

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.

RESPONDENT'S BRIEF

David R. Vail (#178809)
SODERBERG & VAIL, L.L.C.
The Colwell Building, Suite 500
123 North Third Street
Minneapolis, MN 55401
(612) 349-9090

Daniel A. Lively (#194323)
7805 Telegraph Road
Suite 200
Bloomington, MN 55438
(952) 944-7023

Attorney for Employee-Relator

*Attorney for Employer and
Insurer - Respondents*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
LEGAL ISSUES	iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
ARGUMENT:	
1. THE INSURER IS ENTITLED TO A SUBROGATION CREDIT IN THE AMOUNT OF \$62,667	5
CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases:</u>	
Minnesota Supreme Court:	
<u>Easterlin v. State</u> , 330 N.W. 2d 704 (Minn. 1983)	2, 8, 9, 10, 11, 13
<u>Henning v. Wineman</u> , 306 N.W. 2d 550 (Minn. 1981)...	2, 5, 6, 10
<u>McDonough v. Muska Electric Co.</u> , 486 N.W. 2d 768 (Minn. 1992)	9, 10, 12
<u>Naig v. Bloomington Sanitation</u> , 258 N.W. 2d 891 (Minn. 1977)	5, 6, 8, 9, 11
Workers' Compensation Court of Appeals:	
<u>Adams v. DSR Sales, Inc.</u> , File No. WC05-287 slip op. (WCCA June 28, 2006)	3, 11, 12
<u>Womack v. Fikes of Minn.</u> , 61 W.C.D. 574 (WCCA 2001)	7, 9, 10, 13
 <u>Statutes:</u>	
M.S. § 176.061, subd. 5	2, 7
M.S. § 176.061, subd. 6	5, 6, 7, 8, 9, 10
M.S. § 176.061, subd. 8(a)	7, 10

LEGAL ISSUES

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

The WCCA held: In the affirmative.

Easterlin v. State, 330 N.W. 2d 704 (Minn. 1983)

McDonough v. Muska Electric Co., 486 N.W. 2d 768 (Minn. 1992)

Womack v. Fikes of Minn., 61 W.C.D. 574 (WCCA 2001)

Naig v. Bloomington Sanitation, 258 N.W. 2d 891

M.S. § 176.061

STATEMENT OF THE CASE

This matter came on for hearing before Compensation Judge Jerome G. Arnold of the Office of Administrative Hearings on August 16, 2005, at the Government Services Center in Duluth, Minnesota. The issues included:

1. Whether the employer/insurer is entitled to a subrogation credit, and if so, the amount of the employer/insurer's credit from a third party litigation settlement wherein the employee received the gross amount of \$100,000 for a general release of all claims;
2. Whether the employer/insurer had notice of the third party litigation; and,
3. Whether the employer/insurer was given notice of the third party settlement prior to its completion and the distribution of monies from that settlement.

Findings and Order dated October 13, 2005, Statement of Issues, numbers 7 (a) and (b); Appendix at A-11 to A-19.

Compensation Judge Jerome G. Arnold determined that:

1. ...the employee entered into an agreement with the third party tortfeasor, giving a general release in exchange for the policy limits of \$100,000 on June 24, 2003, without giving notice to the employer/insurer.

2. No notice of the distribution of the \$100,000 settlement was given to the insurer...[and]...no distribution of the proceeds was had...as might have occurred pursuant to Henning v. Wineman.
3. The employee has failed to rebut the presumption of prejudice as set forth in Easterlin v. State, in failing to give notice to the employer/insurer of the third party settlement.
4. The employee is not entitled to the application of M.S. 176.061, subdivision 5 or an allocation determinable under Henning v. Wineman.
5. ...the entire net recovery of \$62,667...is the subrogation credit.
6. The employer/insurer is entitled to a dollar for dollar set off to be taken against its subrogation interest of \$62,667 for any past payments determined to be at least \$32,584.38 and for any payments made under this order, except payments of interest.

Findings and Order dated October 13, 2005, Findings numbers 5, 6, 22, 23, 24 and Order numbers 4 and 5; Appendix at A-11 to A-19.

The employee served and filed a timely Notice to Appeal. The basis of the appeal was that the Compensation Judge committed an error of law by finding that proper notice was not given of the third party settlement and by awarding a dollar for dollar set off of future benefits.

The Workers' Compensation Court of Appeals issued its Decision on June 28, 2006. In part, the Workers' Compensation Court of Appeals concluded..."that

the compensation judge properly determined that, because the employee failed to give notice to Unitrin of settlement negotiations and also failed to rebut the presumption of prejudice, the entire net proceeds of the third-party settlement are available as a credit against Unitrin's workers' compensation liability."

Adams v. DSR Sales, Inc., File No. WC05-287, slip op. at 7 (WCCA June 28, 2006); Appendix at A-20 to A-31 (hereinafter Adams II).

The employee filed a Petition for Writ of Certiorari, Writ of Certiorari and Statement of Case on July 26, 2006. Appendix at A-32 to A-39. Relator's Brief was served and file on August 14, 2006. This is Respondent's timely brief.

STATEMENT OF THE FACTS

On June 23, 2002, Dave Adams (hereinafter Employee) was injured while riding a motorcycle in South Dakota. See transcript of hearing on August 16, 2005, hereinafter T. at 3. This accident arose out of and in the course and scope of employment and was caused by a third party. T. at 31-32. Employee injured his right leg and thoracic spine T. at 33-36. These facts are undisputed.

As the result of an earlier hearing before Judge Gregory Bonovetz on September 3, 2003, Employer and Insurer were ordered to pay medical benefits. Findings and Order dated September 5, 2003; Appendix at A-1 to A-6. The bills eventually totaled at least \$32,584.38.

In addition to the workers' compensation claim, Employee also asserted a claim against the third party tortfeasor. Employee entered into an agreement with the third party tortfeasor pursuant to a General Release for the policy limits of \$100,000. Hearing Exhibit 1 and T. at 48. Employee was advised by his attorney of the impact of the General Release and decided to proceed with the third party settlement. T. at 49. Employee was aware that the third-party settlement would have an impact on the workers' compensation claim. T. at 46-49.

Notice of the third party settlement was never provided to the workers' compensation carrier. As a result, Judge Arnold determined that the Employer and Insurer were entitled to a subrogation credit of \$62,667. Findings and Order dated October 13, 2005, Orders 4 and 6; Appendix at A-11 to A-19.

ARGUMENT

1. THE INSURER IS ENTITLED TO A SUBROGATION CREDIT IN THE AMOUNT OF \$62,667

If an injured worker has pursued a third party action against a separate tortfeasor who caused the injury and made a recovery, that amount is subject to the distribution formula set forth in M.S. 176.061, subdivision 6:

The proceeds of all actions for damages or of settlement of an action under this section ... shall be divided as follows:

- (a) After deducting the reasonable cost of collection... then,
- (b) One-third of the remainder shall in any event be paid to the injured employee...without being subject to any right of subrogation.
- (c) Out of the balance remaining, the employer or the Special Compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's independents by the employer or the Special Compensation Fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or Special Compensation fund to the employee or the employee's dependents.
- (d) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the Special Compensation Fund for any benefits which the employer or the Special Compensation Fund is obligated to pay, but has not paid, and for any benefits that the employer or the Special Compensation Fund is obligated to make in the future.

This distribution formula may only be altered under very limited circumstances involving a Naig settlement, a Henning distribution or by failure of an employee to provide notice of a pending third party settlement. Naig v. Bloomington

Sanitation, 258 N.W. 2d 891 (1977); Henning v. Wineman, 306 N.W. 2d 550 (1980).

A Naig settlement allows an injured worker to enter into a settlement with a third party tortfeasor for damages not compensable under the Minnesota Workers' Compensation Act. This type of settlement is not subject to the distribution formula in M.S. 176.061 subdivision 6, nor does it impact the injured workers rights to receive further workers' compensation benefits. Naig v. Bloomington Sanitation, 258 N.W. 2d 891 (1977).

Here it is undisputed that the employee settled his third party claim pursuant to a General Release. He had the opportunity to reach a Naig settlement, but for whatever reason failed to do so. There can be no argument that the exception provided by the Naig case applies to the present dispute.

A Henning distribution allows the injured worker to obtain an apportionment of damages from a court resulting in a distribution more favorable than allowed under the distribution formula. The injured party petitions the District Court for a finding determining which damages are compensable under the Workers' Compensation Act and which damages are non-compensable. The affect is much the same as in a Naig settlement. Further, the requirements for obtaining a Henning distribution are very stringent. Henning v. Wineman, 306 N.W. 2d 550 (1980).

Again, it is undisputed that the employee did not settle his third party claim pursuant to a Henning distribution. Accordingly, the Henning exception does not apply.

The third exception is found in M.S. 176.061, subdivision 8(a) which provides that the employer and insurer are entitled to notice of any pending settlement of a third party claim. If as in the present case, the employee fails to do so, the settlement is void as to the insurer's right of subrogation and the employee cannot avail himself of the distribution formula set forth in M.S. 176.061, subd. 6.

M.S. 176.061, subd. 8(a) provides:

In every case arising under subdivision 5, 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 within a reasonable time...[and]...any settlement between the employee or the employee's dependents and the third party is void as against the employer's right of subrogation or indemnity.

Again it is an undisputed fact that the employee failed to provide notice of any discussions indicating that he intended to settle the third party claim. There was no evidence of any communication regarding settlement between the employee's attorney (Joseph Lyons-Leoni) and the insurer, Unitrin. The record is absolutely silent and the rights of the insurer were prejudiced.

The statute (M.S. 176.061, subd.8(a)) is clear and unambiguous on its face. It requires that notice must be given of any intent to settle the third party claim. The notice requirement is not optional. If this notice of the intent to settle is not given, the settlement is void as to the insurer's right of subrogation. M.S. 176.061, subdivision 8(a) and Womak v. Fikes of Minnesota, 61 W.C.D. 574 (2001). The end result is that the employee forfeits his right to protect his one third share of the third-party proceeds. Womak at 581.

In its Decision dated June 28, 2006, the Workers' Compensation Court of Appeals traced the line of cases leading to Womak. A brief discussion of the cases will

show the clear support of existing law that requires the employee to provide notice of settlement negotiations to the insurer and the consequence for failing in that obligation.

The Workers' Compensation Court of Appeals initially discussed Easterlin v. State, 330 N.W. 2d 704 (1983). In that claim, the employee was injured on July 13, 1979, as a result of a work related motor vehicle accident. The employee was paid wage loss benefits by the State of Minnesota (self insured employer). The employee then commenced a third-party action against the at fault driver. In October, 1980, the third-party claim was subsequently settled pursuant to Naig v. Bloomington Sanitation, 258 N.W. 2d 891 (1977). The employee settled for all damages not covered by the Workers' Compensation Act. A copy of the settlement agreement was then provided to the self insured employer. After the employee filed a Claim Petition, the self insured employer sought allocation of the third party proceeds pursuant to M.S.A. 176.061, subd. 6.

The compensation judge ruled that the third party proceeds were not subject M.S.A. 176.061, subd. 6. The Workers' Compensation Court of Appeals reversed the compensation judge determining that the employee had failed to provide adequate notice of settlement negotiations as required by Naig and that as a penalty the settlement was subject to M.S. 176.061, subd. 6. The Minnesota Supreme Court affirmed the Workers' Compensation Court of Appeals Decision and stated clearly that:

“We hold that notice of settlement negotiations for a Naig settlement must be given to the employer-insurer in a manner and at a time such that the employer-insurer has a reasonable opportunity to participate in the negotiations and to appear or intervene in any litigation to protect its interests.”

Easterlin, at 710.

It should be noted that Easterlin was decided under a different version of M.S. 176.061, subd. 6. The key ideas, however, to take from Easterlin is the employee's absolute duty to provide notice of settlement negotiations to the employer and that failure to do so results in a penalty to the employee. In the present claim there is no dispute that notice of settlement negotiations or the actual settlement of the third-party claim was never provided to the insurer.

The next case discussed is McDonough v. Muska Electric Co., 486 N.W. 2d 768 (1992). This case was decided under the current version of M.S. 176.061, subd. 6. The Minnesota Supreme Court reaffirmed Easterlin and even extended the holding by stating "...it is incumbent on an employee to give his or her employer notice of pending Naig settlement negotiations regardless of whether a compensation claim has been file." McDonough at 771.

Easterlin notice was required even in a situation in which the employer had not paid any workers' compensation benefits. It should be noted that the employer was not allowed to use the credit as the employee rebutted the presumption of prejudice.

Finally, the Workers' Compensation Court of Appeals discussed Womack v. Fikes of Minnesota, 61 W.C.D. 574 (W.C.C.A. 2001), a recent case directly on point with the present case. In Womack, the employee was injured in a work related motor vehicle accident. The employee filed a suit against the other driver and later filed a Claim Petition alleging entitlement to workers' compensation benefits. The employer denied liability contending in part that the employee had not been in the course and scope of employment at the time of the accident. The third party claim proceeded to trial and a special verdict was issued. The

employer was not provided notice of the suit or trial. Subsequently, the workers' compensation claim proceeded to a hearing and certain benefits were awarded.

On appeal, the employer argued based on Easterlin that as the employee failed to provide notice of the third party action and trial the credit should be taken dollar for dollar against benefits payable to the employee or on his behalf. The employee argued that Easterlin did not apply and the credit should be calculated pursuant to the formula in M.S. 176.061, subd. 6 or as the result of a Henning allocation made by a compensation judge or a district court judge. In other words, the employee and employer disagreed as to the consequences for failure to provide proper notice of the third party claim.

The Workers' Compensation Court of Appeals found that "...when an employee fails to give notice as required by M.S. 176.061, subd. 8(a), he is not entitled to request a Henning allocation from a verdict or settlement." Womack at 581.

Further, the Court ruled that if the employee "...fails to give notice in a situation where he might use a one third deduction, then his penalty should be the loss of his right to protect that one third interest in the net recovery." Womack at 582.

The penalty or consequence for failing to provide notice was twofold:

- 1) no Henning allocation and,
- 2) forfeit of right to protect a one third share of the third party proceeds.

This is exactly what the compensation judge and the Workers' Compensation Court of Appeals decided. These determinations are well founded in Minnesota case law as set forth in Easterlin, McDonough and Womack.

The employee argues that as the insurer was aware of a possible third party claim, the notice requirement was satisfied. In fact, having knowledge of a third party claim is not sufficient. Employee further argues the insurer "...took no action to preserve their rights in the third-party case. They did nothing." What the employee fails to acknowledge is that he has the burden to provide notice of the settlement. As the WCCA stated:

"...it is not reasonable to expect an employer and insurer to maintain constant contact with litigants in a third-party action in order to be assured the opportunity to join settlement talks, especially when the burden on the employee to give notice of settlement is so minimal."

Adams v. DSR Sales, Inc., File No. WC05-287, slip op. at 6 (WCCA June 28, 2006; Appendix at A-20 to A-31.

The Minnesota Supreme Court in Easterlin also viewed the burden as light stating that by, "Giving the employer notice of pending settlement negotiations, hardly an onerous chore..." Easterlin at 710.

The Minnesota Supreme Court in Easterlin held that the failure to provide notice of settlement negotiations was:

"...presumptively prejudicial to the employer, and if the presumption is not rebutted by the employee, the employer is entitled to a credit for future compensation payable against the employee's Naig settlement."

Easterlin at 710.

The burden is on the employee to show the lack of prejudice. Here, the employee failed to meet that burden. Again, the record is silent as to any evidence concerning the required lack of prejudice.

In the employee's brief, there is a statement that the Workers' Compensation Court of Appeals and Minnesota Supreme Court had previously found in similar circumstances (no benefits paid) that the employee had rebutted the presumption of prejudice. McDonough. This argument is misleading. In fact, in McDonough the Court once again affirmed the obligation of the employee to provide proper notice regardless of the status of the workers' compensation claim. The Court did find that no credit was due because the presumption of prejudice was rebutted with specific evidence. As noted above, there was no such evidence in the present case. As the Workers' Compensation Court of Appeals stated..."employee presented no evidence whatsoever that would tend to rebut the presumption; in fact, the employee's testimony clearly establishes that he is frankly hostile to the workers' compensation carrier making it unlikely that Unitrin could expect cooperation from the employee in any claim made by Unitrin against the third party or third party insurance carrier." Adams II at 6-7. This statement was based in part upon the employee's testimony at trial when asked whether he had reimbursed Unitrin for benefits paid, the employee answered, "I'd file bankruptcy before I would do that." T at 53.

Also, the employee argues that somehow he is being treated unfairly. In reality the insurer is the party with the grievance. The employee's duty was simple and not onerous. All that was required was that he provides the insurer with notice of the settlement negotiations. The Workers' Compensation Act required the notice. The many opinions of the Workers' Compensation Court of Appeals affirmed the need for notice. The Minnesota Supreme Court also has affirmed the need for notice. The employee failed to comply with the statute. The

employee failed to comply with well established Minnesota case law. The consequence for this failure is clear: the employee should lose the right to protect the one third interest in the net recovery. Womack at 582. In the end, it was the insurer who was treated unfairly. The insurer has suffered prejudice as the result of the employee's failure to provide the statutory and case law based notice.

The prejudice to the insurer is real, significant and obvious. The insurer would be required to file a suit in District Court. Also, the impact of the employee's settlement for the full coverage of the liability insurance on the insurer's rights is clear. Simply, there is no additional insurance coverage for the insurer to pursue. Further, the insurer would require the cooperation of the employee who as noted above may have no interest in participating. Finally, the insurer was denied the opportunity to admit liability in the workers' compensation matter, pay the benefits claimed and to be reimbursed through settlement of the third-party action.

It should also be noted that from a broad public policy view that the result of employee's lack of notice is contrary to the Minnesota Supreme Court's stated goal, "...that every reasonable effort be made to avoid a multiplicity of lawsuits." Easterlin at 709.

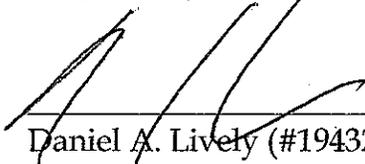
The Compensation Judge's Findings and Order indicated that he was aware of and considered the presumption of prejudice and rightly determined that the employee failed to rebut that presumption. This was appropriately affirmed on appeal by the Workers' Compensation Court of Appeals.

CONCLUSION

The employee failed to provide the required notice of his intent to settle the third party claim. This failure prejudiced the employer. The Workers' Compensation Court of Appeals Decision was well reasoned and complies with the Workers' Compensation Act and appropriate case law.

Dated this 7th day of September, 2006.

Respectfully Submitted,



Daniel A. Lively (#194323)
Attorney for Employer/Insurer
7805 Telegraph Road, Suite 200
Bloomington, Minnesota 55348
(952) 944-7023