the 2000 amendments. In fact, the 2000 amendments improve the balance between the employee, employer and tortfeasor in three ways.

First, the 2000 amendments eliminate the incongruity between the employer's potential recovery on its claim for workers' compensation benefits and its exposure on a contribution claim under *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977). In *Lambertson*, the Minnesota Supreme Court recognized a right to contribution against an at fault employer limited to the amount of workers' compensation benefits paid and payable. The intent of *Lambertson* was to balance the right of contribution against the right of the employer to recover workers' compensation benefits paid and payable. Application of *Tyroll* upset this balance by creating potential exposure on a contribution claim in excess of the potential recovery of workers' compensation benefits. Under *Lambertson*, the employer can be held liable on a contribution claim for up to the amount of workers' compensation benefits paid and payable. This was true even though, under *Tyroll*, the employer could not recover the full amount of benefits after a *Naig* settlement unless those benefits were also recoverable at common law or by statute. In allowing the employer or insurer to recover the full amount of workers' compensation benefits regardless of whether those benefits are recoverable at common law or by statute, the 2000 amendments eliminate any asymmetry between the employers' potential exposure and potential recovery.

The 2000 amendments to §176.061 also harmonize a workers' compensation insurer's recovery in *Naig* and non-*Naig* situations, thereby remedying an inequity to the blameless workers' compensation insurer. *Tyroll*

created an incongruity between a workers' compensation insurer's recovery in *Naig* and non-*Naig* situations. In the absence of a *Naig* settlement, a workers' compensation insurer is entitled to recover all workers' compensation benefits paid and payable regardless of whether such benefits are recoverable at common law. Minn. Stat §176.061, Subd. 6. This was true before the 2000 amendments and remains true today. Under *Tyroll*, after a *Naig* settlement, the employer or workers' compensation insurer could not recover benefits that the employee could not recover under the common law or by statute. This reduces the potential recovery of the workers' compensation insurer when compared to a resolution in the absence of a *Naig* settlement. Because *Naig* settlements are between the employee and the tortfeasor, those parties could conspire to reduce the potential recovery of the workers' compensation insurer, who is not a party to a *Naig* settlement. The 2000 amendment eliminates this inequity. After the 2000 revisions to §176.061, an employer can recover the full amount of workers' compensation benefits paid and payable regardless of whether such benefits would be recoverable at common law or by statute. Therefore, the workers' compensation insurer's recovery after the 2000 amendments is the same with or without a *Naig* settlement, harmonizing the treatment of the workers' compensation insurer in *Naig* and non-*Naig* situations.

Finally, the 2000 amendments improve the balance between the employer and the tortfeasor in work related accidents by placing financial responsibility on the negligent tortfeasor rather than on the innocent employer. It is certainly within

the authority of the Legislature to elevate the substantive rights of an innocent workers' compensation insurer above the substantive rights of a negligent tortfeasor whose carelessness required the workers' compensation insurer to pay substantial benefits. Indeed, it is difficult to reach any other conclusion on the relative equities than the Legislature reached in amending §176.061. The undisputed facts of this case illustrate the inequities of pre-amendment law. Under the Workers' Compensation Act, Zurich was required to pay workers' compensation benefits of \$104,319. If Zurich is limited to recovery of damages the employee's dependents could recover under the Wrongful Death Act, Zurich would recover only \$48,336.05 from the tortfeasor whose negligence was the sole cause of this accident. Where is the equity in such a result? As the trial court correctly noted:

Not only is the language of the amendments clear, but, as the *amicus curiae* brief notes, it is premised on sound public policy. It places the burden of all compensable damages on the culpable tortfeasor rather than on the innocent employer.

*Zurich Am. Ins. Co. v. Bjelland*, 690 N.W.2d at 356 (citing Brief of Amicus Curiae Minnesota Self-Insurer's Association at 4-7; Zurich App. 13-16 ).

The Workers' Compensation Act establishes the substantive rights of employees, employers, and third-parties to the employment relationship whose negligent acts injure employees. Establishment of these rights involves a complex balance of the substantive rights of these parties. It is the prerogative of the Minnesota Legislature to establish this balance. The 2000 amendments changed

this substantive balance. This is as appropriate as it is unsurprising. The public policy arguments set-forth above demonstrate that the 2000 amendments are rationally related to legitimate public policy objectives. It is for the Legislature to make these public policy judgments. The plain language of the 2000 amendments establish that the Legislature intended to eliminate common law or other statutory limitations on the recovery of an employer or insurer called on to pay workers' compensation benefits.

**IV. The 2000 Amendments to Minn. Stat. §176.061 did not Deprive Appellant of any Procedural Protections.**

Without referencing either the 2000 amendments or the position of Zurich, appellant asserts that the issue before this Court is whether a workers' compensation insurer retains the burden of proving the nature and the extent of its damages. App. Brief at 1. Appellant insinuates that Zurich is attempting to deprive Appellant of its right to a fair trial, stating that application of §176.061 as written will "forever deny third-party tortfeasors their right to defend the claims against them", deprive a tortfeasor of its right to a jury trial, and, deprive a tortfeasor of its right to challenge the reasonableness of workers' compensation benefit payments. App. Brief at 18-20. This diatribe is nothing more than an attempt to set up a straw man in the hope that this Court will be so impressed with appellant's destruction of the straw man that the Court loses sight of the real issue. The issue before this Court is whether §176.061 now allows an innocent workers' compensation insurer to recover statutorily mandated workers' compensation

benefits from a negligent tortfeasor "regardless of whether such benefits are recoverable at common law or by statute." However, addressing appellant's straw man, the 2000 amendment to §176.061 does not abrogate—indeed, it does not even affect—a tortfeasor's right to present a full defense.

Zurich has always acknowledged that it had the burden of proving that appellant was liable and the burden of proving the nature and extent of Zurich's damages. Specifically, Zurich acknowledged that it retained the burden of proving:

1. Appellant was negligent;
2. The negligence of appellant was a direct cause of the death of Eugene Bodeker; and,
3. The fair and reasonable amount of workers' compensation benefits paid and payable.

Appellant had a right to a full hearing on the merits on all of these issues. There is no question that appellant was entitled to a jury trial on issues of negligence and direct cause. Zurich has never argued otherwise. Appellant in this case admitted that he was negligent and that his negligence was the direct cause of the death of Mr. Bodeker. Therefore, no trial on these issues was necessary. However, where disputed, a tortfeasor has a right to a jury trial on issues of negligence and causality. If the jury finds that the tortfeasor was not negligent, or that the negligence of the employee exceeded the negligence of the tortfeasor, the workers' compensation insurer would have no right to recover. Similarly, if the jury finds that the actions of the tortfeasor were not a direct cause of the injury for which

workers' compensation benefits were paid, the workers' compensation insurer would have no right to recover.

Appellant further asserts that application of §176.061 as written will preclude tortfeasors from challenging the reasonableness of workers' compensation benefits. This is simply wrong. Tortfeasors have an absolute right to proffer evidence that workers' compensation benefits paid and payable were not reasonable. Appellant could have submitted evidence that Zurich overpaid benefits. It has long been the practice in Minnesota for tortfeasors disputing the reasonableness of workers' compensation benefits to submit such evidence to the court for determination. *See, e.g., Tyroll*, 505 N.W.2d at 61, n. 6; *M.W. Ettinger*, 494 N.W.2d at 34-35 (Simonett, J., concurring). Appellant never disputed the reasonableness of workers' compensation benefits paid, presumably because it was so obvious that the amount paid was reasonable. However, appellant had the right to challenge the reasonableness of the workers' compensation benefit payments at issue in this litigation.

Appellant's assertion that application of §176.061 as written will deprive appellant of a right to a jury trial fails because Zurich, the adverse party, agreed that appellant could submit all issues to a jury and appellant stipulated to all fact issues.<sup>6</sup> Zurich has never asserted that appellant did not have a right to a jury trial.

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<sup>6</sup> This Court should disregard appellant's assertion that Minn. Stat. §176.061 unconstitutionally deprives tortfeasors of a right to a jury trial because appellant has not properly raised its constitutional argument. A party challenging the constitutionality of a statute is required to provide notice and an opportunity to intervene to the Minnesota Attorney General Minn. R. Civ. P. 24.04. Appellant did not provide notice of its constitutional challenge to the Minnesota Attorney General when this case was pending before the trial

Appellant stipulated to negligence and direct cause, thereby eliminating any need for a jury determination of these issues. In the face of Zurich's well-supported motion for summary judgment, appellant did not submit evidence that the workers' compensation benefit payments were not statutorily required, and stipulated that workers' compensation benefits paid were reasonable. Simply put, appellant never requested a jury trial in this case, making this issue moot.<sup>7</sup>

The only change in the 2000 Legislative revision to §176.061 is that the common law or other statute no longer limit a workers' compensation insurer's recovery. Therefore, a jury no longer needs to determine tort damages. This is the result of a legislative change in the substantive law regarding the measure of damages. This change in the substantive law does not abrogate any of the procedural rights the law accords tortfeasors.

### CONCLUSION

The negligence of appellant was the sole direct cause of the death of Eugene Bodeker. Because of this negligence, Zurich was statutorily required to pay workers' compensation benefits totaling \$104,319. Zurich seeks recovery of these benefit payments. Appellant asks that this Court deprive Zurich of a right to recover the

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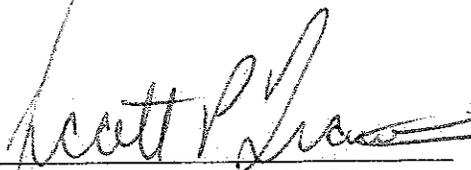
court or the Court of Appeals. Therefore, this Court should disregard this argument. *Leary v. Smith*, 272 Minn. 34, 136 N.W.2d 552 (1965).

<sup>7</sup> Minnesota law plainly reserves determination of the reasonable value of workers' compensation benefits to the court. *Tyroll*, 505 N.W.2d at 61. In *Tyroll*, facing a constitutional challenge that the tortfeasor was deprived of its right to a jury trial, the Minnesota Supreme Court held that the court should determine the reasonable amount of workers' compensation benefits paid and payable. *Id.* If court determination of the reasonableness of the workers' compensation benefit payments did not deprive the tortfeasor of a right to a jury trial in *Tyroll*, court determination of this issue does not deprive a tortfeasor of a right to a jury trial after the 2000 amendments to §176.061. This dispenses with appellant's argument that he has somehow been deprived of a right to a jury trial. However, Zurich did not object to submission of this issue to a jury

majority of those benefit payments because those benefits are not recoverable by Mr. Bodeker's dependents at common law or by statute. The position of appellant would leave the blameless workers' compensation insurer uncompensated for \$55,982.95, for benefit the negligent tortfeasor. Minnesota law no longer sanctions this transparently inequitable result. In 2000, the Minnesota Legislature amended §176.061 to state that an employer or workers' compensation insurer is entitled to recover all workers' compensation benefits paid or payable "regardless of whether such benefits were recoverable by the employee or the employee's dependants at common law or by statute." These amendments unequivocally establish that the common law or other statutory measures of damages no longer limit the recovery of an employer or workers' compensation insurer. The Workers' Compensation Act now provides the measure of damages. This Court should affirm the Court of Appeals and remand for entry of judgment in favor of Zurich for the full amount of workers' compensation benefit payments.

DRAWE & HEISICK

Dated: April 29, 2005.

  
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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) (with amendments effective July 1, 2007).