

NO. A12-0395

State of Minnesota
In Supreme Court

Tessa M. Washek,

Employee-Relator,

vs.

New Dimensions Home Health Care,

Employer-Respondent,

and

State Fund Mutual Insurance Company,

Insurer-Respondent.

RELATOR'S BRIEF AND ADDENDUM

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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).

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LEGAL ISSUES

- I. WAS THE FINDING OF THE COMPENSATION JUDGE, THAT THE INSTALLATION OF A DEVICE WAS A COMPENSABLE MEDICAL EXPENSE, SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE?

The Workers' Compensation Court of Appeals held: In the negative.

STATEMENT OF THE CASE

This matter comes before the Court pursuant to a Medical Request filed June 7, 2010. (T.5; Employer Ex. 1, page 36)

On May 19, 2010, the employee filed a Request for Certification of a Dispute over the installation of a medical device:

A ceiling mount lift track system is requested, allowing a safer transfer for showering and significantly reducing "skin break downs" during transfers.

(See, Judgment Roll; T.5)

Certification was issued on or about May 26, 2010. (See, Judgment Roll; Employer Ex. 1, page 36) On June 7, 2010, the employee filed a Medical Request. (See, Judgment Roll; T.5; Pet. Ex. J)

On or about July 14, 2010, the employee changed attorneys. (See, Judgment Roll) Although an administrative conference pursuant to M. S. § 176.106 was scheduled for August 24, 2010, on the lift track system dispute, it was never held.¹ (T.5; Employer Ex. 1, page 38)

Finally, on June 24, 2011, a hearing was held in Fergus Falls, Minnesota on the issue of the disputed medical device. On July 21, 2011, a compensation judge at the Office of Administrative Hearings awarded the

¹ Because the claim was in excess of \$7,500.00, it was apparently sent from the Department of Labor and Industry to the Office of Administrative Hearings. (T.5)

disputed ceiling mounted lift track system “including construction modifications necessary to install the track in the employee’s home.” (See, A-1)

On August 7, 2011, the employer and insurer filed an appeal to the Workers’ Compensation Court of Appeals. On February 7, 2012, a three-judge panel of the Workers’ Compensation Court of Appeals reversed the factual findings of the compensation judge. (See, A-5) One of those judges dissented. (See, A-5) The Workers’ Compensation Court of Appeals took away the medical benefits that had been awarded. (See, A-5)

On March 6, 2012, the employee appealed to this Court. (See, A-12) This is the timely Brief of the Employee-Relator.

STATEMENT OF FACTS

The employee in this matter is Tessa M. Washek. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) She was born on December 25, 1980, and was 30 years old on the day of the hearing. (Pet. Ex. J)

On December 18, 2002, the employee was employed by New Dimensions Home Health as a personal care attendant. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) On December 18, 2002, the employee sustained multiple injuries as a result of a motor vehicle accident which arose out of, and in the course of employment. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) She sustained a spinal cord injury which renders her paraplegic and also sustained a closed head injury and internal injuries. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

The employee is permanently and totally disabled as a result of her December 18, 2002 work-related injuries. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) She is able to use a wheelchair for mobility. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

In 2003, the employee obtained a grant through Battle Lake Lions Club and Habitat for Humanity (Habitat) to build a wheelchair accessible home. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

In early 2003, the insurer contacted an accessibility specialist, Julee Quarve-Peterson, who took the necessary steps to obtain an order for home remodeling in order to allow the employee to move freely in her home and to otherwise accommodate her disability. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) This involved obtaining information from the employee and her QRC, contacting Habitat, who was building a home for the employee, and preparing a proposal for the Minnesota Council on Disability. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) The insurer agreed to the proposal, which was then approved and sent to the Department of Labor and Industry. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) An Award for Residential Remodeling was issued on December 17, 2003. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

By the time of the second hearing on November 30, 2006, some remodeling items specified in the September 30, 2003 remodeling plan had not yet been completed. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) These items included installation of threshold adaptors, relocation of intercom units, installation of adjustable closet rods and shelves, installation of ceramic tile on shower walls and modification of the shower to allow "roll-in" access. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A) At the second hearing on November 30, 2006, the employer and insurer stipulated that these alterations were reasonably

required to accommodate the employee's work-related disability and that \$5,252.00 represented a reasonable expense. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

The judge found, in the second Findings and Order, that the employer satisfied its obligation to "furnish" residential remodeling under Minn. Stat. § 176.137 by paying for the necessary services. (See, F&O No. 2, served and filed 12/20/06, Pet. Ex. A)

The second Findings and Order of December 20, 2006 was not appealed. (See, Judgment Roll) Instead, the parties completed a partial Stipulation for Settlement on March 20, 2007, providing for the disputed remodeling. (See, Judgment Roll)

However, on September 4, 2008, the employee's then-attorney filed another Medical Request. (See, Judgment Roll) Among the items claimed was an accessibility assessment of shower and toilet difficulties, through Jane Hampton of Accessibility Design. (See, Judgment Roll) Eventually, a hearing at the Office of Administrative Hearings was set for January 29, 2009. (See, Judgment Roll) This time, instead of a hearing, the parties entered into another settlement. (See, Judgment Roll) A Stipulation for Settlement was filed on May 12, 2009, providing:

The employer and insurer agree to retain Jane Hampton, Disability Specialist, for a single evaluation of the feasibility of shower revision for Ms. Washek's home.

(See, Judgment Roll: Stipulation/Award on Stipulation of 5/12/09, page 2)

Previously, on November 26, 2008, a home evaluation had been performed by Andrea Nyberg, MA, OTR/L. (Pet. Ex. B; Employer Ex. 1, page 30) This was done to assess the employee's home bathing facilities.

(Pet. Ex. B; Employer Ex. 1, page 30)

A number of concerns were identified, including:

Skin integrity issues from transfers onto the shower chair.

(Pet. Ex. B; Employer Ex. 1, pages 30-31)

Various recommendations were made by Ms. Nyberg. (Pet. Ex. B; Employer Ex. 1, pages 30-31)

Subsequently, similar recommendations were made by the employer and insurer's own expert, Julee Quarve-Peterson. (Employer Ex. 1, page 31) In an email dated January 12, 2009, Ms. Quarve-Peterson indicated:

- 6) Consider a ceiling track system from the bedroom into the bathroom, over the toilet, up to the sink and into the shower (existing one). This will minimize the number of needed transfers and possible falls this option may require no changes to the shower size or location, the toilet seat or skin break downs.

(Pet. Ex. D; Employer Ex. 1, page 32)

Accordingly, on February 24, 2009, Ms. Hampton met with the employee, the QRC and the claims adjuster at the employee's home. (Pet. Ex. E; Employer Ex. 1, page 32) The purpose of the assessment was to identify access and safety issues pertaining to the employee's use of the shower and toilet. (Pet. Ex. E; Employer Ex. 1, page 32)

Ms. Hampton identified several significant safety concerns. (Pet. Ex. E; Employer Ex. 1, pages 32-33) For instance, she identified problems with the toilet causing a "sheering action" that could "irritate" the flap procedure which had been conducted on the employee's buttocks. (Pet. Ex. E) Ms. Hampton also recommended:

Install a ceiling mounted lift system that would extend over the bed to the toilet . . .

(Pet. Ex. E; Employer Ex. 1, pages 32-33)

In addition, on March 26, 2009, the employer and insurer hired their own expert, Julee Quarve-Peterson, to render an opinion on the ceiling track system:

The recommendation by Jane Hampton of a ceiling mounted track transfer system could significantly reduce Tessa's need for an aid to assist in transfers and showering. The track system could also reduce the "skin break downs" during transfers . . . it is the opinion of Julee Quarve-Peterson, Inc. that a ceiling track system is partially a durable medical device . . .

(Pet. Ex. F; Employer Ex. 1, page 33)

On June 15, 2009, Ms. Hampton provided a "quote" for the ceiling-mounted lift. (Pet. Ex. H; Employer Ex. 1, pages 35-36, 37-38):

A.	Total equipment price:	\$13,339.00
	Est. shipping/handling:	425.00
	MN State sales tax:	<u>000.00</u>
		\$13,764.00
	Installation of motor and rail:	<u>1,650.00</u>
	Total delivered and installed:	\$15,414.00
B.	Contractor bids	
	1. Cullen's Home Center	\$14,823.00
	or	
	2. Paul Davis Restoration	12,930.00
C.	Miscellaneous products:	<u>80.00</u>
		\$30,317.00
		or
		\$28,424.00

(Pet. Ex. J; T.10-14; Employer Ex. 1, pages 36-37)

On May 19, 2010, because the employer and insurer refused to furnish the disputed medical device, the employee filed a Request for Certification of dispute:

Tessa is a 29-year-old paraplegic. A ceiling mount lift track system is requested, allowing a safe transfer for showering and significantly reducing "skin break downs" during transfers.

(Pet. Ex. H; Employer Ex. 1, pages 36-37)

On June 7, 2010, the employee filed the Medical Request for the disputed device. (Pet. Ex. J; T.10; Employer Ex. 1, page 30) On June 11, 2010, the employer and insurer filed a Medical Response:

The employer and insurer deny the entitlement to the installation of the track system requested.

(Pet. Ex. K; Employer Ex. 1, page 38)

This matter was supposed to be heard on an "expedited" basis pursuant to M. S. § 176.106, subd. 3. (T.5) However, because of other matters in litigation, the matter did not come up for hearing until over a year later, on June 24, 2011. (T.5; Employer Ex. 1, pages 38-39)

Subsequently, the employee did return to work. (Employer Ex. 1, pages 29-30)

However, the employee did in fact develop "skin break downs" in the spring of 2011 due to the denial of the track system. (Employer Ex. 1, pages 30, 39-40) She was soon taken off work again. (Employer Ex. 1, pages 30, 39-40)

The deposition of Julee Quarve-Peterson was taken on June 13, 2011 and submitted into evidence by the employer and insurer. (Employer Ex. 1)

She testified that she was not aware that the employee had gone to the Perham, Minnesota Emergency Room on May 19, 2011. (Employer Ex. 1, page 41) She was not aware that the employee went

there specifically for treatment caused by scratches to her bottom from the old shower system. (Employer Ex. 1, page 41) She was not aware that the employee had sores on her bottom from the shower chair she had been using. (Employer Ex. 1, page 41) She was not aware that the employee would hit her bottom when she was transferring and this caused sores on her bottom. (Employer Ex. 1, page 41)

She did testify, however, that the installation of the track system would very likely take care of that problem:

Q: That's the whole idea, fair to say?

A. Yes.

(Employer Ex. 1, page 42)

STANDARD OF REVIEW

In reviewing cases on appeal, the Court must determine whether “the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, “they are supported by evidence that a reasonable mind might accept as adequate.” Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, “[f]act findings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

ARGUMENT

THE FINDING OF THE COMPENSATION JUDGE, THAT THE INSTALLATION OF A DEVICE WAS A COMPENSABLE MEDICAL EXPENSE, IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

We should be clear as to the result of the employer and insurer's position. The employee is seeking the installation of a device that all parties agree is reasonable, necessary, and related to the employee's work injury. If the workers' compensation insurer is not responsible for this payment, this burden will fall on the employee. Even if a health insurance policy is available to the employee in this case, such policies uniformly contain provisions which exclude coverage for work-related injuries. The end result, then, is that Tessa Washek will be responsible for approximately \$14,000.00 in out-of-pocket costs for reasonable and necessary treatment of her work injury.

"A basic thought underlying the Compensation Act is that the business of industry shall in the first instance pay for accidental injuries as a business expense or part of the cost of production." State ex rel. Chambers v. District Court, Hennepin County, 139 Minn. 205, 209, 166 N.W. 185, 187 (1918). "Workers' compensation . . . is social legislation providing a measure of security to workers injured on the job, with the burden of that expense considered a proportionate part of the expense of

production.” Botler v. Wagner Greenhouses, 754 N.W.2d 665, 667, 68 W.C.D. 470, 477 (Minn. 2008), quoting from Franke v. Fabcon, 509 N.W.2d 373, 376, 49 W.C.D. 520, 524 (Minn. 1993).

Minn. Stat. § 176.135, subd. 1 provides that “the employer shall furnish” any medical treatment “as may reasonably be required at the time of the injury and at any time thereafter to cure and relieve from the effects of the injury.” (Emphasis added) This provision has existed in the statute since the time of the initial enactment of the Workers' Compensation Law in 1913 and has changed only to impose additional obligations on the employer. See, General Statutes of Minnesota (1913), § 8212. It has never been the law in Minnesota that an injured worker must pay for medical treatment that is related to the work injury and is necessary to “cure and relieve from the effects of the injury.”

As argued by the employer and insurer, Minn. Stat. § 176.137, subd. 5, reverses ninety-plus years of case law and conflicts with a fundamental provision of the workers' compensation statute.

First, it is not reasonable to conclude that the legislature meant to reverse a fundamental principle of the workers' compensation law in such an offhand manner. Second, imposition of liability for medical expenses on an employee is contrary to the even-handed approach which the legislature has stated to be its intention in the interpretation of the workers' compensation statute. Minn. Stat. § 176.001. Third, this interpretation has

a result that is “absurd, impossible of execution, or unreasonable” and is contrary to statutory language that “the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17.

As found by the compensation judge, Minn. Stat. § 176.135 requires that the employer and insurer “furnish” the employee with such medical treatment as is reasonable and necessary to cure and relieve the effects of her occupational injury, including durable medical goods. However, the employee is unable to use the lift system until the ceiling-mounted track is installed in her home. Installation of the ceiling track is necessary in order for the employer and insurer to “furnish” the reasonable and necessary lift device, and therefore is a compensable medical expense under Minn. Stat. § 176.135.

Black’s Law Dictionary defines “furnish” as: “To supply, provide or equip, for accomplishment of a particular purpose.” Black’s Law Dictionary 608 (5th ed. 1979) (Emphasis added)

As found by the compensation judge, the key question does not involve categorization of the installation work, but rather the purpose of the work.

Minn. Stat. § 176.137 relates to remodeling the home of an injured worker in order to facilitate mobility and accommodate the workers’ disability:

. . . such alteration or remodeling of the employee's principal residence as is reasonably required to enable the employee to move freely into and throughout the residence . . .

(Minn. Stat. § 176.137, subd. 1) (Emphasis added)

Unlike the disputed provision in Schatz v. Interfaith Care Center, WC11-5233 (WCCA, Jun. 16, 2011), the stated purpose of the statute is clear and unambiguous. As with all statutory construction, the task of the Court is to “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 Surely, the legislature was aware that alterations might be necessary to provide for the installation of reasonable and necessary medical devices – not to allow “free movement,” but to provide for the cure and relief of the injury. Wouldn't it have been relatively easy for the legislature to include such language, had it intended to exclude expenses like this?

The disputed installation work herein is not for the purpose of allowing the employee mobility in her home. Rather, the lift system has been recommended, by three or four providers, for a specific medical purpose:

To reduce the number of transfers necessary for the employee's wheelchair to a toilet or shower seat. The medical goal is to prevent further skin breakdown and repetitive trauma to the employee's upper extremities.

(See, F&O served and filed 7/21/11, Memorandum of Compensation Judge, page 4, A-4)

Minn. Stat. § 176.135, subd. 1(a) requires that an employer furnish reasonable and necessary medical treatment and apparatus. The problem with the employer and insurer's position is that the lift track system is of no use to the employee if merely delivered to her doorstep in a shipping carton. In statutory terms, the reasonable and necessary medical equipment has not been "furnished" to the employee until it has been installed and is available for use. In this case, installation requires some construction modifications; however, whether the work is defined as "remodeling" is not the controlling factor. The work is necessary in order to provide the employee with reasonable and necessary medical treatment and therefore should be compensable under Minn. Stat. § 176.135.

CONCLUSION

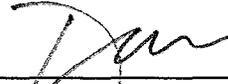
There is no conflict between the provisions of Minn. Stat. § 176.137, subd. 5 and Minn. Stat. § 176.135. There is no conflict because Minn. Stat. § 176.135, establishing the liability of an employer for medical treatment of a work injury, is fundamental to the workers' compensation system and must be given primary consideration and effect in this case.

As noted by the dissenting judge of the Workers' Compensation Court of Appeals, substantial evidence supports the compensation judge's finding that the cost for the installation work is reasonable and necessary and is a compensable medical expense under Minn. Stat. § 176.135. Given the standard of review in Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984), the Workers' Compensation Court of Appeals should have affirmed the factual findings of the compensation judge.

The Decision of the Workers' Compensation Court of Appeals overturning factual findings made by the trier of fact, is manifestly contrary to the evidence and should be reversed.

Respectfully submitted,

DATED: March 28, 2012



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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

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 13-font. The length of this Brief is 412 lines and 3,259 words. This Brief was prepared using Microsoft Office Word 2003, Microsoft Windows XP Professional.

DATED: March 28, 2012



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