

State of Minnesota
In Supreme Court

Mark Schmitt,

Employee-Respondent,

v.

Innovative Lawn Systems and Total Repair Services,

Employers-Respondent,

and

American Interstate Insurance Company,

Insurer-Respondent,

and

West Bend Mutual Insurance Company,

Insurer-Relator,

and

MN Dept. of Labor & Industry Rehab Unit, MN Dept. of Human
Services, St. Paul Radiology, and Regions Hospital,

Intervenors,

and

Special Compensation Fund,

Respondent.

**BRIEF OF AMERICAN INTERSTATE INSURANCE COMPANY,
INSURER-RESPONDENT**

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ISSUES

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CASE: SAZAMA EXCAVATING V. WAUSAU INS. COS., 521 N.W.2D 379 (MINN. CT. APP. 1994).

STATEMENT OF THE CASE

On November 30, 2004, the employee, Mark Schmitt, injured his left foot and ankle during the course and scope of his employment with Innovative Lawn Systems. (Findings 1 and 2.) The employee filed a Claim Petition and, subsequently, American Interstate Insurance Company paid various workers' compensation benefits pursuant to a temporary order and sought reimbursement from West Bend Mutual Insurance Co. (Finding 1.)

The matter came before the Honorable Gary P. Mesna on June 14, 2006. Judge Mesna found West Bend was liable for all workers' compensation benefits to which the employee was entitled and ordered Innovative Lawn Systems and West Bend to reimburse American Interstate for all benefits it had paid under the temporary order (Finding 21; Order 1). The compensation judge also denied Innovative Lawn Systems' request for payment of its attorney's fees and costs. (Finding 22) The Workers' Compensation Court of Appeals affirmed the compensation judge's findings and orders in their entirety. West Bend now appeals those findings and orders and Innovative Lawn Systems has also requested review of the compensation judge's ruling as to its request for attorney's fees.

STATEMENT OF FACTS

Jeffrey Trog began operating Valley Lawn Services in 1986. (T. 60) In 1997, the business expanded and its name changed to Valley Landscape, Inc. (T. 61-62) Also in 1997, David Otterdahl joined the company and the company's name was eventually changed to Structural Repair Services. (T. 61, 62, 82)

Structural Repair Services had several divisions, each of which was engaged in distinct activities. (T. 63) Structural Repair Services was advised that the different activities should be operated under separate corporate structures. (T. 63) As a result, the company was divided into Structural Repair Services, Total Repair, Inc., Valley Erosion, and Valley Waterproofing. (T. 63-64)

In 2000, American Interstate began insuring Valley Landscape and Structural Repair Services. (T. 82) Secondary companies named in the policy included total Repair, Inc., Valley Erosion and Valley Waterproofing. (American Interstate's Exh. 5) Structural Repair Services performed concrete-type work, drain tiles and structural work. (T. 83) Total Repair, Inc. performed warranty work for builders. (T. 83-84) Fifty-percent of Valley Erosion's work consisted of erosion control, while the remaining half consisted of lawn work and snow plowing. (T. 84-85) Despite the different activities of each entity, Structural Repair, Total Repair, Valley Erosion and Valley Waterproofing shared the same address, facility, equipment, and employees. (T. 85, 96)

Each entity had separate liability insurance policies which were obtained through insurance agent Dennis Just, who was associated with the Ross Nesbit Insurance Agency. (T. 64-65) The entities, however, were insured under one workers' compensation policy through American Interstate. (T. 64)

On December 18, 2000, American Interstate sent a notice of cancellation for workers' compensation insurance to Structural Repair Services, effective February 24, 2001. (T. 69) However, there was no evidence that the notice of

cancellation was filed with the Commissioner of the Department of Labor and Industry.

In October 2001, Jeffrey Trog and Mr. Otterdahl ended their partnership. (T. 67) Between December 2000 and October 2001, Valley Erosion was still operating and Jeffrey Trog believed the company was still covered for its workers' compensation liability insurance. (T. 70) However, by at least Spring 2002, he knew that Valley Erosion's workers' compensation insurer was no longer American Interstate. (T. 95)

Eventually, Mr. Otterdahl took over operations of Valley Waterproofing and Jeffrey Trog continued operating the remaining businesses, except he combined Valley Erosion, Total Repair, and Structural Repair into one company, Total Repair. (T. 71) Valley Erosion, as its own company, ceased to operate after that time. (Id.) Total Repair was insured for workers' compensation purposes from August 1, 2002 through the date of Mr. Schmitt's injury, November 30, 2004, by West Bend, procured through agent Dennis Just. (T. 88)

After October 2001, neither Valley Erosion nor Structural Repair operated under their respective names. (T. 89) Rather, all business was conducted under the name Total Repair. (Id.) Valley Erosion equipment logos were replaced by Total Repair logos and decals. (Id.) There was no longer a business which operated as Valley Erosion, there were no Valley Erosion employees, no bills were generated under the name Valley Erosion, and Valley Erosion had no customers. (T. 90-91) After October 2001, Jeff Trog threw away all corporate records and any

paperwork he had that that contained the name "Valley Erosion." (T. 91) Also, after that time, Jeff Trog had no recollection of paying continued premiums to American Interstate for workers' compensation insurance coverage. (T. 95)

In Spring 2002, Jeffrey Trog had discussions with his brother, John Trog, about John Trog's general interest in establishing a new lawn care business. (T. 70-71) Jeffrey Trog and John Trog then became partners and on May 1, 2002, using only the corporate structure of Valley Erosion, they created a new company they called Innovative Lawn Systems. (T. 73-74, 91.) The reason for the name change was that John Trog wanted the two of them to start a new business and not operate one that was already in existence. (T. 72) Absolutely nothing "transferred" from Valley Erosion to Innovative Lawn Systems in this process except, arguably, the name and then only for a short period of time. (T. 92) Before Innovative Lawn Systems was formed, John Trog had no involvement with Valley Erosion or any other entities owned, or previously owned, by Jeffrey Trog. (T. 144)

At Innovative Lawn System's inception, John Trog developed new business records, documents and invoices. (T. 145) He used nothing from Valley Erosion. (Id.) He even obtained a new federal tax identification number. (Id.) In addition, Innovative Lawn Systems did not engage in erosion control activities as Valley Erosion previously had. (T. 143-44) Innovative Lawns Systems' sole line of business involved performing lawn service and snow plowing. (T. 151)

Under the new Innovative Lawn Systems corporate by-laws, John Trog was named president and essentially ran the business. (T. 74-75) John Trog brought his own customers to the business, developed new customers, and bought all equipment. (T. 93) Jeffrey Trog was named secretary and handled financial matters, but did not participate in the day-to-day operations of Innovative Lawn Systems . (T. 74-75)

With regard to insurance, Jeffrey Trog contacted insurance agent Dennis Just, and told Mr. Just that his brother, John Trog, would be contacting him to take care of all the insurance needs of Innovative Lawn Systems. It was Jeffrey Trog's belief that the "insurance needs" would include liability, auto, inland marine and workers' compensation insurance coverage. (T. 75-76) Jeff Trog knew that when he and his brother started Innovative Lawn Systems in 2002 that the company did not have workers' compensation insurance coverage through American Interstate. (T. 96)

John Trog contacted Mr. Just regarding insurance and requested that he provide Innovative Lawn Systems "with all the needed insurance to operate the business properly." (T. 124-25) John Trog admitted that he did not know exactly what insurance he needed, but that he relied on Mr. Just to tell him what he needed. (T. 125) John Trog completed the insurance application and provided Mr. Just with his tax identification number. (T. 134) It was John Trog's understanding that the tax identification number was required to hire employees. (Id.) When John Trog received the insurance policies, they were written by West

Bend. (T. 128) John Trog admitted he did not fully understand the insurance contract, but he assumed his premium payment was for all forms of insurance coverage for Innovative Lawn Systems, including workers' compensation insurance. (T. 129, 147.)

According to John Trog, Innovative Lawn Systems hired full time and part-time seasonal employees. (T. 127) In addition, during busier times, he would give employees of his brother's company, Total Repair, opportunities to pick up hours and work for Innovative Lawn Systems. (Id.) Mark Schmitt, the injured employee, was hired by John Trog to work for Innovative Lawn Systems. (Id.)

Mr. Just never told John Trog anything he had to do if he hired employees for Innovative Lawn Systems. (T. 157) Mr. Just never told John Trog that he would have to call him to report new hires to be insured in the same way he had told Mr. Trog that he had to call him to insure new pieces of equipment. (Id.)

In order to procure work, John Trog and Innovative Lawn Systems would contact condominium associations and submit project bids. (T. 127-28) At the time the bids were submitted to the clients, Innovative Lawn Systems was also required to concurrently submit Certificates of Liability Insurance, which evidenced the company carried liability and workers' compensation insurance. (T. 128) When John Trog needed a Certificate of Liability Insurance, he called Mr. Just's office and requested these Certificates be sent to whichever association he was submitting a project bid. (T. 129) If the association required proof of workers' compensation insurance, John Trog communicated that to Mr. Just's

office. (T. 129) Mr. Just's office never told John Trog that Innovative Lawn Systems did not have workers' compensation liability insurance. (T. 135)

John Trog reviewed the Certificates of Liability Insurance prior to forwarding them to the associations and they included workers' compensation liability coverage. (T. 131) John Trog had no reason to believe that Mr. Just had not secured the workers' compensation insurance that was so indicated on the Certificate of Liability Insurance. (T. 132.) In fact, when he received the Certificates, he felt he was covered for purposes of workers' compensation insurance. (T. 143; American Interstate Ex. 7)

Within one to two days of Mark Schmitt's injury, John Trog contacted Mr. Just and told him that he needed to make a workers' compensation accident claim. (T. 136) Mr. Just instructed John Trog to complete an accident report and fax it to his office. (T. 137) John Trog did as instructed and Mr. Just told John Trog that he would submit the faxed injury reports to West Bend and wait to hear back. (T. 141) Mr. Just did not give John Trog any reason to believe that there would be a problem with the claim under the policy John Trog believed he had. (Id.) In fact, Mr. Just told John Trog that there should not be any problem. (T. 141)

For twenty years, Jeffrey Trog relied on Dennis Just to take care of all his insurance needs. (T. 75) Jeffrey Trog admitted he did not possess a great amount of knowledge with respect to insurance and trusted Mr. Just to procure the requisite insurance to operate his corporation. (T. 67) Mr. Just likewise admitted that John Trog did not have the business savvy to know what questions to ask to

determine what insurance coverage he should have and that John Trog relied on him to make those determinations. (Innovative Lawn Systems, Exhibit 1, p. 90)

Jeffrey Trog's understanding of the relationship between the Ross Nesbitt agency and insurers American Interstate and West Bend was that Dennis Just had authority to act on behalf of both insurers. (T. 65) John Trog also believed that Dennis Just had authority to act on behalf of West Bend. (T. 130)

Despite John Trog's belief that he had secured the requisite workers' compensation insurance from Dennis Just, the Ross Nesbitt Agency and West Bend Mutual, he was informed by Mr. Just that West Bend was denying coverage because Innovative Lawn Systems' policy did not include workers' compensation coverage. (T. 142)

ARGUMENT

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the appellate courts] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993). See Minn. Stat. § 176.471, subd. 1 (review may be taken to the supreme court when the workers' compensation court of appeals has committed an error of law).

I. THE COMPENSATION JUDGE'S DETERMINATION THAT AMERICAN INTERSTATE INSURANCE COMPANY DID NOT INSURE INNOVATIVE LAWN SYSTEMS FOR PURPOSES OF WORKERS' COMPENSATION WAS NOT LEGALLY ERRONEOUS.

In his Findings and Order, the compensation judge found that American Interstate effectively canceled its policy with the two named insureds, Structural Repair Services, Inc. and Valley Landscaping, Inc., and regardless, any policy issued to cover these businesses (and any other companies named as secondary insureds under the policy) did not extend to Innovative Lawn Systems, Inc. as it was a new and distinct company, separate from those covered under the American Interstate insurance contract. As such, the compensation judge found that American Interstate did not provide workers' compensation insurance coverage to Innovative Lawn Systems on the date of the employee's injury. The Workers' Compensation Court of Appeals did not specifically address this particular issue in its decision.

Minnesota Statute § 176.185 provides, in part:

No policy [of workers' compensation insurance] shall be canceled by the insurer within the policy period nor terminated upon its expiration date until a notice in writing is delivered or mailed to the insured and filed with the commissioner, fixing the date on which it is proposed to cancel it, or declaring that the insurer does not intend to renew the policy upon the expiration date. A cancellation or termination is not effective until 30 days after written notice has been filed with the commissioner in a manner prescribed by the commissioner unless prior to the expiration of the 30-day period the employer obtains other insurance coverage or an order exempting the employer from carrying insurance as provided in section 176.181.

In this case, a notice of cancellation was sent to Structural Steel Erosion, which was located at the same address as Valley Erosion. While Jeff Trog could not recall receiving this notice of cancellation, the compensation judge ruled that

he did receive this notice given his subsequent action of trying to obtain workers' compensation insurance coverage for the businesses he was still operating. While American Interstate and the compensation judge acknowledged that this notice was not filed with the commissioner as is required under Minn. Stat. §176.185, subd. 1, the judge ruled that the notice fulfilled the purpose of the statute in that it provided the companies whose coverage was being terminated with sufficient notice of the termination to obtain alternative coverage. The compensation judge ruled under the circumstances of this case that the substance of the cancellation letter sent by American Interstate met the intent of Minn. Stat. §176.185.

In doing so, the compensation judge cited the case of Zakrajshek v. Shuster, 239 N.W.2d 919 (Minn. 1976), where the supreme court rejected the Special Compensation Fund's position that because a notice of cancellation was defective, insurance coverage on the employer was to continue indefinitely. Although Zakrajshek involves a situation where notice was served to the insured and filed with the commissioner, the underlying principle it stands for applies equally to the facts of the present case. In Zakrajshek, the court held Minn. Stat. §176.185, subd. 1, was not intended to provide free insurance to employers, but was instead "intended to provide the employer a reasonable opportunity to obtain replacement insurance before his coverage is terminated and to provide the department a reasonable time to see that he does." Id. In the present case, the purpose of the statute was fulfilled. The employer, Structural Repair Services through Jeff Trog, was made aware that it needed to find replacement workers' compensation

coverage and Jeff Trog did so, but only for those companies he was operating at the time.

In its brief, West Bend tries to make much out of the fact that American Interstate only mailed its cancellation notice to Structural Repair Service and not directly to Valley Erosion. However, the companies covered under the American Interstate insurance policy (Valley Landscaping, Structural Repair Services, Valley Waterproofing, Valley Erosion, and Total Repair) were noted on Jeff Trog's application for workers' compensation insurance to all be located at the same address, to all use the same federal tax identification number and to all be owned by the same two people (Jeff Trog and David Otterdahl). (American Interstate's Exh. 4). The address for all five companies was listed on the application as 8901 Lyndale Avenue South in Bloomington, Minnesota. (Id.) This is the same address to which American Interstate's notice of cancellation was sent. (American Interstate's Exh. 6) As such, while the notice of cancellation was not sent directly to Valley Erosion (which it should also be pointed out was not the primary insured company on the policy in question), it was sent to its corporate address to the owner of both Valley Erosion and Structural Repair Services, Jeff Trog. As Structural Repair Services was the primary insured on the policy sought to be cancelled by American Interstate, it is only logical to assume that once Jeff Trog received a notice of an intent to cancel the primary insured company's policy, he realized the policy for all the secondarily insured companies (including Valley Erosion) on that same policy would be cancelled as well. He

acknowledged this fact when he testified that by the spring of 2002, he knew Valley Erosion no longer had workers' compensation coverage through American Interstate. The fact that the notice of cancellation sent to Jeff Trog in this case was not specifically addressed to Valley Erosion makes no difference whatsoever. That would be putting form over substance.

West Bend attempts to argue on appeal that regardless of whether Jeff Trog received notice of American Interstate's intention to cancel its workers' compensation policy, American Interstate still cannot deny coverage solely because notice was not filed with the Department of Labor & Industry. However, this would again be putting form over substance. As argued above, the sole purpose of Minn. Stat. §176.185 is to provide employers with timely notice of an intent to cancel a policy. The portion of the statute dealing with filing the cancellation notice with the Department only serves to allow an employer another source for "reminding" it to obtain coverage elsewhere before the cancellation becomes effective. However, in this case, Jeff Trog needed no "reminding." He knew at least by the spring of 2002 that American Interstate no longer insured Valley Erosion. Therefore, the fact that the cancellation notice in question was not filed with the Department has no bearing on whether it affectively achieved its purpose, which was to warn Jeff Trog that his companies' policy with American Interstate was going to be cancelled and he needed to find coverage elsewhere. In fact, Jeff Trog did subsequently obtain replacement workers' compensation insurance for the businesses he was still operating that were the subject of the prior

workers' compensation coverage with American Interstate. Clearly, when Jeff Trog rolled the American Interstate-insured businesses that were still actually operating into one business (Total Repair) and insured it for workers' compensation liability with West Bend, the purpose of the statute was fulfilled.

Even if the court had determined that the cancellation of workers' compensation insurance coverage to Structural Repair Services, Valley Landscaping, or any of the secondarily named companies was not effective, American Interstate would still not have coverage for any injuries occurring to employees of Innovative Lawn Systems.

The testimony with regard to the creation of Innovative Lawn Systems is clear. While John Trog initially used the shell of the corporation known as Valley Erosion to start a new company, he later changed the name of the company to Innovative Lawn Systems to make it clear that this was a new and distinct company from Valley Erosion. New by-laws were created for the new company, shares for the new company were assigned to its new owners and the company pursued at least a somewhat different line of work than the work that had been performed by Valley Erosion. By the time Innovative Lawn Systems was created, Valley Erosion had no equipment or assets and had been unused as a corporation name for some time. Valley Erosion ceased to exist as a functioning corporation. As a new and distinct company, American Interstate's coverage (if any) for Valley Erosion did not extend to Innovative Lawn Services. See Yoselowitz v. Peoples

Bakery, 277 N.W. 221, 224 (Minn. 1938) (holding that coverage under a workers' compensation insurance policy did not extend to a successor corporation).

In its brief, West Bend attempts to argue that a name change alone does not terminate insurance coverage. However, this case involves more than a simple name change between Valley Erosion and Innovative Lawn Systems. It is clear from the testimony of the two people who created Innovative Lawn Systems (Jeff and John Trog) that Innovative Lawn Systems was its own, separate and distinct company from Valley Erosion in every way, shape and form. The only reason the two companies are even remotely connected is that Innovative Lawn Systems was created under the shell of Valley Erosion company, presumably in order to avoid the expense associated with incorporating a brand new company. From the testimony given in this case, it is clear that there was no intention on the part of either Jeff or John Trog to continue the company known as Valley Erosion in any way. In fact, John Trog wanted to distance himself as far as he could from that company, telling his brother he wanted to start anew. If that were not the case, the Trogs would have not changed the name of the company, put new logos and decals on the equipment and gotten rid of every document on which the "Valley Erosion" name was written. Neither of the brothers considered Valley Erosion to be a continuing company after the formation of Innovative Lawn Systems. As the two are clearly distinct and separate companies, any purported insurance coverage which may have existed between American Interstate and Valley Erosion did not carry over to cover Innovative Lawn Systems.

II. THE COMPENSATION JUDGE DID NOT MAKE AN ERROR OF LAW IN DETERMINING THAT INNOVATIVE LAWN SYSTEMS REASONABLY RELIED ON THE REPRESENTATIONS OF WEST BEND'S AGENT THAT IT HAD WORKERS' COMPENSATION INSURANCE COVERAGE THROUGH THAT COMPANY AND THAT WEST BEND WAS ESTOPPED FROM DENYING COVERAGE.

Estoppel is an equitable doctrine "intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights." Northern Petrochemical Co. v. United States Fire Ins. Co., 277 N.W.2d 408 (Minn.1979). In general, there are three elements of equitable estoppel: (1) promises or inducements are made by one party to another; (2) the other party reasonably relies upon the promises or inducements; and (3) the relying party is or will be harmed if estoppel is not applied. Eide v. State Farm Mut. Auto. Ins. Co., 492 N.W.2d 549, 556 (Minn. Ct. App. 1992). See also Lofgren v. Pieper Farms, slip op. (W.C.C.A. July 18, 1997). The doctrine of equitable estoppel applies in workers' compensation cases. See, e.g., Neuberger v. Hennepin County Workhouse, 340 N.W.2d 330 (Minn. 1983); Kahn v. State, Univ. of Minn., 289 N.W.2d 737 (Minn. 1980). Whether equitable estoppel is applicable depends on the facts of each case and is a question for the trier of fact. O'Donnell v. Continental Casualty Co., 263 Minn. 326, 331, 116 N.W.2d 680, 684 (1962).

In the present case, all three elements allowing for the application of the doctrine of equitable estoppel have been met. First, West Bend made representations that Innovative Lawn Systems had workers' compensation

insurance coverage when it issued Certificates of Liability Insurance coverage to the company that specifically included this type of coverage. These representations were then communicated to Innovative Lawn Systems when copies of the certificates were sent to it. There is no dispute that these Certificates were sent to Innovative Lawn Systems by Mr. Just or that they showed, at least on their face, that Innovative Lawn Systems had workers' compensation coverage through West Bend. Therefore, the "promise" of workers' compensation coverage was made by West Bend through these Certificates.

With regard to the reasonableness of John Trog's reliance on the promise of coverage, John Trog was an inexperienced businessman who knew little about workers' compensation insurance coverage, including when it was required and how much it cost. John Trog relied entirely on the expertise of Mr. Just in procuring his insurance needs. Although he never received a bill for workers' compensation insurance, the compensation judge found John Trog reasonably believed that workers' compensation insurance coverage was part of the overall package of insurance for which he was paying a premium to West Bend. He believed that Innovative Lawn Systems had workers' compensation insurance and the Certificates of Liability Insurance only confirmed his belief. Under these circumstances, John Trog's reliance on agent Just was justified and reasonable.

In its brief, West Bend contends it would have been unreasonable for the Trogs to rely on the Certificates of Liability Insurance provided by its agent when they never specifically discussed workers' compensation insurance coverage with

Mr. Just and they never told Mr. Just that Innovative Lawn Systems had employees.

West Bend's arguments are without merit. First, Jeffrey Trog contacted Mr. Just and told him that he was to provide and take care of all of the insurance needs for Innovative Lawn Systems. Jeffrey Trog testified that he believed these "insurance needs" included workers' compensation insurance. Thereafter, John Trog contacted Mr. Just and requested that he provide him with all the needed insurance to operate the business properly. John Trog admitted at trial that he did not know exactly what insurance he needed, but he relied on Mr. Just to tell him what those needs were.

In addition, in order to submit project bids, John Trog and Innovative Lawn Systems had to submit Certificates of Liability Insurance to their clients. In procuring those Certificates of Liability Insurance, John Trog called Mr. Just's office and requested the Certificates of Liability be sent to whichever client he was submitting a project bid. On those occasions, Mr. Just's office issued Certificates of Liability Insurance indicating that Innovative Lawn Systems did in fact have workers' compensation liability insurance. Given the circumstances, and Mr. Just's failure to inform John Trog he did not actually have workers' compensation liability insurance when he provided documents to the contrary, it was not unreasonable for John Trog to rely on the Certificates of Liability Insurance, which indicated Innovative Lawn Systems did have workers' compensation

insurance. Thus, the second criteria for application of the estoppel doctrine has been met.

The third criteria for application of the doctrine of estoppel is that Innovative Lawn Systems must be subject to some sort of damage if workers' compensation coverage with West Bend is not found. In this case, if Innovative Lawn Systems was not covered by this policy of insurance, the company would incur substantial damages as it would be uninsured for the employee's workers' compensation claim and would be subject to penalties from the Minnesota Department of Labor and Industry as a result, as well as the cost of the claim itself.

As Innovative Lawn Systems does not have workers' compensation coverage through American Interstate, West Bend must be estopped from denying coverage under the circumstances of this case as to do so would be detrimental to the employer.

In its attempt to avoid application of the doctrine of equitable estoppel, West Bend argues in its brief that if a contract of insurance is found to exist between it and Innovative Lawn Systems, as John Trog intentionally withheld and misrepresented the fact that the company had employees from Mr. Just in an effort to secure Certificates of Coverage for workers' compensation insurance, West Bend should be relieved of any liability. In making its argument, West Bend cites the case of North Star Center, Inc. v. Sibley Bowl, Inc., 205 N.W.2d 331, 332 (Minn. 1975). However, in that case, the court stated that one party to a contract may rescind the contract only if the other party intentionally conceals a fact

material to the transaction knowing that the other party acts on the presumption that no such fact exists. Id. In the present case, no testimony was produced showing that John Trog intentionally withheld information from Mr. Just regarding his employees. When John Trog first secured insurance coverage from West Bend, he told Mr. Just that Innovative Lawn Systems had no employees at the time, which was a true statement. No evidence was produced showing that at any time subsequent to that time did Mr. Just inquire from John Trog as to the number of employees the company may or may not have had at any given time. John Trog did not intentionally misrepresent any information, as Mr. Just apparently never asked John Trog again how many employees Innovative Lawn Systems had.¹ As such, there was no intentional misrepresentation shown and West Bend cannot now use this argument to avoid its liability in this case.

III. THE COMPENSATION JUDGE HAD JURISDICTION TO DETERMINE THAT WEST BEND WAS ESTOPPED FROM DENYING INNOVATIVE LAWN SYSTEMS WORKERS' COMPENSATION COVERAGE.

The issue presented to the compensation judge was whether the acts of West Bend's agent bound it for workers' compensation liability such that West Bend was estopped from denying coverage. The issue did not involve a circumstance where the compensation judge was asked to interpret the language of a contract that had already come into existence, nor was an issue regarding "errors

¹ If anything, John Trog, as an inexperienced business person, may not have known that he needed to inform Mr. Just of the changes the company's number of employees. As indicated earlier in this brief, Mr. Just never informed John Trog that he needed to keep Mr. Just aware of any new employees he hired. (T. 157)

and omissions” raised. Rather, the compensation judge was asked only to determine if coverage existed at the time of Mr. Schmitt’s injury as a result of the acts of West Bend’s agent. As it relates to that single issue, the compensation judge had proper subject matter jurisdiction.

Generally, compensation judges have broad authority and discretion to hear and determine all issues of fact and law presented to them which arise under the Workers’ Compensation Act. Peterson v. Vern Donnay Construction Co., et. al., 48 W.C.D 664, 669 (W.C.C.A. 1993). Inclusive of this broad grant of jurisdiction is authority to determine coverage issues which are ancillary to the adjudication of the employee’s claim as well as collateral coverage issues where the employee’s rights are not necessarily in dispute. Id.

Inherent in any insurance coverage issue is the threshold determination of whether a contractual relationship ever came into being. This necessarily invokes principles of contract law (e.g., offer, acceptance, consideration, reliance, etc.) and agency theory (e.g., an agent’s authority – actual, implied or apparent – to bind its principal to the terms of a contract), both of which workers’ compensation courts have long been permitted to decide. See Steidel v. Metcalf, 297 N.W. 324 (Minn. 1941); Nehring v. Bast, 103 N.W.2d 368 (Minn. 1960); Oster v. Riley, 150 N.W.2d 43 (Minn. 1967); and Krebs v. Krebs, 36 W.C.D. 288 (W.C.C.A. 1983).

For example, in Nehring, a case which raised issues similar to those presently before this Court, the lower court was asked to decide if the employer was insured for workers’ compensation liability by the insurer, where no written

policy was in effect, due to the negligent acts of its agent. Nehring, 103 N.W.2d at 368. The compensation judge determined that coverage existed under the facts of the case and his decision was upheld by the Minnesota Supreme Court. Id.

Although the issue of jurisdiction was not expressly raised in Nehring, implicit in the Supreme Court's affirmation of the lower courts' findings was the fact that the lower courts had jurisdiction to decide the threshold issue of coverage. Had the Supreme Court determined that the lower court lacked jurisdiction to decide whether coverage existed due to the acts of the insurer's agent, it never would have reached the substantive issues of the case. Rather, the Supreme Court would have summarily dismissed the matter for lack of subject matter jurisdiction as it has done on multiple other occasions. See Taft v. Advance United Expressways, 464 N.W.2d 725 (Minn.1991) (ruling that the compensation judge's jurisdiction did not extend to interpreting or applying the provisions of the Minnesota Insurance Guaranty Act); see also Weber v. City of Inver Grove Heights, 461 N.W.2d 918 (Minn. 1990) (holding that neither the compensation judge nor the Workers' Compensation Court of Appeals has jurisdiction to determine constitutional issues).

Likewise, Krebs raised an issue of an agent's apparent authority to bind the insurer for coverage. Krebs v. Krebs, 36 W.C.D. 288 (W.C.C.A. 1983). In that case, the employee maintained that the insurer should be estopped from denying coverage as the employer detrimentally relied on the instructions he received from the agent with respect to electing coverage for his son. Id. As requested, the

employer sent written notification to the agent that he was electing coverage for his son. Id. The agent advised the employer she “would take care of it” and send an endorsement to the insurer adding the son to the policy. Id. at 290. According to the court, the agent acted as though she had authority to bind the insurer and she did not advise the employer that there would be any delay in obtaining coverage. Id. The Workers’ Compensation Court of Appeals accepted the employee’s contention and found that there was sufficient evidence to support a determination that it was reasonable for the employer to believe that the agent had authority to accept the written notice of election of coverage on behalf of the insurer, despite the arguments of the insurer to the contrary. Id. Again, implicit in the decision of the Workers’ Compensation Court of Appeals was that the compensation judge had jurisdiction to decide the threshold issue of coverage.

Another example can be seen in the Minnesota Supreme Court case Oster v. Riley, 150 N.W.2d 43 (Minn. 1967). The issue presented in Oster was whether the workers’ compensation policy was in effect at the time the deceased employee was initially injured. In Oster, the insurer’s agent represented to the employer that a workers’ compensation policy would be put into effect when the employer “called-in” and notified the agent that additional employees were to be added to the payroll. Id. In fact, it had been the common practice of the employer to “call-in” to the agent when he needed to acquire insurance for his home, cars and boats. Id. On the first day the employee reported to work, the employer did what the

agent instructed, and “called-in” to report the addition of the employee. Id. On that same day, the employee was injured and subsequently died. Id.

The lower courts held, and the Supreme Court affirmed, that the employer could reasonably have understood that he would be insured and the insurer would be bound, based upon the history of dealing between the agent and employer. Id. The Minnesota Supreme Court went on to state that it was “open to the commission to determine whether the employer justifiably thought he was covered by insurance.” Id. Had the Supreme Court believed the lower courts did not have jurisdiction to decide the coverage issue, it would not have indicated that it was within the lower court’s discretion to determine the reasonableness of the employer’s reliance.

The case law clearly establishes the compensation judge in this matter had jurisdiction to determine whether West Bend insured Innovative Lawn Systems for purposes of workers’ compensation liability insurance on the date of the employee’s injury.

IV. INNOVATIVE LAWN SYSTEMS IS NOT ENTITLED TO AN AWARD OF ATTORNEY’S FEES AND COSTS FROM AMERICAN INTERSTATE.

Innovative Lawn Systems’ has asked for review of the compensation judge’s and the Workers’ Compensation Court of Appeals’ denial of its claim for payment of its attorney’s fees and costs. American Interstate Insurance maintains Innovative Lawn Systems has no right, contractually or otherwise, to seek an award of attorney’s fees from American Interstate.

As argued above, there was never a contractual agreement to provide workers' compensation coverage between American Interstate and Innovative Lawn Systems. As such, there was also no duty to defend between American Interstate and Innovative Lawn Systems with regard to any claim brought against it by Mr. Schmitt or anyone else. Even if there had been a duty to defend (which is clearly not the case), according to the Minnesota Court of Appeals' holding in Sazama Excavating v. Wausau Ins. Cos., 521 N.W.2d 379 (Minn. Ct. App. 1994), the type of attorney's fees being sought by Innovative Lawn Systems are not awardable in workers' compensation cases. The court in Sazama concluded that as there is not specific legislative authority for an award of attorney's fees where an insurer fails to defend an employer under the Minnesota Workers' Compensation Act, attorney's fees could not be awarded against the insurer. Id. at 383. Given this clear precedent, attorney's fees cannot be awarded to Innovative Lawn Systems against American Interstate.

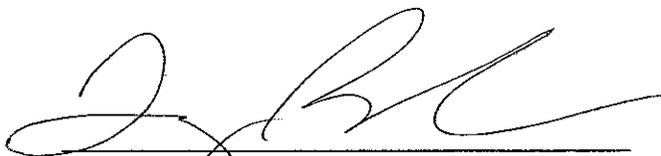
CONCLUSION

Based upon the foregoing, American Interstate respectfully requests that the Findings and Orders of Compensation Judge Gary Mesna be affirmed in their entirety.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).