MARK BROSE, Employee, v. TRANS X, INC., SELF-INSURED/ADMIN'D BY ADMINISTRATIVE CLAIM SERV., Employer, and M.W. ETTINGER and NATIONAL AMER. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 18, 1998

HEADNOTES

APPEALS. Where the hearing on the self-insured employer's contribution claim had not yet been held, and Ettinger and National American had not yet been ordered to pay either benefits or interest on benefits, the appeal of Ettinger and its insurer from a settlement judge's issuance of a temporary order under Minn. Stat. § 176.191 was premature, in that the availability of 12% interest under Minn. Stat. § 176.191 could most efficiently be determined in conjunction with an appeal following hearing and decision on the merits of the contribution claim.

Appeal dismissed.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.
Settlement Judge: John Ellefson.

OPINION

DEBRA A. WILSON, Judge

M. W. Ettinger and National American Insurance Company appeal from a settlement judge's issuance of a temporary order covering benefits previously paid to the employee voluntarily by Trans X, self-insured.[1] We dismiss the appeal as premature.[2]

BACKGROUND

The pertinent facts are undisputed. The employee evidently sustained two work-related injuries relevant to these proceedings. The first injury, on April 8, 1991, occurred while the employee was employed by a company referred to by the parties as M. W. Ettinger,[3] which

[1] The employee did not take part in this appeal.

[2] Because of this disposition, we need not address Trans X's motion to dismiss the appeal or strike the appellant's brief for late filing of that brief.

[3] The parties' briefs indicate that, on the date of this injury, the employee was actually employed not by Ettinger but by Trans X, which had previously purchased Ettinger. However, because most of the pleadings designate Ettinger as the employee's employer for this injury, the

was insured for workers' compensation purposes by National American Insurance Company [National American]. The second injury, on May 7, 1992, occurred while the employee was working for Trans X, Inc., which was then self-insured. Trans X voluntarily commenced payment of workers' compensation benefits.

On June 29, 1995, after receiving a medical report indicating that the employee's 1991 injury was responsible for a portion of the employee's disability, Trans X filed a petition for contribution or reimbursement from Ettinger and Wausau Insurance Company. An amended petition, naming Ettinger and National American, was filed in October of 1995 when Trans X determined that Wausau was not Ettinger's insurer at the time of the 1991 injury. Ettinger and National American subsequently filed a motion to dismiss the petition, contending that Trans X's contribution claim was barred by the 1995 amendments to Minn. Stat. § 176.191,[4] providing for arbitration of equitable apportionment disputes. Trans X agreed to withdraw the petition, and in an order issued on March 28, 1996, a compensation judge struck the matter from the trial calendar. When Trans X then filed a petition for arbitration of the claim, Ettinger and National American apparently responded by asserting that this latest petition had been filed improperly with the Workers' Compensation Division, rather than with the Arbitration Administrator, and that jurisdiction to hear the petition for arbitration was therefore lacking. In the meantime, the employee and Trans X entered into a settlement agreement whereby the employee agreed to accept $113,000 in full, final, and complete settlement of all claims relating to both work injuries, except future medical expense claims. Ettinger and National American were not parties to this agreement. An award on stipulation was issued on July 15, 1996.

On June 18, 1997, Trans X filed a petition for a temporary order, requesting that a temporary order

> be issued allowing the self-insured employer to have all past voluntary benefits, including benefits paid pursuant to the Award on Stipulation served and filed July 15, 1996, together with future medical expenses, to be deemed to have been paid pursuant to a Temporary Order pursuant to Minn. Stat. § 176.191.

On June 24, 1997, prior to any formal notice to or response by Ettinger and National American, a settlement judge issued a temporary order in conformance with Trans X's request. Three days later, Ettinger and National American filed an answer to Trans X's petition for temporary order, asking that the petition be denied. The settlement judge treated Ettinger's answer as a motion to reconsider and held a telephone conference on July 22, 1997, to allow the parties to present their respective positions. On August 21, 1997, the settlement judge issued an Order Dismissing

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parties continued the practice. To avoid confusion, and because we have no actual evidence regarding the appropriate employer, we will follow suit.

[4] See Minn. Stat. § 176.191, subds. 1a and 5 (1996).

Request to Deny the Issuance of Temporary Order, concluding that the temporary order had been properly issued. Ettinger and National American appealed from this order on September 17, 1997. On September 22, 1997, Trans X filed another petition for contribution or reimbursement from Ettinger and National American.

DECISION

The current dispute illustrates the unpopularity of the 1995 amendments to Minn. Stat. § 176.191, which provide in part as follows:

> **Subd. 1a**. **Equitable apportionment**. Equitable apportionment of liability for an injury under this chapter is not allowed except that apportionment among employers and insurers is allowed in a settlement agreement filed pursuant to section 176.521, and an employer or insurer may request equitable apportionment of liability for workers' compensation benefits among employer and insurers by arbitration pursuant to subdivision 5. For purposes of this subdivision, the term equitable apportionment of liability shall include all attempts to obtain contribution and/or reimbursement from other employers or insurers. To the same extent limited by this subdivision, contribution and reimbursement actions based on equitable apportionment are not allowed under this chapter . . . .
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> **Subd. 5. Arbitration**. Where a dispute exists between an employer, insurer, the special compensation fund, or the workers' compensation reinsurance association, regarding apportionment of liability for benefits payable under this chapter, and the requesting party has expended over $10,000 in medical or 52 weeks worth of indemnity benefits and made the request within one year thereafter, a party may require submission of the dispute as to apportionment of liability among employers and insurers to binding arbitration. The decision of the arbitrator shall be conclusive on the issue of apportionment among employers and insurers . . . .

Id. at subds. 1a and 5. In 1997, the legislature amended Minn. Stat. § 176.191 again, this time to provide that a party paying under a temporary order may petition for a formal hearing before a compensation judge for a determination of liability among the parties, thereby avoiding arbitration. Id., subd. 1. It appears likely that Trans X filed its unusual petition for a temporary order in part to avoid the arbitration requirements of the 1995 amendments, and in its initial brief on appeal, Ettinger and National American focused on the inequity of allowing Trans X to circumvent the arbitration provisions in this manner. However, in their reply brief, Ettinger and National American acknowledged that several decisions by this court--decisions issued after the original

temporary order was requested--would almost certainly allow Trans X to pursue its contribution claim before a compensation judge, notwithstanding the 1995 amendments. See, e.g., Peterson v. O.R. Anderberg Constr., No. *[redacted to remove social security number]* (W.C.C.A. Oct. 19, 1997); Silva v. Maplewood Care Ctr., No. *[redacted to remove social security number]* (W.C.C.A. June 18, 1997).[5] In fact, at oral argument, Ettinger and National American conceded that, given this court's decisions in Silva and Peterson, the only remaining issue of any consequence is whether Trans X may properly receive 12% interest for benefits paid under the temporary order, pursuant to Minn. Stat. § 176.191, subd. 1, should Trans X ultimately prevail in its contribution claim.

There is some question whether the temporary order in this matter is properly appealable. See, e.g., Finney v. Owatonna Canning Co., 41 W.C.D. 1027 (W.C.C.A. Mar. 14, 1989) (a temporary order is not ordinarily appealable because such an order does not usually affect the merits of the case or preclude a later determination on the merits; however, a temporary order issued outside the scope of Minn. Stat. § 176.191 is appealable). Moreover, it is at least arguable that Ettinger and National American, which were not parties to the temporary order, lack standing to challenge it. However, whatever the merits of these concerns, we conclude that the present appeal is premature from a judicial economy standpoint. The hearing on Trans X's petition for contribution has not yet been held, and Ettinger and National American have not yet been ordered to pay either any benefits or any interest on benefits. Depending on the outcome of Trans X's contribution claim, determination of Ettinger's potential liability for 12% interest under Minn. Stat. § 176.191 may never be necessary. We also note that the availability of interest under Minn. Stat. § 176.191 is not an issue requiring the submission of evidence at hearing. As such, deferring resolution of the question places no additional burden on the parties in the upcoming litigation. Therefore, because the issue can be resolved, if need be, most efficiently in conjunction with an appeal following decision on the merits of the pending claim for contribution and reimbursement, we dismiss Ettinger's appeal.

[5] In Silva and Peterson, this court clarified that the 1995 amendments to Minn. Stat. § 176.191, ostensibly limiting contribution disputes to resolution through arbitration, are applicable only if both employers and/or insurers are unquestionably liable for some portion of the employee's disability. Appeals in both Silva and Peterson are currently under consideration by the Minnesota Supreme Court.