FRANK L. GLAPA, Employee, v. FRASER SHIPYARDS, INC., and EMPLOYERS MUT. LIAB., Employer-Insurer, FRASER SHIPYARDS, INC., and AETNA CAS. & SUR., Employer-Insurer/Appellants, UNITED TRUCK BODY CO., INC., and AETNA CAS. & SUR., Employer-Insurer, UNITED TRUCK BODY CO., INC., and TRAVELERS INS. CO., Employer-Insurer, MCKENZIE-HAGUE-GILLES CO. and FIDELITY & GUAR. INS. CO., Employer-Insurer, BETHLEHEM STEEL CORP., SELF-INSURED, Employer, MESABA IRON WORKS, INC., and STANDARD FIRE INS., Employer-Insurer, CLYDE IRON WORKS, INC., UNKNOWN INSURER, Employer, MORTENSON EXCAVATING, UNKNOWN INSURER, Employer, WALKER JAMAR CO. and EMPLOYERS OF WAUSAU INS., Employer-Insurer, BECHTEL CORP./SEQUOIA VENTURES and INDUS. INDEM. CO., Employer-Insurer, PEERLESS AUTO BODY and HARTFORD INS. CO., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 13, 1999

No. [REDACTED SSN]

HEADNOTES

JURISDICTION - OUT-OF-STATE INJURY; JURISDICTION - SUBJECT MATTER. Where the employee, a Minnesota resident who sustained an occupational disease injury in Minnesota, was hired in Wisconsin by a Wisconsin employer and worked solely in Wisconsin, subject matter jurisdiction in Minnesota was lacking.

Reversed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Richard C. Lund.

OPINION

DEBRA A. WILSON, Judge

Fraser Shipyards and its insurer appeal from the compensation judge's order denying their motion to dismiss on jurisdiction grounds. We reverse.

BACKGROUND

On December 15, 1995, the employee filed a claim petition alleging entitlement to permanent partial disability benefits due to asbestosis, asbestosis-related pleural disease, and sarcoidosis. Fraser Shipyards [Fraser], a Wisconsin business that employed the employee for about three months in the early 1980s, was one of nine named employers. On February 12, 1996, two months after the claim petition was filed, Fraser and its insurer filed both an answer and a

motion to dismiss. In their answer, Fraser denied liability; "affirmatively allege[d] all jurisdiction, statute of limitations and notice defenses"; and incorporated by reference the motion to dismiss. In the motion to dismiss, which was accompanied by an affidavit from their counsel, Larry Peterson, Fraser and its insurer asserted that personal and subject matter jurisdiction were lacking. The attached affidavit indicated that Mr. Peterson had been counsel for Fraser and its insurer since 1980; that he was very familiar with Fraser's operations; that Fraser had not conducted any business operations outside the state of Wisconsin during the employee's employment; that the employee had been hired by Fraser in Wisconsin; and that the employee had not performed any duties for Fraser outside of its premises in Wisconsin.

In a letter in the division file dated May 9, 1996, Mr. Peterson requested a ruling from Compensation Judge Richard Lund on Fraser's motion to dismiss. Enclosed with this letter were copies of three pieces of correspondence that had been sent by Mr. Peterson to Steven Hawn, the employee's attorney, asking Mr. Hawn to voluntarily dismiss Fraser Shipyards from the action on grounds that the employee had worked for Fraser only in Wisconsin. The file contains no response by Judge Lund to Mr. Peterson's request. Similarly, there is no evidence in the file of any written response by Mr. Hawn to Mr. Peterson's three letters to him, to Mr. Peterson's letter to Judge Lund, or to the motion to dismiss.

On April 29, 1997, the employee filed an amended claim petition, this time not naming Fraser and its insurer as potentially liable parties. However, about a year later, on May 27, 1998, a second amended claim petition was filed, again including Fraser and its insurer, describing the nature of the employee's alleged injury as asbestosis, asbestos-related pleural disease, chronic obstructive pulmonary disease, asthma, and severe hypoxia.

In early June 1998, Fraser and its insurer filed a renewed motion for dismissal, again on both personal and subject matter jurisdiction grounds. Attached to this motion were Mr. Peterson's previous affidavit; a letter from Allen Rivord, an employee in Fraser's personnel/labor relations department, indicating that the employee could have worked for Fraser only in its Superior, Wisconsin plant[1]; a letter from Ronald Peterson, Fraser's yard superintendent during the employee's employment, corroborating Mr. Rivord's account of where the employee had worked; and personnel records from Fraser concerning the employee's short employment there. Among other things, those personnel records indicate that the employee had lived in Saginaw, Minnesota, during his employment by Fraser. Again, the employee apparently filed no written response to the motion; however, at least two of the other employers and their insurers involved in the case objected to Fraser's dismissal from the action.

On August 18, 1998, Michael Kilbury, an associate of Mr. Peterson's now acting

[1] Fraser's renewed motion to dismiss refers to Mr. Rivord's letter as an "affidavit" or "sworn statement"; however, we see no evidence that the document is a sworn statement. For whatever reason, the renewed motion to dismiss is not on the judgment roll; only a copy of it is contained in the file. It is possible that a notary stamp did not photocopy.

as Fraser's counsel, sent another letter to Judge Lund. In this letter, Mr. Kilbury reminded Judge Lund of the motion for dismissal first filed by Fraser in February of 1996 and formally renewed on June 1, 1998, and he asked the judge again for a ruling. In a letter dated September 10, 1998, Judge Lund advised Mr. Kilbury that he generally did "not rule on motions on asbestos cases except at a conference, where everyone can present their arguments." Judge Lund then indicated that the employee's claim was ready for conference, that it would be included in a November group of cases, and that the dismissal motion would be considered at that time. The letter was copied to the employee's attorney but apparently not to the other parties in the matter.

The settlement conference was held on November 17, 1998. There is no indication in the file that the employee submitted any evidence, documentation, or other written response in opposition to Fraser's dismissal motion. However, Judge Lund apparently denied the motion during the course of the conference, and he confirmed that ruling in an order issued on November 25, 1998. In that order, Judge Lund found that there was a fact issue as to whether the employee's employment at Fraser had resulted in an occupational disease, which could not be resolved without a hearing on the record. As to Fraser's arguments on jurisdiction, the judge concluded that personal jurisdiction had been waived as a defense, because Fraser and its insurer had "entered a general appearance" in the matter, and that subject matter jurisdiction over the employee's claim against Fraser existed pursuant to Minn. Stat. § 176.041, subd. 4, "as interpreted in" Washington v. Donaldson's, 359 N.W.2d 599, 37 W.C.D. 292 (Minn. 1984).

Fraser and its insurer appealed from Judge Lund's order denying dismissal. In response, the employee moved this court to dismiss the appeal, claiming that the order at issue was not appealable. In a decision issued on May 11, 1999, a panel of this court denied the employee's motion to dismiss the appeal, and we set the matter for oral argument on the issues of subject matter and personal jurisdiction. Glapa v. Fraser Shipyards, Inc., slip op. (W.C.C.A. May 11, 1999). That oral argument was held on July 20, 1999.

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

In his brief, the employee focused largely on the substantive jurisdiction issues, arguing in part that, pursuant to Minn. Stat. § 176.041, subd. 4, and Washington, 359 N.W.2d 599, 37 W.C.D. 292, Minnesota has subject matter jurisdiction over the employee's occupational disease claims against Fraser and its insurer. At oral argument, however, the employee contended primarily that a remand is essential for the development of a factual record, asserting that a dispute exists as to Fraser's contacts with the state of Minnesota. As the employee explained it, under the procedures currently in place for asbestosis/occupational disease litigation, no discovery is even

conducted prior to settlement conference.[2] We understand that occupational disease cases of this kind may be handled differently and somewhat more informally, to a point, than other workers' compensation claims. We are, moreover, reluctant to undermine what is apparently viewed as an efficient and cost-effective system for handling complex disputes involving numerous parties. It seems to us, however, that the employee has already had more than ample opportunity to ascertain and present the few basic facts or allegations relevant to Fraser's motion.

Fraser and its insurer filed their initial motion to dismiss nearly three years prior to the November 1998 settlement conference. In the interim, Fraser's counsel attempted repeatedly to obtain either a judge's ruling on the motion or the employee's agreement to voluntarily dismiss his claim against Fraser. Counsel was not successful in either endeavor but was eventually notified that the dismissal motion would be considered at the settlement conference. The employee's attorney received the same notification from the judge, more than two months prior to the conference. Assuming, for sake of argument, that Fraser's position as to jurisdiction is correct, it is simply not reasonable to expect them to remain in the case for yet further proceedings when the employee has had nearly three years to establish, or at least raise factual issues, regarding the most basic elements of his claim. We therefore reject the employee's contention that further proceedings are necessary, and we will consider the matter on the merits on the existing record.[3]

As previously indicated, Judge Lund ruled that Fraser and its insurer had waived any personal jurisdiction defense by making a general appearance in the matter, and he based his subject matter jurisdiction conclusion on Washington. The judge's decision as to personal jurisdiction is questionable at best. Fraser reserved "all jurisdiction . . . defenses" in its answer, and it specifically incorporated into its answer its motion to dismiss on jurisdiction grounds, which was filed on the same date.[4] However, whatever the merits of Fraser's position on this issue, we

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[2] We note, however, that the employee's deposition was apparently taken on August 20, 1997, more than a year prior to the conference. While apparently not part of the record before the compensation judge, a partial copy of the deposition is attached to the employee's brief on appeal.

[3] Cf. Vandervest v. Jola & Sopp (J & S) Excavating, 54 W.C.D. 100 (W.C.C.A. 1995) (where counsel filed an affidavit and memorandum of law in opposition to a motion to dismiss, evidentiary hearing on the issue of subject matter jurisdiction was necessary).

[4] We see no evidence whatsoever that Fraser took "some affirmative step invoking the power of the court or implicitly recognizing its jurisdiction," sufficient to conclude that Fraser did in fact waive the personal jurisdiction defense asserted in its answer. Larson v. New Richmond Care Ctr., 520 N.W.2d 480, 482 (Minn. App. 1994) (quoting Peterson v. Eishen, 512 N.W.2d 338, 340 (Minn. 1994). Generally, once a defendant asserts a lack of personal jurisdiction defense, he does not waive it by participating in the action. See Anderson v. Mike Drilling Co., 257 Minn. 487, 495-96, 102 N.W.2d 293, 300 (Minn. 1960). The employee himself concedes that Fraser has not waived its jurisdiction defenses here.

are more concerned here with subject matter jurisdiction.[5] After close review, we decline to extend the holding of Washington to the facts of this case.

In Washington, the employee worked as a machine operator, pulverizing asbestos-containing products, for a company called Majac. This work was performed by the employee in Pennsylvania from 1951 until 1973. Donaldson's, a Minnesota corporation, purchased Majac in 1972, moved the plant to Oklahoma, and transferred the employee to that plant, where he supervised but continued to operate machines. X-rays disclosed that the employee had asbestosis in February of 1975. In August of 1977, Donaldson's moved the plant to Roseville, Minnesota, and again transferred the employee. The employee continued to perform the same work until November of 1979, when he became a field engineer. By August of 1981, the employee had become disabled from his employment due to occupational disease within the meaning of Minn. Stat. § 176.66, subd. 1 (1982). About seven months later, on March 6, 1982, the employee died from asbestosis and carcinoma of the lungs.

Following a hearing, a compensation judge ruled that the employee's exposure to asbestos during his employment with Donaldson's from 1973 through 1977 was a substantial contributing cause of the employee's disability and death, and the judge awarded dependency benefits to the employee's widow. On appeal, the Workers' Compensation Court of Appeals reversed, concluding that the employee had not sustained a compensable injury in Minnesota because his exposure to asbestos in Minnesota had not been a substantial contributing cause of his occupational disease. Washington v. Donaldson's, 36 W.C.D. 643 (W.C.C.A. 1984). The Minnesota Supreme Court reversed. In analyzing the issue, the court apparently concluded that an occupational disease-type personal injury occurs wherever the employee becomes disabled within the meaning of Minn. Stat. § 176.66, subd. 1.[6] The court then noted that Minn. Stat. §

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[5] At oral argument, the employee contended that personal jurisdiction follows automatically from subject matter jurisdiction. This may or may not be true but need not be resolved at this time. Also at oral argument, counsel for Fraser essentially conceded subject matter jurisdiction and focused instead on Fraser's personal jurisdiction position. However, it is well established that subject matter jurisdiction may not be conferred by consent of the parties. See, e.g., Hemmesch v. Molitor, 328 N.W.2d 445, 447, 35 W.C.D. 541, 544 (Minn. 1983).

[6] The court wrote:

> Minn. Stat. § 176.011, subd. 16 (1982), defines personal injury to mean "injury arising out of and in the course of employment and includes personal injury caused by occupational disease." Minn. Stat. § 176.66, subd. 1 (1982), provides that disablement of an employee resulting from an occupational disease "shall be regarded as a personal injury within the meaning of the workers' compensation law," and there is no dispute that employee's disablement occurred on the day he was hospitalized with a collapsed lung. By that date, August 4, 1982, his occupational

176.011, subd. 15 (1982), the provision defining occupational disease, contains no requirement that the disease be a consequence of workplace exposure in this state, and the court would not read such a requirement into the statute, explaining:

> [t]o do so would entirely ignore the interest of the state in the welfare of its citizens and would deprive an employee who was a resident of this state, became disabled in this state, and required medical care in this state, of workers' compensation coverage here. These considerations require us to reverse the unfounded conclusion of the majority of the WCCA that employee did not sustain a compensable injury in Minnesota, and to hold that he did sustain compensable injury here.

Washington, 359 N.W.2d at 601, 37 W.C.D. at 294.

The employee contends that the same controlling facts are present here that were present in Washington–that is, the employee here is a resident of this state, he became disabled in this state, and he requires medical care in this state. Additionally, he was a resident of this state all during his employment and alleged exposure at Fraser's plant in Superior, Wisconsin.[7] However, the two cases are different on one major point: the employer in Washington, Donaldson's, was a Minnesota corporation, whereas Fraser is a Wisconsin corporation.

The employee argues that nothing in Washington indicates that Donaldson's legal status as a Minnesota business was determinative, and we concede that the supreme court did not emphasize or appear to rely on that fact in making its decision. Still, we see no other reasonable explanation for the court's conclusion. As a Minnesota business entity that employed workers in Minnesota, Donaldson's could arguably be expected to carry Minnesota workers' compensation insurance, to participate in workers' compensation proceedings in Minnesota, and to have their workers' compensation obligations governed by the Minnesota act.[8] The same simply cannot be

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> diseases had progressed to the point of interfering with his bodily functions to such an extent that he could no longer perform the duties of his employment. *Dunn v. Vic Manufacturing Co.*, 327 N.W.2d 572 (Minn. 1982). Employee thus sustained a personal injury in this state.

Washington, 359 N.W.2d at 601, 37 W.C.D. at 294. Contrary to the compensation judge's suggestion in the present matter, the court in Washington did not cite or otherwise allude to Minn. Stat. § 176.041, subd. 4, in analyzing this issue.

[7] The exposure at issue with regard to the employee's claim against Fraser is exposure to welding fumes, not asbestos.

[8] In Washington, Employers Insurance of Wausau provided Donaldson's with Minnesota

said for Fraser.[9] Taking the employee's position to its logical extreme, an employer in another state would be subject to Minnesota workers' compensation liability any time one of its workers happened to reside in Minnesota on the date of their disablement from an occupational disease. What the employee has not explained is just how an out-of-state employer is supposed to recognize and insure against such a risk. Washington is problematic enough without extending the holding beyond its facts.

The employee conceded, both in his brief and at oral argument, that Fraser is a Wisconsin corporation for which the employee worked solely in Wisconsin. The only evidence in the matter indicates that the employee was also hired in Wisconsin.[10] Despite a motion to dismiss filed nearly three years prior to the hearing on the motion, the employee submitted no evidence, by affidavit or otherwise, either establishing subject matter jurisdiction or raising any fact issues as to that defense. Because we find Washington inapplicable, and because the employee's arguments as to Minn. Stat. § 176.041, subd. 4, fail for the same reasons,[11] we reverse

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workers' compensation coverage from 1968 through July of 1979. The parties had agreed at hearing that responsibility for compensation should be placed on the insurer that was Donaldson's carrier during the period of the employee's last significant exposure to asbestos. Washington, 359 N.W.2d at 601-02, 37 W.C.D. at 295. The supreme court enforced the parties' agreement on this point.

[9] In fact, the record suggests that Fraser is not insured against workers' compensation liability in Minnesota.

[10] At oral argument, the employee suggested that he had been hired in Minnesota. However, there is no evidence at all to this effect, we see no indication that the employee ever made this allegation at any other point in the proceedings, and Fraser indicated, by affidavit of counsel, that the employee had been hired in Wisconsin. The employee also cited In re Minnesota Asbestos Litigation, 552 N.W.2d 242 (Minn. 1996), to suggest that counsel's affidavit provides insufficient basis to dismiss the matter on jurisdiction grounds. However, that case is distinguishable on several bases, including the fact that it was a civil action. Workers' compensation matters are not governed by the rules of evidence or civil procedure.

[11] Minn. Stat. § 176.041, subd. 4, reads in relevant part:

> 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 . . . .

Judge Lund's decision and grant the motion of Fraser and its insurer to dismiss the employee's claim against them.

Washington would suggest that the employee in the present matter "receive[d] an injury within this state," as he was diagnosed and/or disabled here, and, as the employee points out, the statute does not by its terms require that the employer be a Minnesota business. It is probable that this provision contemplates the occurrence of a traumatic injury, rather than an occupational disease. In any event, our rationale for rejecting the employee's argument as to application of this subdivision is the same as our rationale for rejecting application of Washington. On these facts, it is simply not reasonable to subject Fraser to Minnesota workers' compensation liability.