NO. A06-1721

State of Minnesota
In Supreme Court

Stanley L. Roemhildt,
Employee/Respondent,

vs.

Met Con Companies and,
State Fund Mutual Insurance Company,
Employer and Insurer/Respondent,

and

Gresser Companies and,
Zurich Insurance Company/Creative Risk Solutions,
Employer and Insurer/Relator.

BRIEF AND APPENDIX OF MET CON COMPANIES AND STATE FUND MUTUAL INSURANCE COMPANY - RESPONDENT

Jay T. Hartman (#124291)
Jennifer A. Clayson Kraus (#0350242)
HEACOX, HARTMAN, KOSHMRL, COSGRIFF & JOHNSON, P.A.
550 Hamm Building
408 St. Peter Street
St. Paul, MN 55102
(651) 222-2922

Attorneys for Gresser Companies and Zurich Insurance Company/Creative Risk Solutions

M. Chapin Hall (#167496)
LYNN, SCHARFENBERG & ASSOCIATES
P.O. Box 9470
Minneapolis, MN 55440-9470
(952) 838-4476

Attorneys for Met Con Companies and SFM Mutual Insurance Company

Mark G. Olive (#81541)
SIEBEN, GROSE, VON HOLTUM & CAREY, LTD.
900 Midwest Plaza East
800 Marquette Avenue
Minneapolis, MN 55402
(612) 333-4500

Attorneys for Stanley L. Roemhildt

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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LEGAL ISSUES

I. Can an insurer force a lump-sum settlement upon a non-settling party without a hearing on the merits?

Compensation Judge held: yes.
The Workers' Compensation Court of Appeals held: no.

II. Do principles of equity of convenience supercede a party's basic right to defend a case on the merits?

Compensation Judge held: yes.
The Workers' Compensation Court of Appeals held: no.

STATEMENT OF FACTS

On August 17, 2001, Stanley L. Roemhildt (hereinafter "Employee") claimed to have sustained a work-related personal injury. On that date, Met Con Companies (hereinafter "Met Con") employed Employee. On that date, State Fund Mutual Insurance Company (hereinafter "State Fund Mutual") insured Met Con for Minnesota workers' compensation liability.[1]

On October 21, 2004, Employee served and filed a Claim Petition, seeking workers' compensation benefits from Met Con/State Fund Mutual and from Gresser Companies (hereinafter "Gresser") and Zurich Insurance Company/Creative Risk Solutions (hereinafter "Zurich"). Gresser/Zurich later brought a Petition for Temporary Order and the Office of Administrative Hearings served and filed a Temporary Order on November 22, 2004.

[1] State Fund Mutual underwent a name change in August, 2006 and is now known as SFM Mutual Insurance Company. We are using the former name in this document.

Gresser/Zurich brought a Petition for Contribution against Met Con/State Fund Mutual and the cases were consolidated. In August, 2005, Employee and Gresser/Zurich settled their portion of the case. On August 12, 2005, the Office of Administrative Hearings served and filed an Award on Stipulation, approving a Stipulation for Settlement between Employee and Gresser/Met Con.

The matter came on for hearing on October 14, 2005. Gresser/Zurich asserted that Met Con/State Fund Mutual were not entitled to a hearing on the merits, despite the fact that Met Con/State Fund Mutual never consented to a settlement of the case and did not sign the Stipulation for Settlement. Gresser/Zurich did not attempt, and did not in fact, prove up the Employee's claim against Met Con/State Fund Mutual.

In her Findings and Order, served and filed on December 16, 2005, Compensation Judge Janice Culnane ruled that Met Con/State Fund Mutual were not entitled to a hearing on the underlying merits of the Employee's Claim Petition, but rather on the sole issue of whether or not the Stipulation for Settlement was reasonable.

The Workers' Compensation Court of Appeals reversed.

STANDARD OF REVIEW

Relator Gresser/Zurich has incorrectly stated the standard of review. Whether or not a lump-sum settlement of future benefits that have not accrued can be forced on a non-settling party is a purely legal issue. This Court, therefore, should apply a *de novo* standard of review. Busch v. Advanced Maintenance, 659 N.W.2d 772 and 779 (2003).

ARGUMENT

I. A PARTY CANNOT FORCE A LUMP-SUM SETTLEMENT OF FUTURE BENEFITS ON A NON-SETTLING PARTY, SINCE THE NON-SETTLING PARTY IS ENTITLED TO DEFEND THE UNDERLYING CLAIM ON THE MERITS.

A. The contribution claim violates due process.

The Minnesota Workers' Compensation Act is a statutory scheme that defines the rights and obligations of the parties. A party that wishes a hearing on the merits is entitled to a hearing on the merits.

Met Con/State Fund Mutual are entitled to a workers' compensation hearing on the merits. The Employee and Gresser/Zurich cannot deprive Met Con/State Fund Mutual of this right. Met Con/State Fund Mutual had defenses not only to the equitable apportionment claim of Gresser/Zurich, but also the underlying claims of the Employee. The contribution claim, as asserted, violates due process, since Met Con/State Fund Mutual have an absolute right to defend the case, against the Employee, **on the merits**, as contemplated by §176.001.

The Stipulation between the Employee and Gresser/Zurich does not waive the defenses of State Fund Mutual **on the merits** against the Employee's claims.

B. The contribution claim violates State Fund Mutual's statutory right to a hearing on the merits.

Pursuant to the Minnesota workers' compensation statute and case law, Met Con/State Fund Mutual had various defenses to the claims of the Employee. Neither Employee nor Gresser/Zurich can waive those defenses without Met Con/State Fund Mutual's permission. Since Met Con/State Fund Mutual did not, in fact, sign the underlying Stipulation for Settlement, the effects of that Stipulation cannot be forced upon them.

For example, it is undisputed that maximum medical improvement was served and filed on Employee in early February 2005. The Compensation Judge, however, awarded Gresser/Zurich reimbursement for temporary total disability benefits paid well beyond 90 days post maximum medical improvement. Furthermore, at the hearing of this matter, Employee agreed that he had made absolutely no job search whatsoever (P.93, l.25), even though it is undisputed that he has been released to return to work with restrictions. Employee's complete failure of a job search is a complete defense to his temporary total disability claim. Therefore, Gresser/Zurich's contribution claim based on the payment of temporary total disability benefits, should have failed against Met Con/State Fund Mutual.

Similarly, since Employee, at all times relevant was, in fact, not working, any contribution claim based on a stream of temporary partial disability benefits should have also failed as a matter of law. See Minn. Stat. §176.101, Subd. 2 (b). The Compensation Judge, however, ordered substantial benefits to be paid by Met

Con/State Fund Mutual because she found the settlement amount between the Employee and Gresser/Zurich to be "reasonable".

Additionally, neither the Employee nor Gresser/Zurich proved up at the hearing of this matter that the Employee is, in fact, permanently and totally disabled. Therefore, the Compensation Judge's contribution order against Met Con/State Fund Mutual based on permanent total disability also must fail.

C. The contribution claim against Met Con/State Fund Mutual must also fail because it is based on a speculative, unproven stream of future benefits.

Gresser/Zurich's "expert witness" David Bailly agreed that the vast majority, if not all, of the contribution claim against Met Con/State Fund Mutual was for a lump sum on future benefits that had not yet occurred. Even if the Employee were to prove up a claim against Met Con/State Fund Mutual **on the merits**, a compensation judge cannot award a lump sum for all of the potential future benefits, and require Met Con/State Fund Mutual to pay that amount. Rather, the compensation judge only has jurisdiction to award benefits through the date of the hearing, and continuing as the Employee's condition shall warrant. Since Gresser/Zurich sought contribution for benefits that had not yet accrued, their contribution claim should fail as a matter of law, as being contrary to the Minnesota Workers' Compensation Act.

D. Gresser/Zurich's reliance on Niemi and Masters is misplaced.

Gresser/Zurich rely on Neimi v. Mesabi Drill, 45 W.C.D. 348 (W.C.C.A. 1991), summarily affirmed (Oct. 31, 1991) in support of their position. Neimi, however, dealt only with the factual issue of whether or not the sixth employer's injury was a substantial contributing factor. Neimi never addressed the legal issue of what procedure must be followed to properly preserve and present a contribution claim when the non-settling party defends the case on the merits.

Gresser/Zurich's reliance on Masters v. Moorhead Construction Co., 47 W.C.D. 432 (W.C.C.A. September 21, 1992) also misses the point. Masters held that, under certain circumstances, a contribution claim was not barred. Masters, however, never addressed the legal issue of what procedure must be followed to properly preserve and present a contribution claim when the non-settling party defends the case on the merits.

Gresser/Zurich is just plain wrong when it claims (on page 14 of its Brief) that, "the non-settling party has been deprived of no right or defense…". In fact, the non-settling party would be deprived of the **most important** right of all--the right to defend the case on the merits.

II. SINCE GRESSER/ZURICH NEVER PROVED UP THE UNDERLYING CLAIM AND NEVER "STEPPED INTO THE EMPLOYEE'S SHOES", THE WORKERS' COMPENSATION COURT OF APPEALS CORRECTLY REVERSED THE COMPENSATION JUDGE ON THIS PURELY LEGAL ISSUE.

On page 14 of its Brief, Gresser/Zurich incorrectly claims that "[e]quity demands and the law of contribution requires" that a lump-sum settlement be forced on non-settling party. Procedurally, this assertion fails because Gresser/Zurich never proved up the merits of the Employee's underlying claim.

The W.C.C.A. correctly determined that Gresser/Zurich never "stepped into the Employee's shoes", and that this failure by Gresser/Zurich defeated their contribution claim. This Court should affirm.

During opening statement, Gresser/Zurich specifically asserted that authority vested with the Compensation Judge to determine whether or not the entire settlement was "reasonable" (p.19, l.22). Gresser/Zurich then argued about the "potential exposures" (p.20, l.15-16; Exhibit 2) and a settlement demand (p.20, l.18) made in the case. The potential exposure of a case or a settlement demand would never be properly argued by an employee's attorney during an opening statement of a typical workers' compensation hearing. None of these arguments has any bearing on Gresser/Zurich "stepping into the employee's shoes."

Rather, Gresser/Zurich pursued the contribution claim on a different legal theory, and argued that their settlement payments were "quite reasonable" (p.25, l.5-6), and that on that basis alone, the Compensation Judge should award contribution.

Gresser/Zurich further argued that it was a "perfectly reasonable and valid settlement" (p.32, l.19-20) and that, "[t]he statute vests [the compensation judge] with the right to decide whether a settlement amount to foreclose those rights is reasonable." (p.33, 6-8). Gresser/Zurich, in fact, specifically argued, "it's not whether anybody has an obligation to prove definitively what benefits Mr. Roemhildt would have been entitled to in the future." (p.33, l.11-14).

The Compensation Judge ordered payment by State Fund Mutual of "50% of the lump sum settlement" (Order 2), not some stream of benefits that otherwise would have been owed to the Employee.

Given what it argued at the hearing of this matter--and what the Compensation Judge ordered--it was disingenuous for Gresser/Zurich to claim to the W.C.C.A. for the first time that it somehow "stepped into the Employee's shoes" to pursue its contribution claim.

Gresser/Zurich's failure to pursue its contribution claim in the proper fashion justifies the denial of that claim by the W.C.C.A. This Court should therefore affirm the W.C.C.A. on this purely legal issue.

CONCLUSION

A non-settling party is entitled to defend a workers' compensation claim on the merits. The non-settling party must be entitled to defend only those claims that the injured employee could have brought. The non-settling party's due process and statutory right to a hearing on the merits supercedes any claim of "equity" or "convenience". The decision of the W.C.C.A. reversing the compensation judge should therefore be affirmed.

Respectfully Submitted,

LYNN, SCHARFENBERG & ASSOCIATES

DATED: 11/9/06

M. Chapin Hall (#167496)
Attorneys for Met Con Companies
and SFM Mutual Insurance Company
P.O. Box 9470
Minneapolis, MN 55440-9470
(952) 838-4476

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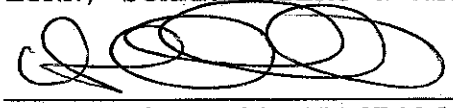
CERTIFICATION OF BRIEF LENGTH

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 monospaced font. The length of this brief is 458 lines and 2,304 words. This brief was prepared using Microsoft Word Office 2000.

LYNN, SCHARFENBERG & ASSOCIATES

DATED: 11/9/06



M. Chapin Hall (#167496)
Attorneys for Met Con Companies
and SFM Mutual Insurance Company
P.O. Box 9470
Minneapolis, MN 55440-9470
(952) 838-4476

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).