

NO. A09-1388

State of Minnesota
In Supreme Court

DAVID K. SEEHUS,

Employee-Respondent,

vs.

BOR-SON CONSTRUCTION, INC. AND CNA RSKCO,

Employer/Insurer-Respondent,

and

WESLEY RESIDENCE, INC., and

MIGA by GAB ROBINS NORTH AMERICA,

Employer/Insurer-Relator,

and

TWIN CITIES SPINE CENTER,
BLUE CROSS BLUE SHIELD OF MINNESOTA & BLUE PLUS,
SMDC HEALTH SYSTEMS,
MINNESOTA DOLI/VOCATIONAL REHABILITATION UNIT,
DR. CHRISTIAN A. AUDETTE,
CHIROPRACTIC HEALTH CENTER,

Intervenors-Respondents.

EMPLOYEE-RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

1. Under the circumstances of this Case should the Employee be responsible for any of the outstanding medical expenses at issue between MIGA and Bor-Son/CNA?

Answer: No

List of most apposite authorities:

- * Minn. Stat. § 60C.02
- * Minn. Stat. § 176.001
- * Minn. Stat. § 60C

2. Did MIGA ever assert that the Employee's direct claim against it was not a "covered claim" under the meaning of Chapter 60C?

Answer: No

List of most apposite authorities:

- * Anderson Trucking Service Inc. v. Minnesota Insurance Guaranty Association, 492 N.W.2d 281 (Minn. App. 1993)
- * Reinsurance Association of Minnesota v. Dunbar Kapple Inc., 443 N.W.2d 242, 246-7 (Minn. App. 1989)
- * Minn. Stat. § 60C
- * Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433 (Minn. 1992)
- * Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W.2d 617 (1955)

3. Did the Compensation Judge have proper subject matter jurisdiction to join Bor-Son/CNA as a party to the Employee's claim against MIGA thus creating an issue of apportionment between MIGA and Bor-Son/CNA?

Answer: No

List of most apposite authorities:

- * Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433 (Minn. 1992)
- * Taft v. Advance United Expressways, 464 N.W.2d 725 (Minn. 1991)

4. Did the WCCA's decision violate Chapter 60C.13 requiring exhaustion of other

insurance coverage?

Answer: No

STANDARD OF REVIEW

On review on certiorari, questions of law are considered under a de novo standard. Busch v. Advanced Maintenance, 659 N.W.2d 772, 776 (Minn. 2003). A determination of whether subject matter jurisdiction exists is a question of law. Hale v. Viking Trucking Co., 654 N.W.2d 119, 123 (Minn. 2002). Since the issues in this case raise questions of law a de novo review is appropriate.

ARGUMENT

I. UNDER THE CIRCUMSTANCES OF THIS CASE THE EMPLOYEE SHOULD NOT BE RESPONSIBLE FOR ANY OF THE OUTSTANDING MEDICAL EXPENSES AT ISSUE BETWEEN MIGA AND BOR-SON/CNA.

The Employee's primary interest in this appeal is to assure that this Court's review and ultimate decision leaves him with no responsibility for payment of the disputed medical expenses. Whether viewed under Minn. Stat. § 60C.02 or Minn. Stat. § 176.001 the legislative purpose is to ensure that benefits payable as a result of an established work injury are in fact paid, whether by a solvent workers' compensation insurer or by MIGA should an insurer go insolvent. This Court's review about whether the dispute between MIGA and Bor-Son/CNA was properly in the workers' compensation setting should not prejudice the Employee herein.

In this case the Employee brought a workers' compensation claim directly against

MIGA. The Employee did not make a claim for payment of the disputed medical expenses directly against Bor-Son/CNA. The Employee has never done anything to create an apportionment issue in this case.

The compensation judge's finding that responsibility for the medical expenses is 50% MIGA's and 50% Bor-Son/CNA's was never appealed. This means the finding that the medical expenses were entirely the result of a work injury is the law of this case.

In it's brief Bor-Son/CNA cites to Pearson v. Foot Transfer Co., 221 N.W2d 710 (Minn.1974) to argue that the Employee should be responsible for half the medical expenses in this case simply because Bor-Son/CNA has no recourse against MIGA under Minn. Stat. § 60C. This despite the fact that those expenses were established as entirely work-related and the Employee carries no culpability in the legal bar against Bor-Son/CNA recovering that portion of those bills that were found to be due to the injury covered by MIGA. In this case, Bor-Son's lack of recourse against MIGA is a result of statutory application, not any culpability of the employee.

Unlike this case, the Employee in Pearson the employee was culpable in the lack of workers' compensation coverage for his second injury because he failed to give the proper notice of his injury to the second employer. This culpability was a primary factor in the court's finding that the first insurer was only responsible for those benefits apportioned to it's date of injury.

While Bor-Son/CNA would argue that it's not fair to be ordered to pay for

medical expenses not caused by it's date of injury, it's even less fair to make a non-culpable injured employee pay for half his medical expenses that are entirely work-related. One way or another, it's not going to be fair, but the primary intent of the Legislature is to compensate the injured worker, not protect solvent insurers at the injured workers' expense.

Bor-Son/CNA mistakenly cites Ast.v. Har Ned Lumber, 46 W.C.D. 490 (W.C.C.A. 1991) in support of their position. In Ast there was no claim that the employee therein should absorb the cost of any benefits where it was clearly established that all benefits claimed were the result of work-related injuries. Rather Ast involved a dispute between solvent insurers and is inapplicable to the facts of this case.

MIGA correctly states that there will be cases where a solvent insurer will not be able to recover against MIGA for payment of medical expenses occurring under MIGA's coverage. But that "unfairness" is the result of a law, Minn. Stat. § 60C, that was passed by the Minnesota Legislature with agreement by insurers such as CNA. The numerous cases cited by both MIGA and Bor-Son/CNA have long established that solvent insurers cannot recover through apportionment claims against MIGA no matter what the circumstance and no matter their feelings of "unfairness".

The bottom line for the Employee is that whether this Court adopts the position of the compensation judge or the position of the WCCA, both decisions resulted in full payment of the Employee's medical expenses by either Bor-Son/CNA or MIGA. That

result should not change.

II. DID MIGA EVER ASSERT THAT THE EMPLOYEE'S DIRECT CLAIM AGAINST IT WAS NOT A "COVERED CLAIM" UNDER THE MEANING OF CHAPTER 60C?

The answer in the record is clearly no. MIGA's legal maneuvering on this point directly conflicts with the intent of the Minnesota Legislature to provide for quick and efficient delivery of benefits without excessive delay to injured claimants.

As this Court has pointed out in the past:

The primary intent of the Minnesota workers' compensation law is to "assure the quick and efficient delivery of indemnity and medical benefits to the *injured workers* at a reasonable cost to the *employers* who are subject to the provisions of th[e] chapter."

Anderson Trucking v. Minnesota Ins. Guar., 492 N.W.2d 281 (Minn. App. 1992) citing Reinsurance Ass'n of Minnesota v. Dunbar Kapple, Inc., 443 N.W.2d 242, 246-7 (Minn. App. 1989) (quoting Minn. Stat. §176.001(1988) (emphasis in original).

In reference to Minn. Stat. §60C this Court also has noted that:

The Act exists for the benefits of injured workers who otherwise would be left without compensation where an insurer becomes insolvent.

Anderson Trucking v. Minnesota Ins. Guar., 492 N.W.2d 281 (Minn. App. 1992).

In its brief MIGA admits that the Employee filed only a direct claim against MIGA. In the current proceedings the Employee never made a direct or tangential claim against Bor-Son/CNA. Bor-Son/CNA is correct that MIGA accepted the Employee's direct claim as a "covered claim". MIGA's Answer to the Claim Petition did not deny

that the Employee had a “covered claim”. MIGA never made a motion at any point in this case to dismiss it from the Employee’s direct claim against MIGA. MIGA agreed to go through a workers’ compensation hearing to defend the Employee’s direct claim against it in the workers’ compensation system. The Employee waited over 12 months to get to a hearing of his claim. Never during that time did MIGA assert that the Employee should not be allowed to establish MIGA’s responsibility for the medical expenses in the workers’ compensation system. Neither did it deny that the compensation judge had authority to order MIGA to pay benefits if the Employee could prove his claim that MIGA was entirely responsible for the claimed medical expenses.

The most obvious evidence that the Employee’s claim was a “covered claim” was MIGA’s willingness to enter into not one but two Stipulations for Settlement and submit them to the compensation judge for approval. Either a claim is a “covered claim” or it is not.

What MIGA did assert at hearing was that any result short of 100% liability, i.e., a determination that liability should be apportioned between MIGA and Bor-Son/CNA created a claim that was not a “covered claim” as between MIGA and Bor-Son/CNA.

MIGA’s rationale is that under the case law the compensation judge has no jurisdiction over issues of apportionment between MIGA and a solvent insurer. One would think that if that is true after a judge makes an apportionment determination (which MIGA claimed) then it is equally true before that determination was made.

Jurisdiction isn't something that comes and goes. A request for an apportionment decision by any party (including MIGA) is just that---whether made before or after a factual hearing. It's not the compensation judge's decision that turns the claim between MIGA and Bor-Son/CNA into an apportionment issue, thus robbing the judge of jurisdiction. It's the request for an apportionment determination between MIGA and a solvent insurer that is not within the workers' compensation courts' jurisdiction. That request was solely made MIGA. The Employee never asked the compensation judge to decide an apportionment issue.

Any claim that the Employee's direct claim was not a "covered claim" should logically have been made before the hearing. MIGA did not make such a motion to be dismissed from the Employee's direct claim because it knew that the Employee's direct claim was a "covered claim".

It is also knew that any request for an apportionment determination came from MIGA itself. Had the Employee brought a direct claim against both MIGA and Bor-Son/CNA there would be no jurisdiction under the case law because then the Employee would have been asking for an apportionment decision. Had Bor-Son/CNA been the primary defendant to the Employee's claim and sought to bring in MIGA there likewise would be no jurisdiction.

Since the request for an apportionment determination originated from MIGA there should be two possible results, neither of which should affect the Employee's right to

proceed directly against MIGA in the workers' compensation system. The first would be that there should never have been jurisdiction over the issue of apportionment, i.e., the WCCA was right in their determination that the compensation judge should never have granted the Motion for Joinder/Petition for Contribution and/or Reimbursement per Gerads v. Bernick's Pepsi-Cola, 486 N.W.2d 433 (Minn.1992). The alternative conclusion might be that MIGA by its Motion sought to pursue its statutory subrogation right through the workers' compensation system. MIGA claims the right to subrogation in its' brief. However, it does not appear that Gerad allows MIGA to choose the workers' compensation venue to seek subrogation against Bor-Son/CNA. As the Gerads Court noted MIGA's subrogation right exists under Minn. Stat. § 60C.

Whatever the result, to allow MIGA to defend the Employee's direct claim against MIGA in the workers' compensation system for over 12 months and then allow MIGA to escape liability for the Employee's direct claim solely because it sought to share responsibility with a solvent insurer is directly contrary to the Legislature's intent clearly enunciated in Minn. Stat. § 60C.02, subd.2 and 3 and Minn. Stat. § 176.001.

The WCCA took the proper approach in this case. It was proper for the compensation judge to decide the Employee-Respondent's direct claim against MIGA because MIGA never denied that the Employee's direct claim was a "covered claim". It was improper for the compensation judge to address the fight between MIGA and Bor-Son/CNA. Once the WCCA found the compensation judge lacked jurisdiction to join

Bor-Son/CNA the WCCA properly applied Marsolek v. Miller Waste Mills, 244 Minn.55, 69 N.W.2d 617 (1955). Consistent with Marsolek it was proper for the WCCA to order full payment by MIGA, the last employer during whose employment the Employee suffered injury. As MIGA admits in its brief, they can still pursue their subrogation right against Bor-Son/CNA under Minn. Stat. § 60C for Bor-Son's portion of the Employee's medical benefits.

MIGA chose to try to escape total liability for the Employee-Respondent's direct claim by litigating that claim in the workers' compensation system. It lost. The Employee should not be made to wait even longer to have his work-related medical benefits paid based upon MIGA's attempt after the fact to deny that it did accept the Employee's direct claim as a "covered claim" under Minn. Stat. § 60.

III. DID THE COMPENSATION JUDGE HAVE PROPER SUBJECT MATTER JURISDICTION TO JOIN BOR-SON/CNA AS A PARTY TO THE EMPLOYEE'S CLAIM AGAINST MIGA THUS CREATING AN ISSUE OF APPORTIONMENT BETWEEN MIGA AND BOR-SON/CNA?

MIGA's argument appears to revolve around their claim that it's Motion was strictly a Motion for Joinder and nothing more, i.e., that there was no attempt by MIGA to achieve apportionment of liability between MIGA and Bor-Son/CNA. That being the case, MIGA would argue that Gerad v. Bernick's Pepsi-Cola, supra, is distinguishable since in Gerad MIGA was seeking contribution/indemnity for benefits already paid by MIGA.

In this case it is clear that MIGA was in fact asking the workers' compensation

courts to take jurisdiction over a claim that it anticipated would involve an apportionment dispute. First of all, if MIGA was only seeking Joinder to decide whether either MIGA or Bor-Son/CNA was entirely liable for the employee's claims then why the need to title its motion as "Motion for Joinder/Petition for Contribution and/or Reimbursement"?

This was not simply a typographical error. In the body of the Motion at paragraph IV MIGA specifically states "That Bor-Son Construction, Inc. And Artex Insurance Company may be liable in full or in part. . ." and goes on to pray:

"WHEREFORE, the Employer and Insurer request an Order from the Office of Administrative Hearings joining Bor-Son Construction, Inc. and Artex Insurance Company in this matter and directing Bor-Son Construction, Inc. and Artex Insurance Company to pay their proportionate share of benefits in medical expenses as the evidence may disclose."(emphasis added)

In other words, the relief sought was not simply an Order that Bor-Son pay all benefits as a Motion for Joinder might do but pay their "proportionate share" after an apportionment determination.

That was exactly what MIGA continued to argue at hearing. The attorney for MIGA specifically argued that if the judge found MIGA 100% liable (the Employee's direct claim) he could order them to pay. The factual issue for determination by the compensation judge at hearing was whether MIGA was 100% liable (the opinion of the Employee's doctors), 50% liable (the opinion of Bor-Son/CNA's doctor) or had no liability (the opinion of MIGA's doctor).

Although MIGA consented to litigate the Employee's direct claim and agreed to submit the factual apportionment issue to the workers' compensation courts, its true intent became clear at hearing. The attorney for MIGA specifically argued that if the compensation judge found MIGA 100% responsible he could determine that the Employee's direct claim was a "covered claim" and order full payment, which MIGA agreed would be the case. However, if the compensation judge found MIGA less than 100% liable MIGA asked the compensation judge to find that the Employee's claim against MIGA was not a "covered claim" and dismiss MIGA.

What MIGA truly was seeking was the opportunity to litigate for a favorable factual determination that it was not responsible for any of the claimed medical expenses and, if it lost on that issue, reserving a claim that the Employee's direct claim was not a "covered claim" after all. MIGA tried to make this a no lose situation for themselves. This represents a misuse of the system intended to protect injured workers and flies in the face of the stated purposes of Minn. Stat. §60C and Minn. Stat. §176. The purpose is not to allow MIGA to escape liability entirely by legal maneuvering, especially when MIGA itself has determined that an Employee's direct claim is in fact a "covered claim."

The compensation judge did in fact find MIGA liable for less than 100% of the medical expenses, then determined that he had no jurisdiction to order MIGA to pay anything. Why? Because he determined that this was an apportionment issue between MIGA and Bor-Son/CNA and thus not a "covered claim". He did not make a

determination that the Employee's direct claim against MIGA was not a "covered claim." The problem is that under Taft v. Advance United Expressways, 464 N.W.2d 725 (Minn.1991) and Gerads, supra, the compensation judge had no jurisdiction at any point to decide whether a "covered claim" existed between any of the parties.

The compensation judge's stated basis for issuing the Order for Joinder was that Bors-Son "may be liable for a portion of the benefits claimed". This required a threshold determination that the dispute between MIGA and Bor-Son/CNA was a "covered claim." Practically speaking, there would be no point to joining a dispute that does not involve a "covered claim". Taft and Gerads do not allow a compensation judge to make that call as to whether the dispute between MIGA and Bor-Son/CNA was a "covered claim". The WCCA properly recognized that Gerads bars such a determination by a compensation judge no matter which party raises the issue.

In Taft supra, the Court held that the Workers' Compensation Court of Appeals does not have subject matter jurisdiction over a contribution/indemnity claim by a compensation insurer against MIGA. As the Court pointed out, determination of whether a claim is a "covered claim" is not properly before the Workers' Compensation Court of Appeals but rather needs to be determined by proceeding before the Guaranty Association. The Taft court concluded that entitlement to equitable apportionment from the insolvent insurer is simply a predicate fact to solvent insurer's claim that the entitlement constitutes a "covered claim" when made against the Guaranty Association

under the provisions of the Insurance Guaranty Association Act.” Id. at 727.

Taft, supra and Gerad, supra don’t allow the compensation judge to determine after the hearing whether what started out as a “covered claim” against MIGA (Employee’s direct claim) ceases to be “covered” because as the WCCA correctly concluded the compensation judge lacked subject matter jurisdiction to even issue the Order for Joinder/Petition for Contribution and/or Reimbursement in the first place

The compensation judge simply didn’t have jurisdiction to apply Minn. Stat. § 60C to determine whether the dispute between MIGA and Bor-Son/CNA, which MIGA brought to the table, was a “covered claim” either at the time of the Order for Joinder or claim against MIGA after making the apportionment decision following the trial of the Employee’s direct claim.

IV. DID THE WCCA’S DECISION VIOLATE CHAPTER 60C.13 REQUIRING EXHAUSTION OF OTHER INSURANCE COVERAGE?

When the dust settles in this case, the fact remains that the Employee filed, pursued and litigated a workers’ compensation claim directly against MIGA with the consent of MIGA. Minn. Stat. § 60C.13, subd.1 does not apply to such a claim. The compensation judge made an unappealed finding that MIGA, which was defending the last claimed date of injury was 50% responsible for the Employee’s medical expense claim. The Employee’s right to pursue his claim under the workers’ compensation policy which coverage MIGA assumed and defended is specifically excepted from the prohibitions contained in Minn. Stat. § 60C.13, subd.1. The WCCA correctly ordered

MIGA to make full payment of the claimed medical expenses.

CONCLUSION

The WCCA correctly ordered MIGA to make full payment of the claim medical expenses. The Employee respectfully requests that the Supreme Court of Minnesota affirm the decision of the Workers' Compensation Court of Appeals.

Dated this 24th day of September, 2009.

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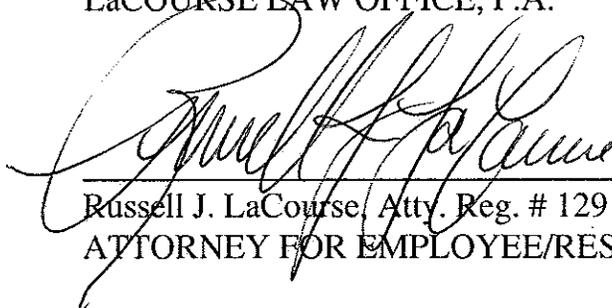
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Minn. R. Civ. App. P. 132.01, subd. 3 because this brief contains 3,281 number of words, excluding the parts of the brief excluded by Minn. R. Civ. App. P. 132.01, subd. 3.

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Dated: September 24, 2009

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