TIMOTHY DAVIS, Employee, v. CBI NA-CON, INC., and INS. CO. OF THE STATE OF PENN., admin'd by CRAWFORD & CO., Employer-Insurer/Appellants, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 16, 1999

No. [REDACTED SSN]

HEADNOTES

JURISDICTION - NON-RESIDENT; JURISDICTION - OUT-OF-STATE INJURY; STATUTES CONSTRUED - MINN. STAT. § 176.041, SUBDS. 2 & 4. For Minnesota jurisdiction to exist, the employee must have been regularly performing the primary duties of his employment in Minnesota about the time he was injured outside the state. Determination of jurisdiction under subdivision 2 of the statute may entail analysis of complexities in the unique circumstances of each case that normally may be more directly relevant to application of subdivisions 3 and 4 of the statute. Where, under stipulated facts, the employee had been a resident of Kentucky at the time of his hiring and was living in Louisiana on the date of his diagnosis and hospitalization for work-related silicosis, where he had never been a resident of Minnesota, where his employer was a Texas corporation that had never maintained a Minnesota facility from which it conducted any permanent operations, where the employee's job assignments and paycheck originated from Texas, and where the employee last worked under Minnesota exposure to silica two years prior to the effective date of his work injury by silicosis and had worked with exposure to silica in four other states for nearly two years thereafter, Minnesota jurisdiction for the employee's work-related silicosis condition did not exist, notwithstanding the fact that the total number of work assignment days involving exposure to silica, over the course of seventeen years prior to the employee's work injury, was greater in Minnesota than in any other state.

Reversed.

Determined by Pederson, J., Hefte, J., and Johnson, J.
Compensation Judge: David S. Barnett.

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination of subject matter jurisdiction pursuant to Minn. Stat. § 176.041, subd. 2 (1993), and from the judge's consequent award of workers' compensation benefits. We reverse.

BACKGROUND

This claim was submitted to the compensation judge based on stipulated facts, without any live or deposition testimony. The parties have agreed to the following pertinent facts. The employee, Timothy Davis, was hired by Chicago Bridge and Iron Company [CBI] in March 1976. CBI is an Illinois corporation with its principal place of business in Illinois. CBI built water towers and other large storage tanks like those in oil refineries. On or about May 27, 1985, the employee left CBI and became an employee of CBI Na-Con, Inc. [Na-Con]. Na-Con is a Texas corporation with its principal place of business in Texas. Na-Con also built water towers and other large storage tanks.

From March 1976 until approximately June 1993, the employee's principal place of residence was Harned, Kentucky. In about June 1993, the employee purchased a travel trailer/mobile home. Since that time, the employee and his family have lived about ten months each year in their mobile home which has been kept in Reserve, Louisiana, and have lived about two months each year (during the summer) in a home they continue to own in Harned, Kentucky. The employee's children have attended school in Louisiana since the fall of 1993. In 1991, 1992, and 1993, the employee filed income tax returns in the state of Kentucky, listing his residence as Harned, Kentucky. In 1994, the employee filed income tax returns in the state of Louisiana, listing his address as Reserve, Louisiana.

Attached as Exhibit A to the Stipulated Facts submitted to the compensation judge is a chart which depicts the job sites the employee worked at for CBI and Na-Con between March 23, 1976, and August 15, 1993, setting forth certain information with respect to each job site. The exhibit includes the dates of the employee's assignment to each job site, a brief description of the job performed by the employee at each site, and whether silica-containing materials were used at the job site. The parties agreed that the exhibit was not to be construed as indicating silica exposure during the entire period of each assignment, as the periods of assignment included days off as well as days when, due to the tasks performed, the employee was not being exposed to silica.

The employee's initial position with CBI was as a painter and laborer/sandblaster helper. The employee held this position throughout 1976 and early 1977. During this time, the employee helped the sandblasters, tended pot (which included filling "pots" with silica sand for use by the sandblasters), worked inside tanks or vessels which were being sandblasted, and did cleanup work. From early 1977 through 1985, the employee performed interior and exterior sandblasting (primarily on water towers and occasionally on other types of vessels, tanks, or structures), tended pot, performed interior work in vessels during sandblasting operations, and did cleanup work inside tanks or vessels after sandblasting had taken place.

From 1986 through 1993, the employee's position with Na-Con was that of paint foreman. During this time, generally, the employee did interior and exterior sandblasting, supervised interior and exterior sandblasting and painting by others, tended pot, filled sand cans (occasionally), and did occasional interior work in vessels during or after sandblasting operations. In 1994 and 1995, the employee worked for Na-Con in a field office in a sedentary capacity, with no exposure to silica-containing materials.

Between March 1976 and November 1993, the employee performed work for CBI and Na-Con in Arizona, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, Texas and Wisconsin. While working in these states, the employee would temporarily reside near his current job site, in a hotel or motel or other temporary accommodation. In the course of this employment between March 23, 1976, and August 15, 1993, the employee was exposed to silica-containing materials on those job sites where silica sand was utilized. The employee's last job in Minnesota ended on September 21, 1991. Thereafter the employee was exposed to silica-containing materials at seven different job sites in four states, his last exposure being at a job site in Pascagoula, Mississippi, between August 1 and August 15, 1993. As of August 15, 1993, the date of his last exposure, the employee was earning a wage of at least $766.80, sufficient to entitle him to the maximum compensation rate then in effect in Minnesota, $481.95 per week.[1]

On November 16, 1993, at the age of thirty-seven, the employee became disabled from the occupational disease of silicosis. The employee's silicosis arose out of and in the course of his employment with CBI and Na-Con. From November 16 to November 29, 1993, the employee was hospitalized at River Parishes Hospital in LaPlace, Louisiana, for a pneumothorax of the left lung for which, on November 26, 1993, he underwent an apical blebectomy, a resection of blebs of the lower lobe, and pleurodesis. During the course of this treatment, the employee was diagnosed as having silicosis. The employee was living at the time in his mobile home/travel trailer in Reserve, Louisiana. He returned to work with Na-Con following his hospitalization, but he was hospitalized a second time at the same hospital in October 1994, for a pneumothorax of the right lung, for which, on October 21, 1994, he underwent a thoracoscopy apical blebectomy and pleurodesis.

On February 6, 1996, the employee filed a Claim Petition alleging entitlement to temporary total disability benefits or, in the alternative, permanent total disability benefits from December 11, 1995, to the present and continuing, as well as benefits for a permanent partial disability of 50% to 75% of the body as a whole, due to the occupational lung disease of silicosis related to his employment with Na-Con. The employee identified November 16, 1993, as his date of injury, which was the date upon which he was first hospitalized and his condition of silicosis diagnosed. Na-Con and its insurer filed an Answer to the petition on February 28, 1996, asserting in part that Minnesota lacked subject matter jurisdiction for the claim.

Subsequent to the filing of the employee's Claim Petition, and commencing on or about May 1, 1996, Na-Con and its insurer began paying the employee disability benefits under the laws of the state of Louisiana, in the amount of $323.00 per week. Payment was made with the understanding that receipt of those benefits by the employee did not constitute an election to

[1] Minn. Stat. § 176.66, subd. 11 (1993), provides that the compensation rate for an occupational disease is 66-2/3 percent of the employee's weekly wage on the date of injury, subject to the maximum compensation rate in effect on the date of last exposure.

submit to Louisiana jurisdiction; instead, the employee maintained the right to assert entitlement to benefits in Minnesota. The employee was also found to be entitled to Social Security disability benefits based upon an onset of disability on December 11, 1995, with benefits payable commencing June 1996.

On March 30, 1998, the employee filed an Amended Claim Petition, joining the Special Compensation Fund as a party because of the Fund's liability for supplementary benefits.[2] The parties stipulated that the employee would be eligible for supplementary benefits as of August 15, 1997.

The matter was submitted to Compensation Judge David S. Barnett on stipulated facts on June 16, 1998. In addition to the facts set forth above, the parties also agreed in substance that, as a result of his work-related silicosis, the employee has been permanently and totally disabled since December 11, 1995, with a current permanent partial disability to 50% of the body as a whole due to the condition, pursuant to provisions of Minn. R. 5223.0560, subp. 2.D. This permanency rating was based upon pulmonary function testing at the Mayo Clinic on August 6, 1997, and at East Jefferson General Hospital on September 24, 1997. It was further agreed that permanent partial disability benefits would be payable as impairment compensation concurrently with permanent total disability benefits. In addition to stipulated facts, the parties submitted written arguments to the compensation judge on the issue of Minnesota jurisdiction for the employee's claim. The employee argued that Minnesota jurisdiction could be found under Minn. Stat. § 176.041, subd. 2 and/or subd. 4. In his Findings and Order, served and filed August 6, 1998, Judge Barnett determined that there was Minnesota jurisdiction over the employee's claim pursuant to Minn. Stat. § 176.041, subd. 2, and he ordered payment of benefits in accordance with the stipulated facts. Na-Con and its insurer appeal.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Jurisdiction Pursuant to Minn. Stat. § 176.041, subd. 2

As a general rule, injuries which occur outside of Minnesota are not subject to the

[2] Pursuant to Minn. Stat. § 176.66, subd. 11 (1993), "[t]he employee shall be eligible for supplementary benefits notwithstanding the provisions of section 176.132, after four years have elapsed since the date of last significant exposure to the hazard of the occupational disease if that employee's weekly compensation rate is less than the current supplementary benefit rate."

Minnesota Workers' Compensation Act. Minn. Stat. § 176.041, subd. 5a ("[e]xcept as specifically provided by subdivisions 2 and 3, injuries occurring outside of this state are not subject to this chapter"). Moreover, the extraterritorial application of the Minnesota Workers' Compensation Act "is limited by the terms of the statute itself. Thus, whether [the employee's] injury is compensable under the Minnesota Workers' Compensation Act will depend on whether the circumstances of [the employee's] employment and injury fall within the applicable statute's extraterritorial application provisions." Morrisette v. Harrison International Corp., 486 N.W.2d 424, 427, 46 W.C.D. 721, 724 (Minn. 1992). The primary arguments of the parties before this court pertain to whether the compensation judge properly concluded that jurisdiction is afforded by Minn. Stat. § 176.041, subd. 2.

Minn. Stat. § 176.041, subd. 2, provides as follows:

> Subd. 2. **Extraterritorial application.** If an employee who regularly performs the primary duties of employment within this state receives an injury while outside of this state in the employ of the same employer, the provisions of this chapter shall apply to such injury. If a resident of this state is transferred outside the territorial limits of the United States as an employee of a Minnesota employer, the resident shall be presumed to be temporarily employed outside of this state while so employed.

In his analysis and application of Minn. Stat. § 176.041, subd. 2, to the stipulated facts, the compensation judge emphasized that between May 27, 1985, and August 15, 1993, while the employee worked for Na-Con, the total number of days during which the employee was assigned to Minnesota jobs involving silica exposure was significantly greater than the number of days during which he was assigned to such jobs in any other state. Apparently on that basis, the judge found Minnesota jurisdiction, concluding that the employee had regularly performed the primary duties of employment within the state of Minnesota, pursuant to the statute's interpretation in Gillund v. Royal/Milbank Ins. Co., 46 W.C.D. 520 (W.C.C.A. 1992), and Burgard v. Innworks, Inc., slip op. (W.C.C.A. May 6, 1996).

In Gillund, this court had held that,

> [t]he statute does not require that more of the employee's time be spent in Minnesota than elsewhere, only that the employee regularly performed "primary" job duties in this state. A "primary" duty may be defined as one which is "a fundamental or basic part of an organized whole." The American Heritage Dictionary, 983 (2d Ed. 1985).

46 W.C.D. at 523-24. With respect to the regularity requirement, the court in Gillund defined "regularly" as "customar[il]y, usual[ly], or normal[ly]." Gillund, 46 W.C.D. at 524, citing The American Heritage Dictionary, 1041 (2d Ed. 1985). The compensation judge concluded in the

instant case that the employee clearly performed "fundamental" duties in Minnesota which were a "basic part of an organized whole." In addition, the judge concluded that the employee's employment in Minnesota was customary, usual, and/or normal. Besides placing particular emphasis on the fact that the employee's total number of days at job assignments in Minnesota was greater than his number of days at assignments in any other state, the judge noted that the employee had worked in Minnesota every year from 1982 through 1991.

Na-Con and its insurer contend that "[a] Louisiana resident who (a) sustained a personal injury in Louisiana two years after his last contact with Minnesota, (b) did not, and did not contend that he ever would, work in Minnesota again, and (c) had no more than infrequent, intermittent, and irregular employment in Minnesota during the course of his 17 year career as a traveling painter working in 20 different states, is not 'an employee who regularly performs the primary duties of employment within [Minnesota]' within the meaning of Minn. Stat. § 176.041 (2)."[3] Na-Con and its insurer also argue that this court's recent decision in Letourneau v. Benson Elec., slip op.5 (W.C.C.A. June 16, 1998), makes it clear that Minn. Stat. § 176.041, subd. 2, requires "a) a truly regular, not an irregular or episodic, presence in Minnesota and b) that there be a contemporaneous, or at least near-contemporaneous, relationship between his 'regular perform[ance]' and the injury."

It is clear from the evidence that the employee performed duties "fundamental" to his employment in Minnesota, as well as in nineteen other states. The employee worked for the CBI and Na-Con as a painter/sandblaster wherever he was assigned, throughout the Midwest, South, and Southwest. There is no suggestion in the record that the duties performed by the employee in Minnesota were any different from or less "primary" than were the duties he performed in any other state. To that extent, we concur with the compensation judge that the employee performed the primary duties of his employment within the state of Minnesota. The parties have stipulated, however, that the employee's last date of employment in Minnesota was September 21, 1991. His date of injury is November 16, 1993. Thus, the employee did not regularly perform the duties of his employment within this state for more than two years prior to his injury. The compensation judge offers no explanation as to how he reconciled the statutory requirement of "regularly performs" with a two-year preinjury absence from the state. The adjectives used by the Gillund court to define "regularly" apply to what is frequent in occurrence and consequently considered regular or expected. The employee's performance of work in Minnesota varied considerably between 1985 and 1991. There was no evidence suggesting a constancy or predictability to the employee's work in this state. Even if we agreed with the

[3] In support of their position, Na-Con and its insurer cite Washington v. Donaldson's, 359 N.W.2d 599, 36 W.C.D. 643 (Minn. 1984), for the proposition that "[d]isablement occurs when an occupational disease '[progresses] to the point of interfering with [the employee's] bodily functions to such an extent that he could no longer perform the duties of his employment,'" arguing that, although he last worked in Minnesota on September 21, 1991, as documented in Exhibit "A" attached to the Stipulated Facts submitted to the compensation judge, the employee was not disabled and hospitalized until November 16, 1993, in the state of Louisiana.

compensation judge that the employee regularly performed the duties of his employment within this state through September 21, 1991, we cannot conclude that regular performance in 1991 extends to all dates in the future. Although the quantity of time an employee spends within this state may be an important factor in the determination of what constitutes regular performance, we believe that the statute reasonably requires some temporal nexus between the regular performance of primary duties within this state and the injury outside of this state.

More importantly, however, we believe the analysis required by subdivision 2 does not fit precisely with the transitory nature of the employee's employment. In the context of this employment relationship, we question whether it is appropriate to conclude that the employee regularly performs employment duties in any state. To suggest that the employee regularly performs his primary duties in this state because the total number of days of job assignments in Minnesota were more numerous than any of the other 19 states in which the employee worked ignores the transitory nature of the duties performed. During the period of May 27, 1985 to August 15, 1993 (the Na-Con time frame), the employee worked at 74 job sites in 13 states. Each job site consisted of specific duties which, when completed, called for the employee moving to a new site. Each project was considered a temporary job site. "Employees whose work activity, by its very nature, is transient constitute a unique class." Vaughn v. Nelson Bros. Constr., 520 N.W.2d 395, 397, 51 W.C.D. 159, 161 (Minn. 1994).

Our supreme court had occasion to consider traveling or transitory employees in Vaughn, id. In Vaughn, in which subdivision 3 of the statute was primarily at issue, the court concluded that a traveling or transitory employee's situation was "reasonably within the scope of the statutory objective"[4] where the employer-employee relationship was centered in Minnesota. The court quoted with approval Professor Larson's treatise, which, it concluded,

> presents the general notion that jurisdiction should be present where the employment relationship is centered. "In this view, the existence of the employer-employee relation within the state gives the state an interest in controlling the incidents of that relation, one of which incidents is the right to receive and the obligation to pay compensation."

Vaughn, 520 N.W.2d at 396, 51 W.C.D. at 160-61, quoting 4 Arthur Larson, The Law of Workmen's Compensation, § 87.41, at 16-114 (1994). With regard to transitory or traveling employees, Professor Larson states as follows:

> In some kinds of employment, like trucking, flying, selling or construction work, the employee may be constantly coming and going without spending any longer sustained periods in the local

[4] 520 N.W.2d at 397, 51 W.C.D. at 162, quoting Fischer v. Malleable Iron Range Co., 303 Minn. 1, 5, 225 N.W.2d 542, 545, 27 W.C.D. 773, 777 (Minn. 1975).

> state than anywhere else; but having rooted his status in the local state by the original creation of the relation there, he does not lose it merely on the strength of the relative amount of time spent in the local state as against foreign states. He loses it only when his regular employment becomes centralized and fixed so clearly in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen as long as his presence in any state, even including the original state, is by the nature of his employment brief and transitory.

Id., § 87.42 (b), at 16-120 to 16-123.

Although it is undisputed that the employee in the instant case was not hired in Minnesota and that subdivision 3 is therefore inapplicable, we believe the supreme court's analysis in Vaughn is nevertheless instructive in this case. The Vaughn court extended coverage under subdivision 3 because the employer-employee relationship was centered in Minnesota. The court noted that "[a]lthough the quantity of time an employee spends in a single locale may be a factor in the determination of the situs of the employment relation, it should not be controlling." Vaughn at 397, 51 W.C.D. at 162. The court found it determinative that the facility that controlled Mr. Vaughn and his assignments was located in Minnesota, that Mr. Vaughn's paycheck was issued from Minnesota, that Mr. Vaughn would travel to Minnesota for administrative tasks, and that Mr. Vaughn's employment had not become centralized or fixed in another state. We believe the circumstances of employment in the instant case clearly evidence that Mr. Davis was in the unique class of employees who are always at a temporary location. Other than the time analysis offered by the employee, we see no factors that would suggest that the employer-employee relationship had become centered in Minnesota. The employee was initially hired by CBI, an Illinois corporation. On November 16, 1993, the date of injury, the employee was employed by Na-Con, a Texas corporation. There is no evidence to suggest that CBI or Na-Con ever maintained a Minnesota facility from which it conducted any operations aside from a temporary job site. Nor is there evidence that the employee's job assignments and paycheck originated in Minnesota.

In addition to the absence of a significant employment nexus in Minnesota, we find the following facts are material to jurisdiction. On the date of injury, the employee was residing in Reserve, Louisiana. When he was hired by CBI and Na-Con, he was a resident of Harned, Kentucky. Through 1993, the employee filed income tax returns in the state of Kentucky, listing his residence as Harned, Kentucky. In 1994, the employee filed income tax returns in the state of Louisiana, listing his address as Reserve, Louisiana. At no time has the employee established a residence in the state of Minnesota. The employee was exposed to silica-containing materials at multiple job sites, at temporary locations in twenty states between March 23, 1976, and August 15, 1993. The employee's last job in the state of Minnesota ended on September 21, 1991. The employee continued to perform his regular job duties and to be exposed to silica-containing materials for nearly two years thereafter, in four states, until his last exposure on August 15, 1993,

in Mississippi. Under the facts here presented, and particularly by analogy with the supreme court's analysis in Vaughn, we conclude that Minn. Stat. § 176.041, subd. 2, is inapplicable to this case and that the jurisdiction of the Minnesota Workers' Compensation Act does not extend to this claim.

Jurisdiction Pursuant to Minn. Stat. § 176.041, subd. 4

The compensation judge found Minnesota jurisdiction under Minn. Stat. §176.041, subd. 2. While contending primarily that that determination was proper, given the stipulated facts and circumstances of this case, the employee suggests in the alternative that jurisdiction is also afforded under the provisions of Minn. Stat. § 176.041, subd. 4.[5] Subdivision 4 applies if the employee regularly performs his job outside the state but "receives an injury within this state in the employ of the same employer."[6] The employee argues that

> it is crucial to an analysis of the jurisdiction issue in this case to be ever-reminded that this is an **occupational disease case involving a latent lung disease**. In other words, the injury occurred due to the inhalation of silica particles, but the manifestation of the injury does not occur until some time after the inhalation (hence, the latent

[5] The employee has not briefed this contention in any detail but has requested in his brief that, since the argument was raised at hearing but not addressed by the compensation judge, the argument be preserved as a ground for appeal from any reversal by this court. Na-Con and its insurer contend that the ground cannot be preserved, in that the employee did not timely cross appeal from the judge's failure to address the argument in his decision. Because the argument was evidently raised at hearing, because the case comes to us on stipulated facts, and because the issues at hearing as identified in the compensation judge's decision included jurisdiction in general but not jurisdiction under any particular statutory subdivision or subdivisions, we infer that the judge's finding of jurisdiction embraced all of the employee's arguments below, and we address the argument on appeal accordingly.

[6] The complete text of Minn. Stat. § 176.041, subd. 4, is as follows:

> **Subd. 4. Out-of-state employments.** If an employee who regularly performs the primary duties of employment outside of this state or is hired to perform the primary duties of employment outside of this state, receives an injury within this state in the employ of the same employer, such injury shall be covered within the provisions of this chapter if the employee chooses to forego any workers' compensation claim resulting from the injury that the employee may have a right to pursue in some other state, provided that the special compensation fund is not liable for payment of benefits pursuant to section 176.183 if the employer is not insured against workers' compensation liability pursuant to this chapter and the employee is a nonresident of Minnesota on the date of the personal injury.

nature of the injury).

(EE brief at pp. 4-5; emphasis in original.) Because it is the inhalation of the silica that causes the injury, and because the employee was exposed to silica on more days in Minnesota than in any other state, the employee argues that he received an injury within this state under the provisions of subdivision 4. We are not persuaded.

Quoting Washington v. Donaldson's 359 N.W.2d 599, 37 W.C.D. 292 (Minn. 1984), Na-Con and its insurer assert that disablement by an occupational disease under Minn. Stat. § 176.66, subd. 1, does not occur until the disease progresses "to the point of interfering with [the employee's] bodily functions to such an extent that he could no longer perform the duties of his employment." They argue that under this rule the work injury of the employee in this case occurred in Louisiana on November 16, 1993, more than two years after the employee's last job in Minnesota. They note further that the employee continued to work on sandblasting jobs in other states and continued to be exposed to silica-containing materials well after leaving Minnesota.

We believe that Minn. Stat. § 176.041, subd. 4, is also inapplicable to this case for the same reasons that subdivision 2 is inapplicable. Mr. Davis' exposure to silica-containing materials occurred at multiple job sites in multiple states. In the absence of a permanent situs of employment, his employment in any state is temporary, and therefore our supreme court's analysis in Vaughn applies to subdivision 4 as well. We conclude that Minnesota simply does not have a substantial connection to or interest in the employment relationship between Mr. Davis and his employer, and his situation does not "reasonably [fall] within the scope of the statutory objective."