

LARRY KNUTSON, Employee, v. A. MORRELL TRUCKING, UNINSURED, Employer/Appellant, and WILDENAUER CHIROPRACTIC CLINIC and CNA/CONTINENTAL INS. CO., Intervenors, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
APRIL 9, 1999

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - ADMISSION. Where, given the bases for the judge's decision, further questioning of the employee as an adverse witness was unlikely to have changed the outcome of the case, and where the employer's attorney had made no offer of proof to allow the judge to reconsider her ruling and to provide a more suitable record for review, the compensation judge's denial of the employer's request to recall the employee as an adverse witness in its own defense case, following completion of the employee's direct testimony and subsequent cross-examination by the employer's attorney, did not constitute reversible error, notwithstanding the law's general favoring of liberal admission of evidence in workers' compensation proceedings.

Affirmed.

Determined by Pederson, J., Johnson, J., and Hefte, J.  
Compensation Judge: Joan G. Hallock

OPINION

WILLIAM R. PEDERSON, Judge

Uninsured employer A. Morrell Trucking appeals from the compensation judge's ruling prohibiting the employer's calling of the employee as an adverse witness following completion of the employee's direct testimony and cross-examination. We affirm.

BACKGROUND

Larry Knutson began working as a truck driver for A. Morrell Trucking on September 9, 1997. Scott Morrell was the sole officer, director, and shareholder of A. Morrell Trucking [the employer], and Mr. Knutson [the employee] was its first hired employee. Mr. Morrell and the employee were personally acquainted prior to the date of hire, having met at job sites that summer.

The employee was hired to operate a company dump truck that hauled dirt, rubble, and sand for the employer's customers. The employer hired out its trucks and drivers together to customers, who would pay based on the amount of time the truck and driver were at the job site

ready to haul material. The employer owned two trucks, only one of which the employee drove in the course of his job. The employee's normal job duties included picking up the truck at a local Sinclair gas station first thing in the morning, checking the truck for safety, driving to the project site, bringing loads of dirt to where the project manager directed, and returning the truck to the Sinclair station. The employee's job schedule for any given day's work was typically communicated to the employee by a telephone call from the employer the evening before. A typical day started at 6:00 or 7:00 a.m. and ended at 3:00 or 4:00 p.m. The latest the employee worked for the employer was 7:00 p.m. He was paid \$12.50 per hour for forty hours of work per week. The employee was paid for the time he spent at the project sites, plus a half hour each day for driving to and from the job sites.

On September 16, 1997, the employee's work day was shortened due to a heavy rainfall. The employee left his job site at about 12:30 p.m. and was back at the Sinclair station about a half hour later. He parked his truck and went home. Upon arriving home, he telephoned his employer and left a message that he was at home. Mr. Morrell called back, and he and the employee agreed to meet at the Sinclair station and then to travel to the Midland Company to obtain an estimate for a spill shield for the employee's truck.<sup>1</sup> The employee arrived at the Sinclair station that afternoon, and Mr. Morrell met him there. Mr. Morrell asked the employee to drive and told him which highway to take. While heading north on Cedar Avenue, the truck slid into a bridge, and the employee was injured. On the date of the injury, the employer was uninsured against workers' compensation liability.

The employee filed a Claim Petition on October 13, 1997, seeking temporary total disability benefits, payment of medical expenses, and vocational rehabilitation services. In its Answer filed on November 24, 1997, the employer admitted that the employee sustained an injury on September 16, 1997, but denied that the injury arose out of and in the course of the employee's employment.

The matter came on for hearing before Compensation Judge Joan G. Hallock on June 18, 1998. On the date of hearing, the parties stipulated that the employee sustained injuries to his head, neck, mid-back, low back, right shoulder, left shoulder, hands, arms, legs, spine, vocal cords, throat, and teeth on the date alleged. They further agreed that the employee had been temporarily totally disabled continuing from September 16, 1997, that he had not reached maximum medical improvement, and that the employer was uninsured for workers' compensation liability on the date of injury. They also agreed to the reasonableness, necessity, and causal relationship of the medical care and treatment received by the employee consequent to the injury, and they agreed that if liability was found CNA/Continental Insurance Company was entitled to

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<sup>1</sup> The employer testified that he intended to have a spill shield installed "because when you haul rubble, meaning concrete or asphalt chunks, when you go to dump it it sometimes falls back underneath the truck and it hits your brake canisters or could puncture a tire." The employer also testified that the use of a spill shield makes a driver's work easier, and he "wanted to get it to make things easier for Larry as a driver."

reimbursement for no-fault benefits it had paid. The principal issue for determination by the compensation judge was whether the employee's injuries arose out of and in the course of the employee's employment with the employer. At the hearing, the employee testified under direct examination and was then cross-examined by counsel for the employer and the Special Compensation Fund. Upon conclusion of the employee's case, and after presenting testimony from two of its own witnesses, counsel for the employer sought to recall the employee for further examination as an adverse witness. The employee's attorney objected to further examination of his client, and the compensation judge sustained the objection. Upon conclusion of the hearing, the compensation judge determined that the employee's injuries did arise out of and in the course of employment, as the trip to obtain an estimate for the spill shield furthered the employer's interests. The employer appeals from the judge's denial of its request to recall the employee as an adverse witness.<sup>2</sup>

## 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

At hearing, the employer argued that, since the truck that the employee was driving at the time he was injured was not hired out to a customer, and since there was no reasonable expectation by the employee that he would be paid for the time he was spending, the employee was not in the course and scope of his employment. The compensation judge rejected this argument. The employer's appeal from the judge's decision is based solely on the contention that the judge committed an error of law in refusing to allow the employer to call the employee as an adverse witness in its own defense. The employer contends that the judge's precluding its questioning of the employee was contrary to the spirit of Rule 611(a) of the Minnesota Rules of Evidence, which ensures the effective presentation of testimony for the purpose of ascertaining the truth.<sup>3</sup> The employer argues that the employee's adverse testimony was essential on the following

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<sup>2</sup> The employer raised several other issues in its Notice of Appeal but limited its discussion to the evidentiary ruling in its brief on appeal. Therefore, our discussion will be limited to the issues addressed in the brief. Minn. R. 9800.0900, subp. 2.

<sup>3</sup> Rule 611(a) provides as follows:

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue

issues:

1. the hours he actually worked;
2. the hours per week he was intended to work;
3. whether the hours he worked were for a two-week period;
4. the standard in the industry as to what a driver's job duties are; and
5. the employee's relationship with the employer and the reason the employee was driving the truck at the time of the accident.

The employer requests that we remand the case to the compensation judge for a new trial, to allow the employer the same opportunity given the employee to put on its "case in chief"<sup>4</sup> in the order it chooses. We decline to do so.

It is a well established principal of workers' compensation proceedings that evidentiary rulings are within the sound discretion of the compensation judge. See Ziehl v. Vreeman Constr., slip op. (W.C.C.A., October 15, 1991). Pursuant to Minn. Stat. § 176.411, "[e]xcept as otherwise provided by [the statute], when a compensation judge makes an investigation or conducts a hearing, the compensation judge is bound neither by the common law or statutory rules of evidence nor by technical or formal rules of pleading or procedure." Minn. Stat. § 176.411, subd. 1; Minn. R. 1415.2900, subp. 6. However, the statute further requires that "[t]he investigation or hearing shall be conducted in a manner to ascertain the substantial rights of the parties." The Minnesota Supreme Court has on several occasions expressed a policy favoring inclusion of evidence in workers' compensation matters. See, e.g., Bey v. Oxford Properties, Inc., 481 N.W.2d 40, 46 W.C.D. 198 (Minn. 1992); Scalf v. LaSalle Convalescent Home/Beverly Enterprises, 481 N.W.2d 364, 366, 46 W.C.D. 283, 286 (Minn. 1992) ("the purpose of [a workers' compensation] proceeding is disclosure of the true facts, a purpose better served by acceptance of all competent, relevant, and material evidence" than by exclusion of evidence).

We agree with the employer that the right to cross-examine an opposing witness is essential to ascertaining the substantial rights of the parties and to the achievement of a fair trial. The issue in this case stems from the fact that the employer, having been afforded an opportunity to fully cross-examine the employee, elected also to reserve additional questions to a later point in the trial without alerting the compensation judge to this desire. While we believe that it would

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embarrassment.

<sup>4</sup> We note that Black's Law Dictionary defines "case in chief" as "[t]hat part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." In this case, the employer was not the party with the initial burden of proof and therefore arguably had no "case in chief" to present.

probably have been more appropriate for the compensation judge to have allowed the employer to further examine the employee, we are not persuaded, having examined the record, that the judge committed reversible error in ruling as she did.

We note that, at the conclusion of a cross-examination of the employee that spans twenty pages in the transcript, counsel for the employer advised the court that he had no further questions of the employee. After presenting testimony of two of his own witnesses, counsel then sought to call the employee back as part of his defense case. The record before us reveals the following exchange:

THE COURT: Okay, thank you. You're excused.

Okay, any other witnesses for the employer?

MR. WENTZELL: Just Mr. Knutson, Your Honor.

THE COURT: You're recalling the employee?

MR. WENTZELL: Yes, as an adverse witness, yes, Your Honor.

MR. CODY: I'll object. He had every chance he could and opportunity to do a full cross-examination of Mr. Knutson and he said he had no further questions. I don't think he's allowed to call him as an adverse witness now in his case in chief. He's had every opportunity to ask him the questions need be and no need to recall him.

MR. WENTZELL: Where do you come up - - excuse me, I apologize, Your Honor. I know of no rules in the civil rules of civil procedure, in the work comp rules, or in rules of evidence, that I have to take my case out of order just because the moving party happens to call a witness first. I don't know anywhere that says I can't - - I have to take my case out of order just because he calls a witness sooner.

THE COURT: I don't understand this, Mr. Wentzell. You mean to tell me that you didn't ask him all the questions you had to ask when you had the opportunity? He's been on the stand, he's been under oath.

MR. WENTZELL: Your Honor, I would assume I have the right to put my case on in the order I wanted to. I mean I didn't realize I had to ask him questions there. If that's the Court's ruling I can't I have to accept that.

MR. CODY: Well, I don't think you even listed Mr. Knutson as a witness, and you didn't, and that's in your response dated 6/16/98, Scott Morrell, Shane Myrlie. You didn't even list him as a witness in your case in chief.

MR. WENTZELL: All witnesses that the employee, or any other parties in the suit, intends to call. You intended to call the plaintiff, the employee, so I have a right to call him too. And if you go back to the original pre-trial I said - - so I have a right to call him, but if

the Court rules otherwise, the Court rules otherwise.

THE COURT: The Court is ruling otherwise.

MR. WENTZELL: Okay.

THE COURT: You've had your opportunity.

MR. WENTZELL: Thank you, Your Honor.

Nowhere in the record does the employer apprise the compensation judge of the substance of the additional evidence expected to be adduced by recalling the employee. Proper procedure would have been for the employer to make an offer of proof, thus allowing the compensation judge to reconsider her ruling and providing a record more suitable for our review. The five issues cited in the employer's brief that were going to be subjects of further cross-examination of the employee were not presented to the compensation judge for consideration. Where an evidentiary ruling of a compensation judge is the sole subject of an appeal, the compensation judge should at least have been made formally aware that the ruling was ultimately not acceptable to the nonprevailing party. The employer in this case simply did not present any compelling reason to the compensation judge for her to allow additional cross-examination when that opportunity had already been afforded the employer.

The essential issue in this case was whether the employee's injuries arose out of the course and scope of his employment. The employer argued that, since the truck was not hired out to a customer at the time of the accident, and since there was no reasonable expectation of payment by the employee at the time he was injured, the employee was not in the course and scope of his employment at the time of the accident. The compensation judge clearly rejected these arguments. The judge based her decision on the fact that the employer and employee were traveling together in the employer's truck at the time of the injury, with the purpose of obtaining an estimate for a spill shield that would aid both the employee in the performance of his job and the employer in the furtherance of its business, and we fail to see how further questioning of the employee would have changed the outcome of the case. Although the rules and case law addressing admissibility of evidence in workers' compensation proceedings generally favor liberal admission of relevant evidence, we cannot conclude that the compensation judge so abused her discretion in this case as to constitute reversible error. Accordingly, the decision of the compensation judge is affirmed.