

NO. A07-635

State of Minnesota
In Court of Appeals

PARADIGM ENTERPRISES, INC.,

Plaintiff/ Respondent,

VS.

WESTFIELD NATIONAL INSURANCE CO.,

Defendant/ Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities	i
Statement of Legal Issue	1
Statement of the Case	1
Facts	1
Argument	3
I. The District Court's Decision	3
II. Statutory Coverage Versus Contractual Coverage	8
Conclusion	12

TABLE OF AUTHORITIES

CASES:

<u>Bohlke v. Bohlke International, Inc.</u> , 36 W.C.D. 205 (Minn. Workers' Comp. Ct. App. 1983)	1,5,6,7
<u>Friendshuh v. North Star Mut. Ins. Co.</u> , 517 N.W. 2d 53 (Minn. App. 1994)	5
<u>Louwagie v. State Farm Fire and Cas. Co.</u> , 397 N.W. 2d 567 (Minn. App. 1986)	5
<u>Meyering v. Wessels</u> , 383 N.W. 2d 670 (Minn. 1986)	5
<u>Thiele v. Stich</u> , 425 N.W. 2d 580 (Minn. 1988)	8

STATUTES:

Minn. Stat. §65B.44	10
Minn. Stat. §176.011, Subd. 11a.....	5,11
Minn. Stat. §176.041, Subd. 1(g)	1,3,4,5,11
Minn. Stat. §176.041, Subd. 1a(e)	2
Minn. Stat. §176.185, Subd. 3	11
Minn. Stat. §176.185, Subd. 9	11
Minn. Stat. §176.302A.011, Subd. 6a	2
Minn. Stat. §645.08(2)	4

OTHER AUTHORITIES:

Webster's Ninth New Collegiate Dictionary (1991)	5
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STATEMENT OF LEGAL ISSUE

In determining whether workers' compensation coverage is mandatory for the executive officers of a closely held corporation under Minn. Stat. § 176.041, Subdivision 1(g), which provides that the Workers' Compensation Act does not apply to executive officers of a closely held corporation having less than 22,880 hours of payroll in the preceding calendar year, is "the preceding calendar year" the calendar year immediately prior to the inception date of the policy of workers' compensation insurance issued by defendant insurer?

THE TRIAL COURT HELD: IN THE AFFIRMATIVE

Minn. Stat. § 176.041, Subd. 1(g);

Bohlke v. Bohlke International, Inc., 36 W.C.D. 205 (Minn. Workers' Comp. Ct. of Appeals 1983)

STATEMENT OF THE CASE

Plaintiff commenced this action against defendant, seeking a refund of excess premium paid to defendant on a policy of workers' compensation insurance issued by defendant for the policy period April 19, 2004 to April 19, 2005. Plaintiff filed a motion for summary judgment. After a hearing, the district court entered judgment in favor of the plaintiff in the amount of \$24,557.55, plus interest and costs. Defendant thereafter filed a timely notice of appeal.

FACTS

Defendant issued a policy of workers' compensation insurance to plaintiff in 2004,

with coverage effective from April 19, 2004 to April 19, 2005. Morken Affidavit, App., pp. 23-25. Plaintiff is a Minnesota closely held corporation, having less than 35 shareholders. Minn. Stat. § 302A.011, subd. 6a. Glen Morken and Ron Morken were at all pertinent times executive officers of plaintiff, and each of them owned more than 25 percent of the shares of plaintiff. Plaintiff had less than 22,880 hours of payroll in 2003, the calendar year immediately preceding the inception of the workers' compensation insurance policy issued by defendant. Id. Neither Glen Morken nor Ron Morken elected workers' compensation coverage for themselves pursuant to Minn. Stat. §176.041, Subdivision 1a(e), prior to the inception date of the policy issued by defendant, April 19, 2004.

The advance premium for the policy issued by the defendant was \$46,359.00. This was paid by plaintiff. After the end of the policy period on April 19, 2005, defendant conducted a payroll audit pursuant to the terms of the insurance policy, and determined that an additional premium of \$73,083.00 was due. The payroll audit included compensation during the policy period that was paid to Glen Morken and Ron Morken, exempt executive officers who had not elected coverage prior to the inception date of the policy. Id.

Plaintiff paid part of the additional assessed premium for the policy period April 19, 2004 to April 19, 2005, and then suspended payment and brought this lawsuit for a refund of excess premium paid. After a hearing on plaintiff's motion for summary judgment, the district court entered judgment in favor of plaintiff.

ARGUMENT

Defendant's position appears to have changed since the summary judgment motion was argued in the district court. At that time, defendant's argument was that the pertinent time period for determining whether there was coverage for plaintiff's executive officers was either the year 2004, the calendar year immediately preceding the payroll audit performed in 2005, or the policy period, which ran from April 19, 2004 to April 19, 2005. During both these time periods, plaintiff had in excess of 22,880 hours of payroll. It was based upon these arguments that the district court entered its order granting plaintiff's motion for summary judgment.

Defendant now argues for the first time that the statutory provisions in the Workers' Compensation Act mandate only minimum coverage, and that the policy of insurance issued by it to plaintiff actually provided workers' compensation coverage to plaintiff's exempt officers. This is an interesting, although ultimately unsupportable, argument, that was not presented to the district court.

Plaintiff will address separately both arguments made by defendant.

The parties agree that there are no material facts in dispute, and that summary judgment by the district court was appropriate. The issue to be resolved on appeal is a legal issue, fully reviewable on a de novo basis by the Court.

I. THE DISTRICT COURT'S DECISION

The statute at issue is Minn. Stat. §176.041, Subdivision 1(g), which provides as

follows:

This chapter (the Workers' Compensation Act) does not apply to any of the following:

. . . .

(g) an executive officer of a closely held corporation having less than 22,880 hours of payroll in the preceding calendar year, if that executive officer owns at least 25 percent of the stock of the corporation.

All the conditions precedent to the application of §176.041, Subd. 1(g) were met in this case. Plaintiff is a closely held corporation. Glen Morken and Ron Morken were executive officers of plaintiff, and each of them owned at least 25 percent of the stock of the corporation. It is undisputed that plaintiff had less than 22,880 hours of payroll in the calendar year 2003, and had more than 22,880 hours of payroll in the calendar year 2004 and the policy period April 19, 2004 to April 19, 2005. It is also undisputed that at no time did Glen Morken or Ron Morken elect coverage pursuant to Minn. Stat. §176.041, Subdivision 1a(e), which provides that an election of coverage for a person otherwise excluded from coverage shall be provided in writing to the insurer.

The district court justifiably felt that the resolution of this case depended on the meaning of the phrase "preceding calendar year" in the statute. App., p. 122. Plaintiff contended that when the term is construed according to the rules of common and approved usage, as required by Minn. Stat. §645.08(2), it can only refer to the full calendar year immediately preceding the date of inception of the workers' compensation coverage.

Because the coverage inception date under the policy issued by defendant was April 19, 2004, the “preceding calendar year” can only be the calendar year 2003. Plaintiff had less than 22,880 hours of payroll in 2003, so there was no mandated coverage for the executive officers at the inception of the policy. Also, the executive officers did not affirmatively elect coverage on or prior to the inception date of the policy. There being no coverage for the executive officers for the policy period April 19, 2004 to April 19, 2005, it was improper to include the payroll of the exempt executive officers in the payroll audit done after the conclusion of the policy year. Common sense requires this conclusion.

There are no reported cases dealing with the meaning of the term “preceding calendar year” as used in Section 176.041, Subdivision 1.¹ There is, however, one reported case interpreting the term “previous calendar year” in the context of an election of coverage case under a preexisting statute, now repealed, which contained language similar to the language in Section 176.041, Subdivision 1. The words “previous” and “preceding” are synonymous. Webster’s Ninth New Collegiate Dictionary, p. 933 (1991). In Bohlke v. Bohlke International, Inc., 36 W.C.D. (WCCA 1983)², the court construed Minn. Stat. §176.012

¹ The term “preceding calendar year” has been interpreted in the context of the family farm exclusion to workers’ compensation coverage contained in Minn. Stat. §176.011, Subdivision 11a. In this context, the term “preceding calendar year” has been held to be the calendar year immediately preceding the date of injury. See, e.g., Meyerling v. Wessels, 383 N.W. 2d 670 (Minn. 1986); Friendshuh v. North Star Mut. Ins. Co., 517 N.W. 2d 53 (Minn. App. 1994); Louwagie v. State Farm Fire and Cas. Co., 397 N.W. 2d 567 (Minn. App. 1986).

² Bohlke is a case decided by the Minnesota Workers’ Compensation Court of Appeals. The Workers’ Compensation Court of Appeals is a specialized court dealing

(1979), which provided in pertinent part as follows:

OWNERS MAY BE COVERED. For the purposes of this Chapter, an owner or owners of a business or farm, executive officer of a family farm corporation as defined in Section 500.024, Subd. 1, clause (c), or an executive officer of a closely held corporation which employed less than the equivalent of 11 full-time employees in the previous calendar year if that executive officer is also an owner of at least 25 percent of the stock of that corporation, and the spouse, parent, and child, regardless of age of the farm owner or farm owners or executive officers and working therefor, or partners of a partnership owning a business or farm, whether or not employing any other person to perform a service for hire, shall be included, within the meaning of the term employee if the owner, owners, partners, family farm corporation or executive officer of a closely held corporation elect to come under the provisions of this chapter, and provide the insurance required thereunder.

The party claiming benefits in Bohlke was an executive officer of the employer, Bohlke International, Inc. On July 6, 1978 the executive officer signed a form electing to be excluded from workers' compensation coverage under the policy insuring the employer. The policy went into effect on August 1, 1978. The primary issue in the case was whether the employer corporation had the equivalent of eleven full time employees "in the previous calendar year." If the corporation had less than eleven full time employees in the previous calendar year, the election of non-coverage by the executive officer was binding, preventing the injured executive officer from making a claim for workers' compensation benefits. If the

only with workers' compensation cases. In cases where an injured employee seeks benefits, the jurisdiction of the Workers' Compensation Court of Appeals is exclusive, and may only be appealed to the Minnesota Supreme Court. Workers' Compensation Court of Appeals cases are reported by the State of Minnesota in "Workers' Compensation Decisions" (W.C.D.), not by West Publishing. A copy of the Bohlke case is attached to this brief for the Court's convenience.

corporation had eleven or more full time employees in the previous calendar year, the election of non-coverage by the injured executive officer would be meaningless, and the claim for benefits could go forward. In interpreting the phrase, “the preceding calendar year,” the court stated as follows:

The question arises are to which calendar years to be considered in measuring the period during which a determination is to be made concerning how many full time employees were employed by Bohlke International, Inc. Again, Minn. Stat. § 176.012 speaks in terms of “less than the equivalent of eleven full time employees in the previous calendar year.” It appears only reasonable that the legislature intended that the previous calendar year would be that of the calendar year prior to the time that the executive officer was making his election. In this instance that would be the calendar year 1977. The facts of record reveal that Bohlke International Inc. had less than eleven full time employee during the calendar year of 1977.

36 W.C.D. at 209-210 (emphasis added). Because the election of non-coverage was executed by the executive office of July 6, 1978, the “previous calendar year” could only be 1977, because that was the full calendar year immediately prior to making the election.

Bohlke is directly on point. Both in Bohlke and in this case the election by the executive officer had to be made as of the date of the inception of the policy, and the validity of the election was dependent on a condition that existed in the “preceding calendar year” or the “previous calendar year;” that is, the calendar year immediately before the inception of coverage. The inception date of coverage in this case was April 19, 2004, so the “preceding calendar year” can only be the calendar year 2003. In the year 2003, plaintiff had less than 22,880 hours of payroll, so in the absence of an election in writing, there was no coverage for the executive officers for the policy period April 19, 2004 to April 19, 2005.

The payroll attributable to the executive officers should thus not have been considered as part of the payroll audit performed by defendant in 2005.

It is notable that defendant in its brief does not cite the Bohlke case, despite the fact that the district court quoted Bohlke in its Memorandum. Defendant apparently has conceded that the combination of common and approved usage and the Bohlke decision are fatal to its position. That may be why the defendant has come up with a whole new theory on appeal.

II. STATUTORY COVERAGE VERSUS CONTRACTUAL COVERAGE

Defendant now argues, for the first time, that its policy provides coverage to plaintiff greater than that mandated by the Workers' Compensation Act. In other words, there was coverage for the executive officers despite the absence of a written election of coverage and despite the fact that plaintiff had less than 22,880 hours of payroll in the calendar year immediately preceding the inception of coverage. This new argument is an apparent concession that defendant's position cannot be sustained under the plain language of the statute.

The general rule is that a reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it. Thiele v. Stich, 425 N.W. 2d 580, 582 (Minn. 1988). Further, a party cannot obtain review by raising the same general issue litigated in the trial court, but under a different theory. A party cannot shift its position on appeal. Id. Defendant here is attempting to litigate the case anew under a different theory. This should not be allowed.

In the event this Court considers defendant's new theory of the case, plaintiff will address the new arguments raised by defendant.

The argument that the policy issued by defendant provides coverage greater than that allowed by the statute fails both factually and legally. This is nothing more than an after-the-fact justification for overcharging premium.

Defendant's policy of insurance is contained in the Appendix filed by defendant. The terms of the workers' compensation insurance policy commence on page 83 of the Appendix. On page 84, under the heading, "Statutory Provisions", the following appears:

These statements apply where they are required by law.

. . . .

5. This insurance conforms to the parts of the workers compensation law that apply to:
 - a. benefits payable by this insurance;
or
 - b. special taxes, payments into security or other special funds, and assessments payable by us under the law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

There is nothing in the policy that suggests that it provides benefits in excess of those provided by the Workers' Compensation Act. Rather, the policy specifically provides that benefits payable under the policy conform to the workers' compensation law and that any term in the policy that conflicts with the workers' compensation law is changed to conform to the law.

Defendant's adherence to the Minnesota Workers' Compensation Act is illustrated by the endorsement on page 79 of the Appendix, which specifically lists the officers of plaintiff corporation for whom coverage was elected. The endorsement states that "The premium basis for the policy includes the remuneration on such persons." The list of officers for whom the election is made does not include Glen Morken and Ron Morken. It is apparent that defendant knew that executive officers had to make an election to be covered under the policy, and that the election was made for the individuals listed on the endorsement. If defendant's policy provided coverage greater than that mandated by the Workers' Compensation Act, there would have been no need to have a specific endorsement to cover some of the executive officers.

The fact that Glen Morken and Ron Morken are not listed on the endorsement as having elected coverage, combined with the statement that "The premium basis for the policy includes the remuneration on such persons," indicates that under the terms of defendant's policy, defendant knew it had no right to include the remuneration of exempt executive officers in the premium basis. That, of course, is exactly what the defendant did when it conducted its premium audit in 2005. It included the payroll for exempt officers for whom it had contracted no risk.

Leaving aside the fact that defendant's policy does not provide coverage greater than that mandated by the Workers' Compensation Act, the argument that a policy of insurance could provide coverage where the Act specifically mandates non-coverage is flawed. The

argument is possibly derived from no-fault cases, where the courts have stated that an automobile insurer may provide coverage in excess of that mandated by statute. Specific provision is made for this in the no-fault statute. Minn. Stat. §65B.44 provides that,

Basic economic loss benefits shall provide reimbursement for all loss suffered through injury arising out of the maintenance or use of a motor vehicle, subject to any applicable deductibles, exclusions, disqualifications, or other conditions, and shall provide a minimum of \$40,000 for loss arising out of the injury of any one person,

The Workers' Compensation Act contains no such language. Instead, the Act discusses in excruciating detail who is covered and who is not covered, and also makes provision for optional coverages, such as executive officers. See, e.g., Minn. Stat. §§176.011 and 176.041. The Act specifically states that, "where the employer's risk is carried by an insurer the insurance policy shall provide compensation for injury or death in accordance with the full benefits conferred by this chapter." Minn. Stat. §176.185, Subd. 3. The statute makes no reference to its prescribed benefits being a "minimum" or "floor." The Workers' Compensation Act is a comprehensive plan of social insurance than embodies the public policy consensus of the legislature, similar in concept to the Social Security Act. There is no deviation from the terms of the Act. Defendant's reliance on Minn. Stat. §176.85, Subdivision 9 is thus misplaced. All Subdivision 9 says is that if an employer who is exempt from Workers' Compensation Act chooses to insure any part of that liability, that insurance will conform with Section 176.185, which includes Subdivision 3. In other words, if an exempt employer, such as a family farm that does not meet the payroll threshold of Section

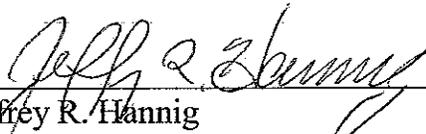
176.011, Subdivision 11a, chooses to purchase workers' compensation insurance, that insurance shall conform to the Workers' Compensation Act. In no way does this support the defendant's argument that the Act merely prescribes a minimum coverage from which employers and insurers can vary.

CONCLUSION

Defendant's arguments on appeal are without merit. The judgment of the district court should be affirmed in all respects.

Dated this 2nd day of May, 2007

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Plaintiff/Respondent complies with the type-volume limitations of Minnesota Rule of Civil Appellate Procedure 132.01, Subdivision 3, in that it utilizes a 13 point proportionally spaced Times New Roman font, which includes serifs. The word count total is 3,110 words and the line count is 293 lines, pursuant to the word counter on the word processing software. The undersigned further certifies that the word processing software used in preparing this brief is Corel Word Perfect, version 9.0.

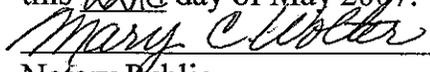
Dated this 22nd day of May 2007.

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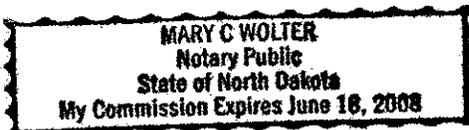


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Subscribed and sworn to before me
this 22nd day of May 2007.



Notary Public



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).