

NO. A06-1344

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State of Minnesota  
*In Supreme Court*

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Connie C. Reider,

*Employee-Respondent,*

vs.

Anoka-Hennepin School District #11,  
Self-Insured,

*Employer-Relator,*

and

Noran Neurological Clinic,  
Blaine Chiropractic Center,

*Intervenors.*

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**BRIEF AND APPENDIX OF ANOKA-HENNEPIN SCHOOL  
DISTRICT #11, SELF-INSURED, RELATOR**

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## LEGAL ISSUE

**I. WHETHER THE TWO-TO-ONE MAJORITY OF THE WORKERS' COMPENSATION COURT OF APPEALS MADE AN ERROR OF LAW IN UPHOLDING THE COMPENSATION JUDGE'S DENIAL OF THE EMPLOYER'S MOTION FOR NEUTRAL MEDICAL EXAMINATION UNDER MINN. STAT. 176.155, SUBD. 2 ON THE GROUNDS THAT THE DECISION TO APPOINT A NEUTRAL IS ALWAYS DISCRETIONARY WITH THE JUDGE, WHEN THE APPLICABLE STATUTE HAD BEEN AMENDED IN 1979 FOR THE SPECIFIC PURPOSE OF REMOVING DISCRETION FROM COMPENSATION JUDGES WHEN THE REQUEST FOR A NEUTRAL MEDICAL EXAMINATION WOULD NOT DELAY THE PROCEEDINGS.**

A two-to-one majority of the Workers' Compensation Court of Appeals panel held that the decision to appoint a neutral medical examiner under Minn. Stat. 176.155, subd. 2 is always discretionary with the compensation judge, regardless of the circumstances.

**II. WHETHER THE APPROPRIATE REMEDY FOR THE EMPLOYER IS AN ORDER FOR A NEUTRAL MEDICAL EXAMINATION FOLLOWED BY A NEW HEARING BEFORE A DIFFERENT COMPENSATION JUDGE.**

The Workers' Compensation Court of Appeals did not reach this issue because it denied the Employer's arguments on appeal. Proper statutory construction and due process requires that a neutral medical examination be ordered under Minn. Stat. 176.155, subd. 2, followed by a new hearing before a different compensation judge.

## STATEMENT OF THE CASE

This matter involves an appeal from the decision of a divided three-judge panel of the Workers' Compensation Court of Appeals. The Employer, the appellant herein, requests that the Minnesota Supreme Court reverse the decision of the Workers' Compensation Court of Appeals that a compensation judge always has discretion as to whether to order a neutral medical examination. The language of Minn. Stat. 176.155, subd. 2, as stated by the dissenting judge of the Workers' Compensation Court of Appeals, is "plain and unambiguous" and "unequivocally requires that the employer be allowed to proceed with that [neutral] examination." *See Dissenting Opinion*, p. 13. Here, because of the polarized medical opinions before trial, the Employer had moved for an order for a neutral medical examination under Minn. Stat. 176.155, subd. 2. The plain language of 176.155, subd. 2 states that when an interested party requests a neutral medical examination in a timely manner "the compensation judge shall make such a designation." The compensation judge should not have denied the Employer's motion and should not have conducted an evidentiary hearing without the benefit of the results of a neutral medical examination. As such, the Employer requests that the matter be remanded back to the Office of Administrative Hearings for a new hearing, to be conducted by a compensation judge who has not already made up his or her mind as to the compensability of the Employee's claims.

The issue before the Minnesota Supreme Court is a question of law and therefore the Court reviews the matter *de novo* and need not defer to the lower court. *CUNA Mut. Ins. Soc'y v. Comm'r of Revenue*, 647 N.W.2d 533 (Minn. 2002).

The claims of Connie Reider (hereinafter, "Employee") were heard before Compensation Judge Cheryl LeClair-Sommer on August 5, 2005, at the Office of Administrative Hearings in Minneapolis. The Employee claimed that her work as an American Sign Language [ASL]

interpreter for the Anoka-Hennepin School District had resulted in an injury to her spine, medical care, and a significant permanent impairment to her body as a whole. The Employer denied that the Employee had sustained a work-related injury and denied that the Employee had any permanent impairment. The Employee's claim relied on the opinions of her chiropractor and neurological clinic and the Employer relied on the opinions of an independently examining neurologist. The opinions of the medical experts were diametrically opposed. The compensation judge denied the Employer's motion for neutral examination and therefore she did not have the benefit of the opinion of a neutral medical examiner at the evidentiary hearing. The plain language of Minn. Stat. 176.155, subd. 2 required the compensation judge to order the neutral examination, but she refused to follow the plain language of the statute.

The compensation judge ruled that the Employee sustained a work-related injury to the cervical and thoracic spine on February 24, 2003 as a result of her ASL interpreting work. The Compensation Judge relied on the opinions of Thomas C. Rice, D.C. and Dr. Ana Groeschel of the Noran Clinic that the Employee's work activities resulted in a *Gillette* injury (day-to-day repetitive trauma-type injury) to her spine and that the work activities caused a severe and permanent injury to the spine, resulting in a 12.5% impairment of the Employee's whole body. The judge awarded the claimed medical expense.

The Employer appealed the Findings and Order to the Workers' Compensation Court of Appeals. On appeal, the Employer sought a reversal of the compensation judge's decision, based on her order denying Employer's Motion for Examination by a Neutral Physician pursuant to Minn. Stat. § 176.155, Subd. 2. The Employer requested a new hearing by a new compensation judge. The Workers' Compensation Court of Appeals, in a two-to-one decision, held that the decision to order a neutral medical examination is always discretionary with the compensation

judge and is never mandatory. This appeal followed.

### STATEMENT OF FACTS

The Employee was born on May 3, 1952, making her 53 years of age on the date of the Hearing on August 5, 2005. (T. 23). Employee has been employed as a school-year American Sign Language interpreter by Employer from 1992 to the present. (T. 28). As a school-year employee under contract with the Employer, Employee has a 195-day contract. Employee works 175 days a year with student contact, 10 additional days for workshops and similar responsibilities, and has 10 paid holidays, which involve no work. (T. 65). Some of the Employee's time at school is spent as down time (i.e. not interpreting). (T. 67). Employee typically interprets for seven periods a day, and has one additional prep period. (T. 35). Each period lasts approximately 45 minutes. (T. 72).

Employee described her duties as an American Sign Language interpreter and mentioned that the signing is typically done in front of the chest and that there is basically an imaginary box in front of her chest that is the "screen" in which she makes her signals. The signing she performs is the same as the familiar signing that takes place at public meetings, etc. Employee typically uses both arms for signing. (T. 37).

Employee alleges that in February of 2003 she experienced pain in the back of her neck, shoulders, and in an area from her upper back down to her mid back. (T. 38-39). The medical records indicate that Employee first sought medical care on April 14, 2003 for the pain she states began in February 2003. (P. Ex. B) (T. 41). She visited Blaine Chiropractic at that time (P. Ex. B). She complained of pain in her neck, shoulders, and left hip. (P. Ex. B). Employee's chiropractor, Dr. Rice, diagnosed the Employee has having a subluxation sprain/strain of the cervical, thoracic spine and left shoulder; myofascitis; and cervicalgia. (P. Ex. B.). Dr. Rice

later stated that Employee has a 10% whole body impairment due to her cervical spine injury and a 2.5% whole body impairment due to her thoracic spine injury, and that such impairment is the result of her work-related injuries of February 13, 2003 and December 3, 2003. (P. Ex. B.). Dr. Rice placed no restrictions on the Employee's work activities. (P. Ex. B). Employee testified that neither of her medical providers have placed any restrictions on her work activities, despite her doctors' opinions that her work had caused a permanent injury to two parts of her spine. (T. 69-70).

Chiropractor Rice referred Employee to the Noran Neurological Clinic (hereinafter, "Noran Clinic"), where she treated with Dr. Groeschel. (P. Ex. D). Dr. Groeschel ordered an MRI scan of the Employee to take place on March 11, 2005. (P. Ex. D). Dr. Groeschel evaluated the MRI results and noted spondylotic and discogenic degenerative changes of the cervical spine. (P. Ex. D). Dr. Groeschel concluded that Employee's work activities contributed to her cervical and thoracic strain, but did not provide an explanation as to causal relationship. (P. Ex. D). Dr. Groeschel concluded that Employee has a 10% whole body impairment due to her cervical spine injury and a 2.5% whole body impairment due to her thoracic spine injury. (P. Ex. D). Dr. Groeschel did not place any restrictions on the Employee's work activities. (P. Ex. D). Employee confirmed that Dr. Groeschel placed no restrictions on Employee's work activities, even though Dr. Groeschel had concluded that the Employee's work activities had caused permanent injuries to her spine. (T. 69-70).

Dr. Neil Dahlquist, a board certified neurologist, conducted an independent medical examination of the Employee on October 26, 2004. (R. Ex. 1). He prepared a detailed report dated October 26, 2004. (R. Ex. 1). He personally reviewed the Employee's voluminous medical records dating back to 1978, including all of Employee's records from Blaine Chiropractic. (R.

Ex. 1).

Dr. Dahlquist physically examined the Employee and found that she had completely normal range of motion of the entire spine including neck, thoracic and lumbar spine. (R. Ex. 1). He noted that Employee has discomfort involving her left trochanteric bursa [hip area], further noting that it was mild. (R. Ex. 1). He found the Employee has normal range of motion of her shoulders, elbows and wrists. (R. Ex. 1). He noted that she did not have any paraspinal muscle abnormalities or pain to percussion of her spinous processes. (R. Ex. 1).

Dr. Dahlquist concluded that Employee has mild trochanteric bursitis, a hip condition, unrelated to the workers' compensation claim. Based upon his review of the record, the physical exam results and his interview with the patient, he stated:

“After review of her voluminous medical records, the patient has had complaints over the years. None of these complaints have actually demonstrated any objective findings....She has had musculoskeletal complaints over the years. Exercises do help and it appears that all of the symptoms that she has basically relate to aging. These musculoskeletal complaints are minor. This patient has always sought medical attention, and I think it is just an example of her heightened awareness of minor musculoskeletal complaints that most people have ignored. I find no evidence that she has sustained any type of repetitive trauma or Gillette type of injury as a result of her job as a sign language interpreter from the Anoka Hennepin School District culminating on February 24, 2003 and December 3, 2003. I don't believe the patient requires chiropractic care.” (R. Ex. 1). (Emphasis added)

Based upon his review of the Employee's records and his own physical examination, Dr. Dahlquist concluded that the Employee did not sustain any permanent injuries as a result of work activities with Employer. (R. Ex. 1). He does not believe Employee requires any medical care as a result of her work with Employer. (R. Ex. 1). Consistent with his findings, Dr. Dahlquist did not place any restrictions on the Employee in any way. (R. Ex. 1).

Subsequent to Employee's independent medical examination on October 26, 2004, Dr. Dahlquist had the occasion to review additional records concerning the Employee so he could

have an up-to-date history of treatment and evaluation since his examination. (R. Ex. 2). He had the occasion to review records from the Noran Clinic, additional (post-dating Dahlquist's prior review on October 26, 2004) records from Blaine Chiropractic, and Employee's massage therapy records. (R. Ex. 2).

Dr. Dahlquist reviewed Employee's MRI scan of the cervical spine done through the Noran Clinic, dated March 11, 2005. (R. Ex. 2). Based upon his review of the actual MRI scan and his knowledge of the Employee's up-to-date medical history, Dr. Dahlquist concluded:

"The MRI scan shows changes consistent with her age. There is absolutely nothing to suggest any nerve root or spinal cord impingement on this scan. This type of scan would be typical for a patient in her age range...I do not believe that the patient has any evidence of permanent disability based on my understanding of the Disabilities Schedules through the State of Minnesota. The patient's MRI scan does show some degenerative changes, but these degenerative changes would not relate to her work, and these changes would not be unusual for her age. In fact, it is not uncommon at all for a patient of her age to show these types of changes, which is a normal aging process...It would be my opinion that it would be inappropriate to award a disability based on age-related changes on an MRI scan. I do not feel the patient has, then, any permanent partial disability related to her employment as a ASL interpreter for the Anoka-Hennepin School District." (R. Ex. 2).

On March 29, 2005, because of the great disparity in medical opinion between the Employee's evidence and the Employer's evidence, the Employer filed a Motion for Examination by a Neutral Physician pursuant to Minn. Stat. § 176.155, Subd. 2. The Motion was filed before the matter had been assigned to a compensation judge and before a Hearing had been set. Employer's Motion referred the compensation judge to Minn. Stat. § 176.155, Subd. 2, which states that a compensation judge, at the request of any interested party, "shall" designate a neutral physician if a dispute exists as to the injury at issue and the request is timely filed ("not later than 30 days prior to scheduled prehearing conference"). No prehearing conference was scheduled within 30 days of the filing of the Motion. There is no issue as to the timeliness of the

request for the neutral medical examination.

In light of the disputed medical evidence with respect to Employee's alleged injuries, Employer asserted that appointment of a neutral physician is required pursuant to the terms of Minn. Stat. § 176.155, Subd. 2. The matter was assigned to the compensation judge on April 7, 2005. No court action regarding the Motion took place for over two months and so on June 13, 2005, counsel for the self-insured Employer sent a letter to the assigned compensation judge, referencing the Motion for Neutral Examination submitted on March 29, 2005 and requesting the appropriate Order as soon as possible, as Hearing had now been set for August 5, 2005. Also, counsel for self-insured Employer left at least two voice messages with the judge after the June 13, 2005 letter requesting action. It should be noted that in Employer's Answer to Employee's Claim Petition filed on August 11, 2004 the Employer expressly reserved a neutral medical examiner as a witness. On June 30, 2005, after more than 3 months had elapsed since the Motion for Neutral Examination had been filed, Compensation Judge LeClair-Sommer finally issued an Order, but not the mandatory Order the Employer expected, but a denial citing numerous reasons. The Judge cited little or no legal authority for the various reasons she gave in her denial.

As will be shown below, the judge's ruling and affirmance by the WCCA is completely at odds with the Legislature's intent when it changed the neutral examination provisions from discretionary to mandatory in 1979. At that time, the Legislature received a specific recommendation from the Minnesota Workers' Compensation Study Commission that a neutral medical examination be mandatory, not optional at the discretion of the judge, if requested by a party, so long as sufficient time was available to have the neutral examination and report available for hearing.

The compensation judge's Order Denying stated that the Motion did not have certain

“necessary” documents, including medical records, a job description, and a list of questions for the doctor to answer. The Compensation Judge imposed requirements for which no legal authority exists. There is no case, rule, statute or other law which sets forth the requirement that the so-called “necessary” documents accompany a Motion or request for Neutral Examination or else it will be deemed “deficient in necessary information,” as stated by the compensation judge.

On appeal, the Workers’ Compensation Court of Appeals held that the 1979 amendments to 176.155, subd. 2 did not change the neutral medical examination provisions from discretionary to mandatory. Their reasoning decision ignores the plain, obvious meaning of the language of the statute. The WCCA simply refused to enforce the clear, unequivocal will of the Legislature.

The argument below demonstrates that this is exactly the type of case the 1979 Legislature had in mind when it changed the law. Prior to 1979, the appointment of a neutral examiner was at the option of the judge. As outlined below, the Legislature changed the law in 1979 to provide for the mandatory appointment of a neutral examiner at the request of a party in a case like we have at bar—where there is a dispute as to the injury from a medical standpoint and the neutral medical examination will not delay the proceedings. There have been no substantive changes to the mandatory provisions of Minn. Stat. 176.155, subd. 2 since they were added in 1979.

## ARGUMENT

**I. WHETHER THE TWO-TO-ONE MAJORITY OF THE WORKERS' COMPENSATION COURT OF APPEALS MADE AN ERROR OF LAW IN UPHOLDING THE COMPENSATION JUDGE'S DENIAL OF THE EMPLOYER'S MOTION FOR NEUTRAL MEDICAL EXAMINATION UNDER MINN. STAT. 176.155, SUBD. 2 ON THE GROUNDS THAT THE DECISION TO APPOINT A NEUTRAL IS ALWAYS DISCRETIONARY WITH THE JUDGE, WHEN IN FACT THE APPLICABLE STATUTE HAD BEEN AMENDED IN 1979 FOR THE SPECIFIC PURPOSE OF REMOVING DISCRETION FROM A COMPENSATION JUDGE WHEN A PARTY'S REQUEST FOR A NEUTRAL MEDICAL EXAMINATION WOULD NOT DELAY A HEARING ON THE MERITS.**

Minn. Stat. 176.155, subd. 2 sets forth the absolute right of a party to a neutral medical examination "in each case of dispute," if the Employee or the Employer files a request on a timely basis. The statute reads, in pertinent part, as follows:

"In each case of dispute as to the injury...the compensation judge conducting the hearing...may with or without the request of any interested party designate a neutral physician to make an examination of the injured worker...and further provided that when an interested party requests, not later than 30 days prior to a scheduled prehearing conference, that a neutral physician be designated, the compensation judge shall make such a designation." *Id.*

Until amended by the 1979 Legislature, the Workers' Compensation Act provided that any neutral examination request by a party was discretionary with the compensation judge, pursuant to Minn. Stat. 176.155, subd. 2. This changed in 1979 when the Legislature granted parties an absolute right to a neutral examination, so long as there was reasonable time for the examination to be conducted. Attached hereto is a copy of the Session Laws for 1979, showing the changes made to the neutral examination provisions. Appendix to brief, p. 49.

The changes made by the 1979 Legislature were based on the findings and recommendations of the Minnesota Workers' Compensation Study Commission. The Study Commission was established by the 1977 Legislature to study how to reduce workers'

compensation costs while assuring fair compensation for on-the-job injuries. Minnesota Workers' Compensation Study Commission, A Report to the Minnesota Legislature and Governor (1979) (hereinafter cited as Study Commission Report). The Study Commission conducted 40 hearings between September 1977 and February 1979. On February 19, 1979 the Study Commission presented its 320-page report to the Legislature and Governor. Attached in the Appendix at A-52 is a copy of the February 19, 1979 transmittal letter signed by Chairman Steve Keefe. The Study Commission made 57 formal Recommendations in its report, covering virtually all aspects of Minnesota workers' compensation law.

The Minnesota Workers' Compensation Study Commission, in its Report, in one of its 57 formal Recommendations, made a formal Recommendation regarding neutral medical examinations, stating as follows:

"34. THE LEGISLATURE SHOULD REQUIRE THE COMPENSATION JUDGE TO APPOINT A NEUTRAL DOCTOR FOR A THIRD MEDICAL OPINION AT THE REQUEST OF EITHER PARTY IN CONTESTED CASES. [emphasis original]

Present law permits a workers' compensation judge to appoint a neutral physician....The judge, however, is not required to appoint a neutral physician when one is requested by one of the parties.

The commission believes that there is good reason to broaden the scope of the present "neutral physician" provision. Medical opinion can become very polarized in workers' compensation litigation. Plaintiff's evidence and defendant's evidence may be quite far apart and in such cases the judge may be pressured to arbitrarily select one opinion or even to "average" the two opinions." Id, at 37.

Attached to this brief is a copy of the title page of the Study Commission Report and pages 37 and 38 of the report, along with the February 19, 1979 transmittal letter from the chairman of the

Study Commission to the Governor and Senate and House leaders. Appendix at A-52-55.

The situation in the case at bar is exactly the type of situation contemplated by the Study Commission when it called for the Legislature to “require” compensation judges to appoint a neutral medical examiner at the request of either party. The 1979 Legislature did exactly what the Study Commission recommended a few months earlier when the Legislature changed Minn. Stat. 176.155, subd. 2 to require the mandatory appointment of a neutral physician. Also attached in the Appendix to this brief, at A-56 through A-58, is the title page and pages 759 and 760 of a 1980 William Mitchell Law Review article by Jay BenAnav, counsel to the Study Commission. The article is titled “Workers’ Compensation Amendments of the 1979 Minnesota Legislature” and appears at page 743, Volume 6, William Mitchell Law Review, 1980. BenAnav states that a main purpose of the change to mandatory neutral examinations is to “provide a check on the inconsistency of medical testimony.” \*

Here, the medical opinions of the Employee and Employer are extremely polarized and inconsistent. The Employee’s medical evidence is that as a result of her work as an ASL interpreter the Employee has sustained a severe, permanent and substantial permanent injury to two separate parts of her spine, resulting in a 12.5% impairment of her whole body function. The Employer’s medical evidence is that the Employee had a normal physical examination, has mild age-related degenerative changes to her spine, has zero percent whole body impairment and

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\* For a comprehensive discussion of the extensive changes made to the Workers’ Compensation Act by the 1979 Legislature, see BenAnav, *Workers’ Compensation Amendments of the 1979 Minnesota Legislature*, 6 Wm. Mitchell L. Rev. 743 (1980); for a comprehensive discussion of the Study Commission Report, its Recommendations and the 1979 amendments, see Note, *The Minnesota Workers’ Compensation Study Commission: Its Impact upon the 1979 Amendments*, 6 Wm. Mitchell L. Rev. 783 (1980). Most of the Study Commission recommendations were adopted by the 1979 Legislature. *Id.* at 783.

did not sustain any type of work injury due to her work activities.

In light of the polarized medical opinions, the Employer desired a neutral medical examination for an evaluation of whether the Employee had sustained any type of injury arising out of her work as an ASL interpreter and, if so, whether the injury was permanent. The Employer filed its Motion for Neutral Medical Examination on a timely basis, shortly after a Settlement Conference proved unsuccessful and before the case was even set for Hearing. The Employer's Motion was filed on March 29, 2005, more than four months before Hearing, which allowed for plenty of time for the neutral examination to be conducted.

The 1979 Legislature wanted either party to a disputed injury to be guaranteed of a neutral exam by a third doctor so long as there was sufficient time for such an exam. If a party, here the Employer, files a Motion for Neutral exam before the Hearing has even been set, the Motion is timely. Here, the compensation judge waited literally months before taking any action, finally took action only when requested by Employer's counsel with follow-up letters and phone calls, failed to conduct a Special Term Hearing or even a conference call with the attorneys on the Motion to hear arguments, and denied the Motion for Neutral exam on grounds for which no legal authority exists. It is not even clear on what actual grounds the Judge decided to deny the Motion.

On appeal, the Workers' Compensation Court of Appeals majority simply decided it would not enforce the clear mandate of the Legislature. The majority quite patently misinterprets the statute to achieve its own ends. It was clear in oral argument, and the decision of the WCCA underscores this, that the majority judges do not like the Legislature removing discretion from the compensation judges and they do not like the prospect of their claimed hypothetical "practical problems" they see with implementing the mandatory neutral medical examinations.

*See*, majority decision at page 12. It is quite obvious from the decision of the majority that they simply think the 1979 Legislature passed a bad law. The majority forced an interpretation of the language of the statute to support their view. Their view is that the decision of whether to order or allow a neutral medical examination should always be discretionary with the compensation judge, regardless of what the Legislature says. Their interpretation is a clear violation of this Court's instruction that a "court must give a plain reading to any statute it construes, and when the language of the statute is clear, the court must not engage in any further construction." *Gomon v. Northland Family Physicians, Ltd.* 645 N.W.2d. 413, 416 (Minn. 2002).

The 1979 version and the current version of Minn. Stat. 176.155, subd. 2 are the same, except for non-substantive changes. Since 1979, Minn. Stat. 176.155, subd. 2 has two basic parts. The first part says the compensation judge can order a neutral examination on his or her own motion, whether or not a party requests it. This has been the law in Minnesota since we first had a Workers' Compensation Act in 1913, as noted by the WCCA *See* majority decision, page 9. The second part of 176.155, subd. 2, added in 1979, states that if a party requests a neutral medical examination in a disputed matter on a timely basis "the compensation judge shall make such a designation." (emphasis added) The WCCA majority finds that these two parts are not consistent with one another. Obviously, the two parts are not inconsistent and are, in fact, complimentary. Part one states that a judge has the authority to order a neutral exam if he or she feels it will be beneficial, regardless of whether the parties want a neutral exam. Part two, added in 1979, states that a judge must order a neutral examination if a party requests in such time as will not delay the proceedings. Quite clearly, our Legislature has spoken and has enacted a clear and strong policy requiring the utilization of a neutral medical examination if either a judge or one of the parties timely requests it. It is not for the Workers' Compensation Court of Appeals to

second-guess the Legislature and invalidate for its own reasons the clear will of the Legislature.

It is worth noting that in previous decisions the Workers' Compensation Court of Appeals has stated that the provisions of Minn. Stat. 176.155, subd. 2, as amended in 1979, are mandatory. In *Banicki v. Lake Center Industries*, 1986 WL 54828 (Minn. Work. Comp. Ct. App.), the WCCA held that the compensation judge had not abused his discretion in not ordering a neutral exam--since no party had even requested a neutral evaluation. In a footnote to that decision, the *Banicki* court stated, "The present statute does mandate appointment of a neutral when a party so requests under time limitations provided in the statute. No such request was made in this case and that portion of the statute does not apply here." *Id.*, at FN 1. The WCCA also stated that the provisions of 176.155, subd. 2, as amended in 1979, were mandatory in *Olson v. Quality Pork Processors*, 1996 WL 705435 (Minn. Work. Comp. Ct. App.). In *Olson*, the WCCA ruled that the mandatory provisions did not apply because the employer had only reserved the right to a neutral examination, but had not actually made a specific request for a neutral exam until the date of hearing. Therefore, the court stated, the mandatory provisions of 176.155, subd. 2 as amended in 1979 were not applicable to the request.

The WCCA reached the same conclusion in *Buck v. Cass County Social Services*, (decided Aug. 12, 1991, Minn. Work. Comp. Ct. App.). The WCCA stated that there are mandatory provisions of 176.155, subd. 2, but that they did not apply in the case at bar because the request for neutral exam was made on the date of hearing. *Id.* at page 12.

The WCCA in the above previous decisions has quite clearly stated that appointment of a neutral is mandatory under 176.155, subd. 2 if the request is timely made. It is hard to understand why the current majority of the WCCA would turn these previous decisions around 180 degrees.

The decision of the majority of the WCCA in the case at bar must be reversed. The majority decision is contrary to the plain language of the statute, as stated by the dissenting opinion of WCCA Judge Miriam Rykken. The majority decision ignores clear Legislative intent, as proven by the 1979 Study Commission Report and Recommendations. The majority decision reflects the view of the majority panel that they simply think the mandatory neutral examination law is not good law or policy, but that judgment is for the Legislature, not the Workers' Compensation Court of Appeals and the judges of the Office of Administrative Hearings. The Legislature made that policy judgment upon the recommendation of a legislatively-created Study Commission which conducted 40 hearings over a year and a half and made a very specific recommendation to change the law to require mandatory neutral examinations. A two-to-one majority of the Workers' Compensation Court of Appeals should not be able to simply wipe-out the clear and plainly-stated legislation approved by both Legislative chambers and signed by the Governor.

It is very plain to see that the Legislature amended the law in 1979 for situations exactly like the one at bar, where the medical evidence is "polarized." The mandatory provisions of 176.155, subd. 2 are still "good law." The Employer did all it could to properly and timely request a neutral exam by filing its Motion before a hearing date was even scheduled and more than four months before the hearing took place. Obviously, there was more than enough time for a neutral examination to take place after the parties could not reach agreement at the February 2005 Settlement Conference and before the hearing took place. The Employer's March 2005 Motion for Neutral Examination should not have been denied. The plain language of Minn. Stat. 176.155, subd. 2 states that in the circumstances at bar "the compensation judge shall" order the requested examination.

The statutory rights of a party to a neutral examination, specifically created in 1979 by

the Legislature for sound policy reasons, signed by the Governor, and based upon the recommendation of the Study Commission Report are important rights! Despite appropriate circumstances and a timely request, the compensation judge and Workers' Compensation Court of Appeals denied the Employer their statutory rights by failing to order a neutral medical examination. The Legislature has determined that a party has the right to have in evidence in disputed medical claims the results of a neutral medical examination. In order for the rights of the Employer to a neutral examination to be protected, the Employer respectfully requests that the Minnesota Supreme Court reverse the decision of the Workers' Compensation Court of Appeals and order that the WCCA remand the matter to the Office of Administrative Hearings for a neutral medical examination, followed by a new hearing, conducted by a compensation judge who has not already made up his or her mind before reviewing all of the admissible and statutorily required medical opinions.

### CONCLUSION

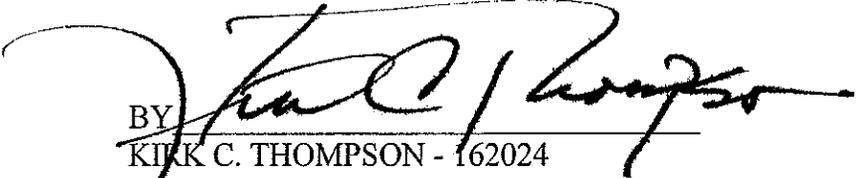
This appeal of the Employer involves an issue of statutory interpretation. Minn. Stat. 176.155, subd. 2, as amended in 1979, was markedly and plainly changed to require a compensation judge to order a neutral medical examination if a timely request was made. Here, there is no question the request was timely, as it was made before the case was even assigned to a judge and set for hearing and was made many months before the hearing took place. The majority of the Workers' Compensation Court of Appeals stated that the appointment of a neutral examiner is always discretionary with the compensation judge. Their interpretation flies in the face of their own previous decisions, the 1979 Study Commission Report and, most importantly, the plain, ordinary meaning of the language of Minn. Stat. 176.155, subd. 2.

The Anoka-Hennepin School District, ISD #11, the appellant and Employer, respectfully

requests that the Minnesota Supreme Court reverse the decision of the Workers' Compensation Court of Appeals and order that a neutral medical examination must take place, followed by a new hearing before a different compensation judge.

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DATED: August 14, 2006

  
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No. A06-1344  
STATE OF MINNESOTA  
IN SUPREME COURT

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Connie C. Reider,

Employee-Respondent,

vs.

Anoka-Hennepin School District #11,  
Self-Insured,

Employer-Relator,

and

Noran Neurological Clinic,  
Blaine Chiropractic Center,

Intervenors.

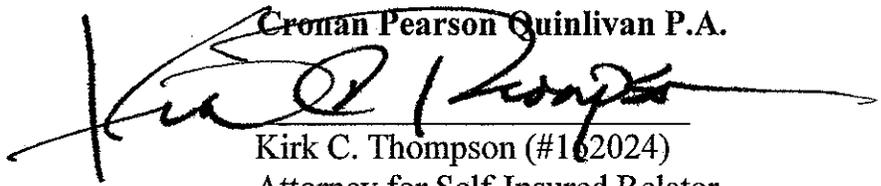
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**CERTIFICATION OF BRIEF LENGTH**

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I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 473 lines and 5,386 words. This brief was prepared using Microsoft Word Office 2003.

Dated: August 14, 2006

  
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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).