

STATE OF MINNESOTA
IN SUPREME COURT
CASE NO. A04-709

Zurich American Insurance Company,

Respondent,

vs.

Donald A. Bjelland,

Appellant.

**RESPONSE TO PETITION FOR
REHEARING IN THE MINNESOTA
SUPREME COURT**

Appellant/prevaling party, Donald A. Bjelland, for its Response to Zurich American Insurance Company's Petition for Rehearing in the Minnesota Supreme Court, asks the Court to deny the Petition for the following reasons.

Although Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure allow for the filing of a petition for rehearing in the Supreme Court, the rule is not intended to provide a party with a second chance to present arguments already rejected by the Court. *See* 3 Magnuson & Herr, *Minnesota Practice Series: Appellate Rules Annotated* (Thomson/West 2005), p. 682. Rather, a party may obtain rehearing only in very limited circumstances articulated in the Rule. Specifically, rehearing **may** be appropriate only when the Supreme Court has overlooked, failed to consider, misapplied or misconceived a controlling statute, decision or principle of law, a material fact or a material question in the case. Minn. R. Civ. App. P. 140.01 "But where a question of law has once been fully discussed on the argument, and considered by the court, [the court] cannot admit that a party is entitled to re-argument, on the ground that there is manifest error in the decision." *Appellate Rules Annotated* at p. 682 (quoting *Derby v. Gallup*, 5 Minn. 119 (1860)).

In this case, the basis for Zurich's Petition for Rehearing appears to be its belief that the Court was unaware of the role of the Workers' Compensation Advisory Council in the 2000 amendments to the Workers' Compensation Act, and of the Advisory Council's supposed rationale for those amendments.¹ The appendix to Bjelland's Brief, however, included the entire 31 pages of legislative history presented to the lower courts, including the very same Rationale of which Zurich believes the Court was unaware. See Appellant Donald A. Bjelland's Appendix at App. 24-55 (legislative history, generally) and 53-55 (reproducing the Rationale). Bjelland discussed the Rationale, including its reference to *Tyroll v Private Label Chemicals*, 505 N.W.2d 54 (Minn. 1993) and *M.W. Ettinger Transfer v. Schaper Mfg, Inc.*, 494 N.W.2d 29 (Minn. 1992) at page 14 of his Appellant's Brief, and again at page 2 of his Reply Brief. Zurich also referenced the Rationale in its Respondent's Brief, although at that time it attempted to down-play the Rationale's significance by characterizing it as an "article" by Mr. Carr. See Zurich's Respondent's Brief, p. 12.

There simply is no basis for concluding that the Court was unaware of or otherwise failed to consider the Rationale cited by Zurich as necessitating a rehearing. The Court's opinion expressly comments on the contemporaneous legislative history, including history from the 1999 legislative session when the amendments at issue were first introduced but failed to pass. Given its reference to both legislative sessions, there is no reason to believe the Court did not review the entire

¹ In fact, the "Rationale for Proposed Revisions to Minn. Stat. §176.061 Simplifying Workers' Compensation Subrogation and Employer Liability" (hereinafter, the "Rationale") that Zurich claims was overlooked by the Court is **not** the rationale of the Workers' Compensation Advisory Council, but rather the rationale that was provided to the Council by the author of the legislation for the Council's consideration. See Carr Aff., ¶ 2.

legislative record before it or, in particular, that it failed to consider a portion of legislative history referred to three times in the parties' briefs. The Court concluded that little legislative intent could be inferred from the legislative history and, accordingly, focused its attention on a second primary consideration in discerning legislative intent – the consequences of the interpretation advanced by Zurich – determining that Zurich's interpretation fundamentally altered the nature of the employer's cause of action against the third party and would result in internal conflicts within Section 176.061.

None of the circumstances under which a rehearing might be appropriate is present in this case. Bjelland, therefore, respectfully requests that Zurich's Petition for Rehearing be denied.

Respectfully submitted,

COUSINEAU McGUIRE CHARTERED

Dated: February 16, 2006

By: 
MICHAEL D. BARRETT #186648
ANDREA E. REISBORD #22411X
Attorneys for Appellant Donald Bjelland
1550 Utica Avenue South, Suite 600
Minneapolis, Minnesota 55416-5318
(952) 546-8400