

NO. A06-1402

State of Minnesota
In Supreme Court

David T. Adams,

Employee-Relator,

vs.

DSR Sales, Inc.,

Employer-Respondent,

and

Milwaukee Insurance Group,

Insurer-Respondent.

RELATOR'S BRIEF AND APPENDIX

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LEGAL ISSUES

1. IS THE WORKERS' COMPENSATION INSURER ENTITLED TO A CREDIT OF \$62,667.00?

The WCCA held: In the affirmative.

STATEMENT OF THE CASE

The employee in this matter, David T. Adams, filed a Claim Petition for various benefits, on December 30, 2002. (See, transcript of 09/03/03 hearing, hereinafter "T", at T.4, 22; See, transcript of 08/16/05 hearing, hereinafter "T2", at T2. 9-13; See, Judgment Roll) Among the benefits claimed were temporary total disability benefits (TTD), or in the alternative, temporary partial disability benefits (TPD) (T.5; T2. 9-13; See, Judgment Roll) In an Answer filed on or about February 18, 2003, the insurer denied the claim. (See, Judgment Roll) Because the Answer was not timely, the matter was set for an "expedited" hearing pursuant to M. S. § 176.312. (See, Order of 02/19/03, Judgment Roll)

The first pretrial conference was held on April 28, 2003. (T2.9) A second pretrial conference was held on July 7, 2003, and a third pretrial was held on August 26, 2003 – about a week before trial. (T2.10) As a result of a Motion to Strike filed by the insurer, the matter was "bifurcated," and the parties litigated only the issue of whether the employee's injury had arisen out of and in the course and scope of his employment. (T.5; T2.10) The insurer's responsibility for reimbursement of the employee's medical bills was also at issue. (T.5; T2.10)

In a Findings and Order filed on September 5, 2003, the compensation judge at the first hearing determined that the employee's

injury was compensable. (See, Findings and Order of 09/05/03, Appendix at A-1 to A-6) The compensation judge also ordered the payment of various bills (See, Findings and Order of 09/05/03, Appendix at A-1 to A-6). In an appeal to the Workers' Compensation Court of Appeals (WCCA), however, the insurer argued that they were not responsible for the bills, based on an alleged "failure to intervene." (See, Judgment Roll; See, Adams v. DSR Sales, Inc., 64 W.C.D. 396 (WCCA 2004))

The WCCA issued its first decision in this matter on March 12, 2004. (See, Adams v. DSR Sales, Inc., 64 W.C.D. 396 (WCCA 2004)) The Order to pay the medical bills was affirmed. (See, Adams v. DSR Sales, Inc., 64 W.C.D. 396 (WCCA 2004))

Accordingly, on or about April 5, 2004, the employee requested that the claim for wage loss benefits be reinstated. (T2.11) However, the employee was directed to file a new Claim Petition. (T2.11)

Another Claim Petition was filed on April 21, 2004. (See, Judgment Roll; See, T2.11) Again, the employee claimed TTD benefits, or in the alternative, TPD. (See, Judgment Roll) Again, the insurer denied liability for any wage loss benefits. (See, Judgment Roll)

Another claim for the unpaid medical bills was also filed on June 7, 2004. (See, T2.11)

A settlement conference was held on November 23, 2004, which also dealt with an ongoing discovery dispute. (See, Judgment Roll;

See, T2.11) A fourth pretrial was held on April 18, 2005, before a different judge. (T2.12) At that time, in addition to various defenses, the insurer raised, for the first time, the issue of entitlement to a "credit." (T2.12)

Another Motion to Strike was filed by the insurer just shortly before trial. (T2.12) The insurer alleged that they "got no notice" regarding a third-party settlement. (T2.14-17, 26) In an Order dated June 13, 2005, the compensation judge denied the Motion to Strike. (See, Judgment Roll; See, Order of 06/13/03) At a fifth pretrial on June 13, 2005, the compensation judge did grant a request by the insurer for a continuance. (T2.12) The matter was continued from July 1, 2005 to August 16, 2005. (See, Order of 06/13/05; See, Judgment Roll)

The employee's claim for wage loss finally came on for hearing on August 16, 2005, more than 2-1/2 years after it had been filed. (See, Judgment Roll; T.1-90; T2. 1-59)

At the hearing, the attorney for the insurer raised the following issues:

- A. A credit in the amount of the indemnity benefits claimed: "\$20,419.65" (T2. 7, 20)
- B. A future credit of \$21,358.35 (T2. 7, 20)

20,419.65
+ 21,358.35
\$41,778.00

(T2. 21)

In a Findings and Order filed on October 13, 2005, the compensation judge found that the workers' compensation carrier had "actual notice" in October, 2002, of the employee's "third party claim." (See, Findings and Order of 10/13/05, hereinafter F&OII; Appendix at A-11 to A-19; Finding No. 3) However, finding that the workers' compensation carrier had no notice of the "settlement," the compensation judge awarded a credit of \$62,667.00 to the employer and insurer. (F&OII, Finding No. 24; Appendix at A-11 to A-19) The compensation judge found that the employee had "failed to rebut the presumption of prejudice to the employer and insurer." (F&OII, Finding No. 22) The judge also awarded a "future credit," ordered payment of medical bills, and awarded attorney's fees. (F&OII, Findings Nos. 12-17, 19-21 and Order No. 6; Appendix at A-11 to A-19)

Both sides appealed to the WCCA. (See, Judgment Roll) The employee appealed on the issues of notice, the application of the presumption, the calculation of the credit, and the amount of the future credit. (See, Notice of Appeal filed 11/10/05)

On June 28, 2006, the WCCA issued its second decision in this matter. (Appendix at A-20 to A-31) The employee filed a Petition for Writ of Certiorari, Writ of Certiorari and Statement of the Case on July 26, 2006. This is the Employee-Relator's timely Brief on Appeal.

STATEMENT OF FACTS

The employee in this matter is David T. Adams. (T.27; T2.29) On June 23, 2002, while in the course and scope of his employment, the employee sustained "rather severe injuries" in a motorcycle accident. (F&OI, Finding No. 6; See, Memorandum at Page 4) The employee incurred "extensive" medical bills, which were reasonable and necessary. (T. 5-6)

By letter dated October 14, 2002, the insurer notified the employee that they were denying the workers' compensation claim. (F&OI, Finding No. 3) At about that same time, the insurer had actual notice that the employee had retained Attorney Joseph Lyons-Leoni to bring a third-party claim against a different insurance company. (F&OI, Finding No. 3)

On or about November 22, 2002, the employee retained a different attorney to represent him in his workers' compensation claim against the insurer. (F&OI, Finding No. 4) A Claim Petition for workers' compensation benefits was filed on or about December 30, 2002. (See, Judgment Roll; T.4, 22; T2. 9-13) The claims were denied by the insurer from December 30, 2002 until September 5, 2003, when they were awarded by a compensation judge. (See, F&OI; T2. 9-13)

In the meantime, while the workers' compensation claims were being denied, the employee and his attorney for the "third-party claim" settled with the other insurer on June 24, 2003. (F&OII, Finding No. 5)

After an appeal to the WCCA was unsuccessful, the workers' compensation insurer continued to deny the claim for TTD, or in the alternative, TPD. (See, Adams v. DSR Sales, Inc., 64 W.C.D. 396 (WCCA 2004); Appendix at A-7 to A-10; T2 9-13) Another Claim Petition was filed on April 21, 2004 (T2.11) and the matter was again set for trial. (T2. 1-59) This time, in addition to the general denial interposed by Answer on April 28, 2004, the insurer raised a new defense:

- A. A credit in the amount of the indemnity benefits claimed:
"\$20,419.65." (T2. 7, 20)
- B. A future credit of \$21,358.35 (T2. 7, 20)

	\$20,419.65
	<u>21,358.35</u>
	\$41,778.00
(T2. 21)	

Following the second hearing, the compensation judge awarded a credit of \$62,667.00, with a credit of a "dollar for each dollar" of future benefits payable. (F&OII, Orders No. 4 and 6; Appendix at A-11 to A-19)

ARGUMENT

I.

THE WORKERS' COMPENSATION INSURER IS NOT ENTITLED TO A CREDIT OF \$62,667.00

On June 23, 2002, while riding his motorcycle through the Black Hills of South Dakota, the Employee-Relator was struck by a car. Although this was clearly a work-related injury, the workers' compensation insurer denied the claim.

Likewise, the insurer for the third-party driver denied any responsibility. Accordingly, the Employee-Relator hired an attorney, Joseph Leoni, to pursue his rights against the driver.

Prior to denying the claim, the workers' compensation insurer investigated by, among other things, taking a statement. The workers' compensation insurer was aware of the pending third-party litigation because she asked Attorney Leoni about it, on the record. The statement was taken in August, 2002.¹

Because the workers' compensation insurer continued to deny any responsibility for workers' compensation benefits, the Employee-Relator then hired a different attorney to represent him in the workers'

¹ In the decision below, the compensation judge made a finding, which was not appealed, that the workers' compensation carrier had "actual notice" that Attorney Leoni was bringing a third-party claim on behalf of the Employee-Relator.

compensation claim. A Claim Petition for workers' compensation benefits was filed on December 30, 2002.

In an Answer, the workers' compensation insurer denied all benefits, and they remained denied until September 5, 2003, when they were awarded by a compensation judge. From August, 2002 to September, 2003, while the Employee-Relator's third-party attorney and the liability insurer resolved their claims, the workers' compensation insurer continued to deny any responsibility. All claims for workers' compensation were denied.

The workers' compensation insurer also took no action to preserve their rights in the third-party case. They did nothing. In fact, the issue was never even brought up during the workers' compensation litigation.

On or about June 24, 2003, the Employee-Relator's third-party case was settled, while the workers' compensation benefits were still being denied.

Meanwhile, the workers' compensation benefits were awarded on September 5, 2003, but because the matter was appealed to the WCCA, and because the workers' compensation claims had been "bifurcated," additional litigation ensued. Following the first WCCA decision in this matter on March 12, 2004², a new Claim Petition was filed on April 21, 2004.

² See, Adams v. DSR Sales, Inc., 64 W.C.D. 396 (WCCA 2004); Appendix at A-7 to A-10.

All along, the workers' compensation insurer had raised a series of defenses to payment: Primary denial of liability, causal relationship, reasonableness and necessity, etc. However, at the fourth pretrial on April 18, 2005, the workers' compensation insurer first raised another reason why they did not owe any wage loss: They claimed "a credit."

It is important to remember that this was never pled, or raised, in any formal fashion. The workers' compensation insurer simply denied workers' compensation benefits for various reasons and, in addition, verbally claimed "a credit."

At the hearing on August 16, 2005, the Respondent's attorney was questioned about this, and claimed a credit of \$41,778.00:

- A. \$20,419.65 "pursuant to statute"
(\$100,000.00 - \$37,333.00 = \$62,667.00;
\$62,667.00 - \$20,889.00 [one-third to Employee-Relator]
= \$41,778.00; \$32,584.38 [paid] - \$12,164.73 = \$20,419.65)
- B. \$21,358.35 "future credit" (\$41,778.00 - \$20,419.65 =
\$21,358.35)

The compensation judge, however, citing Womack v. Fikes, 61 W.C.D. 574 (WCCA 2001) awarded a credit of \$62,667.00, or \$20,000.00 more than the workers' compensation insurer requested.

In the case of Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977), this Court dealt with the interplay between workers' compensation and third-party litigation. Naig at 894.

A subsequent decision by this Court following Naig, was the case of Easterlin v. State, 330 N.W.2d 704 (Minn. 1983). In Easterlin, the parties settled a third-party case using a Naig release. As in the present case, the employer was aware of the potential for a third-party claim. However, in a case of "misdirection," the attorney for the employee actually wrote to the employer and indicated that they were not going to institute proceedings. The attorney then settled the case. This Court held, under those circumstances, that the employee did not get the benefit of the Naig release. In that instance, the employee was required to fall back on the statutory language in M. S. § 176.061, subd. 6: A deduction for fees, and a protected one-third to the employee.

The release in the present case was not a Naig release. It was a general release.

Years later, in a case of first impression, a panel of the WCCA dealt with a similar situation in Womack v. Fikes of Minn., 61 W.C.D. 574 (WCCA 2001) However, Womack did not involve a Naig settlement either.

In Womack, there was a 1997 motor vehicle accident which also turned out to be work related. Both claims were denied. The employee hired a third-party attorney, and instituted suit. Later, he hired a workers' compensation attorney who filed a Claim Petition. Womack, at 583

The employer and insurer denied the workers' compensation claim. The employee did not notify the employer and insurer of the institution or pendency of the third-party claim. Womack, at 583

After a District Court trial in February, 2000, an award of damages was made. Likewise, following a workers' compensation hearing in November, 2000, it was determined that the 1997 motor vehicle accident was work related. Womack, at 584

The compensation judge made an allocation under Henning v. Wineman, 306 N.W.2d 550 (Minn. 1981). However, because no notice was given to the employer and insurer of the institution or pendency of a claim, the WCCA penalized the employee by taking away the statutorily protected one-third provided for in M. S. § 176.061, subd. 6. Womack, at 588

Typically, in the case of a verdict, or “non-Naig” situation, an employee can protect one-third of the net recovery. The decision of the WCCA in the present case takes that away. As stated by the dissenting judge in the present case:

The majority's misplaced reliance on Womack in the present case takes away \$20,889.00 from Mr. Adams.

Adams v. DSR Sales, Inc., File No. WC05-287, slip op. at 9 (WCCA June 28, 2006) (Stofferahn, J., dissenting)

This is unfair in the present case for several reasons: First, it is undisputed that the workers' compensation insurer in this case had "actual" notice of the institution of a third-party claim. This case is distinguishable from Womack, where no notice at all was given. Similarly, it is distinguishable from Easterlin, where there was willful misdirection. The workers' compensation insurer in the present case was aware of the third-party claim and had every opportunity to participate. They chose not to, and instead did nothing to protect their rights.

It seems patently unfair to penalize the employee \$20,000.00 under these circumstances.

Second, it should be emphasized that the alleged failure of the employee to give notice was not raised as an issue at the hearing by the workers' compensation insurer. At the hearing, it was the position of the workers' compensation insurer that the settlement proceeds should be distributed in accordance with M. S. § 176.061, subd. 6, and the workers' compensation insurer prepared an exhibit with its calculations which followed the statutory distribution. The compensation judge, and a majority

of a panel of the WCCA “have provided a ‘remedy’ for this case not sought by any party.” Adams, slip op. at 9 (Stofferahn, J., dissenting)

Third, it seems unfair to penalize the employee \$20,000.00 in a case where the workers' compensation insurer would have no right to intervene in the third-party action even if it had received notice of the pending settlement. The workers' compensation insurer in the present case denied liability for any workers' compensation benefits, and as of the time of the third-party settlement, had paid no benefits of any kind. The WCCA has held previously, in a result affirmed by this Court, that the presumption of prejudice was rebutted in these circumstances and a full credit against the settlement would not be allowed to the insurer. McDonough v. Muska Electric Co., 47 W.C.D. 71 (WCCA 1992); McDonough v. Muska Electric Co., 486 N.W.2d 768 (Minn. 1992)

Finally, as stated by the dissenting judge of the WCCA in this matter, Womack should not be relied upon and should be specifically overruled by this Court:

The premise of Womack is that there should be a consequence to the employee for a failure to give notice of a pending settlement. The key holding of Womack is to punish the employee for the failure to give notice by taking away the employee's statutory one-third share of proceeds under Minn. Stat. § 176.061, subd. 6(b). No authority is given for the imposition of this penalty other than it would be “appropriate.” This court does not have authority to create law. Our jurisdiction is to apply the workers' compensation law as written by the legislature.

The court in Womack ignored the language in Minn. Stat. § 176.061, subd. 6(b), that this amount “shall in any event be paid to the injured employee or the employee’s dependents, without being subject to any right of subrogation.” (emphasis added). The majority’s misplaced reliance on Womack in the present case takes away \$20,889.00 from Mr. Adams.

Womack was decided on an assumption that no consequence for the employee’s failure to provide notice of a third party settlement is provided in the statute. In this assumption, the Womack court erred. In 1983, the legislature enacted Minn. Stat. § 176.061, subd. 8a, which codified the employee’s obligation to give notice and which also provided that “a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer in a reasonable time.” No other consequence is set out in the statute.

It is not clear why the Womack court ignored the statutory language, but it did so. The present majority, because of a concern that the statute is not “adequate” suggests that the Womack penalty should be considered as another possible consequence. It is not this court’s role to consider the adequacy of the provisions of the Workers’ Compensation Act as established by the legislature. There is also no language in the statute which would suggest that the provisions to be found in Minn. Stat. § 176.061, subd. 8a allow for other results. The statutory language creates a situation in which all parties in the third party action are placed back in the negotiation stage as though there had never been an agreement. At that point, the employer and insurer are able to intervene and protect their interest through negotiation. No party is punished. That result is completely inconsistent with the approach followed by Womack in which the employee is punished and the employer receives a windfall. Simple statutory construction would indicate that the Womack approach is not an option to be applied in place of the statute.

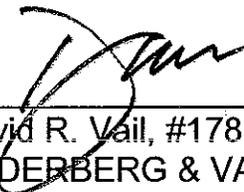
Adams, slip op. at 9-10 (Stofferahn, J., dissenting)

CONCLUSION

For the above-stated reasons, the workers' compensation insurer is not entitled to a credit of \$62,667.00. The result reached by a majority of a panel of the WCCA is contrary to statute, it considers issues not raised by any party at the hearing, it is grossly unfair to the employee, and it provides a "remedy" not sought by any party.

Respectfully submitted,

Dated: August 11, 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).