

NO. A12-0395

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State of Minnesota  
In Supreme Court

Tessa M. Washek,

*Employee-Relator,*

vs.

New Dimension Home Healthcare,

*Employer-Respondent,*

and

SFM Mutual Insurance Company,

*Insurer-Respondent.*

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**BRIEF OF RESPONDENTS NEW DIMENSION HOME HEALTHCARE  
AND SFM MUTUAL INSURANCE COMPANY**

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## LEGAL ISSUES

- I. Did the Compensation Judge err in determining that the proposed installation of the ceiling track device is not remodeling and subject to the requirements of Minn. Stat. §176.137;

The Workers' Compensation Court of Appeals reversed the Compensation Judge and held that the installation of such a device is subject to the limitations of Minn. Stat. §176.137.

- II. Did the Compensation Judge err as a matter of law in creating an exception to the \$60,000.00 cap by determining the cost related to a specific medical apparatus, notwithstanding the need for significant physical modification of a household, are outside the purview of Minn. Stat. §176.137;

The Workers' Compensation Court of Appeals reversed the Compensation Judge and held there was no such authority.

## STATEMENT OF THE CASE

The employer and insurer Respondents generally accept the Relator's Statement of the Case. This matter is before the Court on a Writ of Certiorari pursuant to Minn. Stat. §176.471. Relator appeals the Workers' Compensation Court of Appeals' reversal of the Compensation Judge's decision awarding installation costs for the ceiling track device that would exceed the \$60,000.00 limit of Minn. Stat. §176.137.

## STATEMENT OF FACTS

The Respondents generally accept the Relator's Statement of Facts.

As a result of Ms. Washek's accident of December 18, 2002, the parties have stipulated that she is permanently and totally disabled. She suffers from paraplegia and is wheelchair bound. The employer and insurer are currently paying permanent total disability, subject to the Social Security offset and weekly permanent partial disability for that benefit in excess of 90 percent.

The employer and insurer, by previous stipulations, approved by the Office of Administrative Hearings, have expended approximately \$58,000.00, leaving available to the employee a little less than \$2,000.00 in the statutory allowance of \$60,000.00 pursuant to Minn. Stat. §176.137, subd. 4 (2002).<sup>1</sup>

The focus of this litigation involves a mechanical lift to be installed in Ms. Washek's home. The price for the lift itself is approximately \$15,000.00 which the employer and insurer concede is reasonable and necessary. The proposed cost of installation is approximately an additional \$14,000.00, and the appropriateness and characterization of that cost is in dispute.

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<sup>1</sup> This section was amended to provide for \$75,000.00 in 2011. No party here asserts that this new amendment is retroactive to this date of injury.

## 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.*

The interpretation and construction of a statute is a question of law that this Court reviews *de novo*, Varda v. Northwest Airlines Corp., 692 N.W.2d 440, 444 (Minn. 2005), Falls v. Coca Cola, 726 N.W.2d 96 (Minn.2007).

## ARGUMENT

### I.

The employer and insurer assert that, as opposed to a factual determination, this is a matter of first impression, and an issue of legal interpretation of Minn. Stat. §176.135 and 176.137. The underlying issue is whether or not under the Minnesota workers' compensation law there are limits on the obligation of the employer and insurer to provide reasonable and necessary medical care, treatment and expense.

This issue was directly before this Court in the recent matter of Schatz v. Interfaith Care Center and New Hampshire Insurance Company/Chartis, \_\_\_\_\_ N.W.2d \_\_\_\_\_, Supreme Court No. A11-1171, filed April 11, 2012. Schatz held that the Legislature's clear intention under Minn. Stat. §176.136, subp. 1b(d), (2012), which limited employer's liability to amounts charged for treatment by an out-of-state medical provider to that state's fee schedule, was an appropriate exercise of legislative power, and constitutional. This is so even if the individual injured worker would be personally obligated to make payment of any amounts in excess of that allowed by the provider's state's fee schedule.

This, in essence, is the issue here today. Is the broad mandate of Minn. Stat. §176.135 to provide "reasonable and necessary care and treatment" modified by the \$60,000.00 limitation contained in Minn. Stat. §176.137 (2002)? The Workers' Compensation Court of Appeals held in the affirmative. They did this by determining that installation of this track system, "would require a partial removal of the ceiling, relocation of the electrical wiring and fixtures, raising all door headers in the path of the track and installation of additional support trusses. These are permanent structural changes." (Finding No. 3, Respondent's Exhibit 1, deposition of Julee Quarve-Peterson.)

The employer and insurer contended that this is by any definition remodeling, and the Court of Appeals agreed.

Under Minn. Stat. §176.137, the liability of the employer and insurer for such a benefit is limited to \$60,000.00 for this date of injury. Benefits under Minn. Stat. Ch. 176 are limited in many ways:

1. Temporary total disability is limited to 130 weeks pursuant to Minn. Stat. §176.101, which may result in significant hardship for severely injured individuals who need additional surgery or ongoing treatment;
2. The compensation rate is limited to \$850, which may be a significant hardship for high wage earners;
3. Temporary partial disability pursuant to Minn. Stat. §176.101, subd. 2 is limited to 225 weeks, which may result in a significant hardship on a younger worker whose wage loss exceeds that number of weeks;
4. Retraining benefits pursuant to Minn. Stat. §176.102, subd. 11 is limited to 156 weeks, which may be inadequate for some workers with severe disabilities;
5. Medical benefits are limited pursuant to Minnesota Rules:
  - a) Passive treatment modalities are generally limited to 12 weeks, with 12 additional visits (Minn. Rule 5221.6200, subp. 3; 5221.6205, subp. 3, 5221.6210, subp. 3;
  - b) Therapeutic injections are generally limited to two or three injections to any one site, Minn. Rule 5221.6200, subp. 5, 5221.6205, subp. 5, and 5221.6210, subp. 5;
  - c) Health clubs pursuant to 5221.6600, subp. 2 b are limited to 13 week increments;
  - d) Durable medical equipment in the nature of whirlpools, Jacuzzis, hot tubs, beds, waterbeds, mattresses, chairs, recliners and loungers are not allowed, 5221.6200, subp. 8; 5221.6205, subp. 8 and 5221.6210, subp. 8.

This is part of the legislative attempt to balance the interests of the parties in the State of Minnesota. As this Court stated in Schatz, "...the two basic purposes of the Act are to provide benefits to injured workers and to do so at a reasonable cost to the employers." See Minn. Stat. §176.001 (2010). Cost containment for employers subject to the Act is a legitimate objective of the

Legislature. Gluba ex rel. Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713, 75-26 (Minn. 2007).

The Legislature has significant authority to amend the Act as it sees fit. See Parson v. Holman Erection Company, 428 N.W.2d 72, 76 (Minn. 1988).

Relator urges this Court to adopt the Compensation Judge's position that if the purpose of the work is to foster medical accommodation, it is to be covered under Minn. Stat. §176.135. If this is the criterion, there would be no practical application of whatever statutory limitation exists under Minn. Stat. §176.137.

Significantly injured workers, like Ms. Washek, may be reliant upon a wheelchair or other assists. The purpose of these devices is, of course, to allow mobility but just as importantly to accommodate and protect the individual from further injury or aggravation. Using the Compensation Judge's standard of only looking to the purpose of the work, there is no end to the accommodations that could be done for a person that is wheelchair bound or otherwise dependent upon mechanical assists to prevent injury or aggravation. Every driveway should be paved; there should be pathways built throughout anyone's yard; any time a modification wears out, such as flooring or other remodeling, it should be replaced because this will facilitate a specific medical purpose, i.e., the prevention of additional harm that would be due in significant part to the unassisted disability.

The workers' compensation law determines the rights, benefits and limitations on the parties. It does not address all such ramifications of such injury. This is a no-fault system, without any denial or diminution for comparative fault by the employee. The work injury need not be the approximate nor primary cause, but only a substantial contributing cause of the disability and the need for medical care and treatment. In exchange for this standard of liability and causation, the Act has not only structured, but limited damages. This is the balancing of interests and social utility

recognized by this Court as the exclusive province of the Legislature, Parsons, *supra*, 428 N.W.2d at 76.

Unfortunately, Ms. Washek will have to make many accommodations due to her injury. She will have to obtain substitute services for many of the obligations of everyday life, household and yard maintenance, domestic duties, etc. While these are addressed under some benefit systems, such is not the case in the workers' compensation arena. However, the employer and insurer would assert that the remedy for this "gap" if you will, is the permanent partial disability paid to an injured worker. In Ms. Washek's case, this will exceed \$400,000.00. And, as indicated, is being paid weekly in accordance with the statute. This is, pursuant to Minn. Stat. §176.121, paid for loss of function and use. It is intended to assist the injured worker in obtaining services and goods not addressed by the Minnesota workers' compensation law, and such should be the remedy in this matter.

## **II.**

The Workers' Compensation Court of Appeals' decision effectuates the legislative intent of Minn. Stat. §176.137.

The Workers' Compensation Court of Appeals, in Weston v. University of Minnesota-Duluth, May 20, 1999, determined that the clear legislative intent was that any household remodeling would be authorized only after certification by a licensed architect as to the feasibility and appropriateness of the proposed remodeling was submitted to the Council on Disability for review. The Council on Disability would render an advisory opinion to the Workers' Compensation Division for a determination pursuant to Minn. Stat. §176.106. That determination is subject to review by an evidentiary hearing at the Office of Administrative Hearings.

Why is this so? As a protection for all parties. This certification by the licensed architect as to its being reasonably required is such to assure appropriateness and feasibility. Part of that same subdivision of Minn. Stat. §176.137, subd. 4 also requires that the alteration or remodeling actually be accomplished under the supervision of a licensed architect. This again is to assure that the significant physical restructuring of a home is done in the way most compatible with architectural standards, in a cost-effective fashion, and in a competent and professional manner to assure quality and safety. To adopt the position of the Relator would defeat and circumvent the clear legislative intent to assure cost-effective professionalism in this significant structural alteration.

### III.

There is a remedy not addressed by Relator or the Workers' Compensation Court of Appeals. Minn. Stat. §645.21 specifically contemplates that the Legislature has the power to promulgate a statute that will be applied retroactively. This has previously been done in the workers' compensation law:

1. Minn. Stat. §176.132, providing for payment of supplementary benefits retroactively to all dates of injury; (repealed 1995)
2. Minn. Stat. §176.102(11a), provides for non-monetary rehabilitation benefits for all dates of injury;
3. Minn. Stat. §176.191(1), providing the procedural mechanism for seeking contribution if a party is making payment under a Temporary Order, specifically applies to all dates of injury.

In the employee's lifetime, there will certainly be advancements that will bring significant improvement to, and be necessary for, the quality of life of the employee and those similarly

situated. When that occurs, the Legislature could certainly address Minn. Stat. §176.137 and/or Minn. Stat. §176.135 to obligate employers and insurers to provide such benefits.

**CONCLUSION**

The Workers' Compensation Court of Appeals properly characterized the proposed installation of the track system as household remodeling, consistent with Minn. Stat. §176.137 and this Court's directive in Schatz to balance the provision of benefits to injured workers at a reasonable cost to employers and insurers. Characterization of such installation as a medical expense would serve to defeat the clear and unambiguous legislative intent to limit the employer's liability for this date of injury to \$60,000.00. The decision of the Workers' Compensation Court of Appeals should be affirmed.

Respectfully Submitted,

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DATED: 4-19-12

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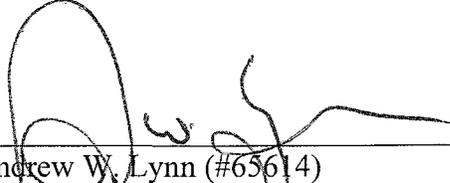
**CERTIFICATION OF BRIEF LENGTH**

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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 412 lines and 2,825 words. This brief was prepared using Microsoft Office Word 2007.

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DATED: 4-19-12

  
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