HARVEY GUY MINNICH, deceased employee, by MARJORIE JANE MINNICH, Petitioner, v. ISENBERG EQUIP., INC. and FEDERATED MUT. GROUP, a/k/a FEDERATED MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 21, 2001

No. [REDACTED SSN]

HEADNOTES

SETTLEMENTS; DEPENDENCY BENEFITS. The compensation judge did not err in rejecting the employer and insurer's argument that two third-party settlement releases precluded the petitioner from claiming dependency benefits in connection with the employee's death.

ATTORNEY FEES - EDQUIST FEES. The compensation judge did not err in holding the employer and Federated Insurance Company liable for Edquist fees in connection with the credit awarded to Federated for their payment of no-fault insurance benefits.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Ronald E. Erickson

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision as to the effect of two settlement agreements on their liability for workers' compensation benefits in connection with the employee's death. The employer and insurer also appeal from the judge's award of Edquist[1] attorney fees. We affirm.

BACKGROUND

The employee was a longtime branch manager for Isenberg Equipment, Inc. [the employer], a farm implement dealer and repair business. His work involved some travel, and on December 2, 1996, he was killed when the company car he was driving collided with a car driven by Troy Richard Dreyer, who lost control of his vehicle after striking a deer. The following month, on January 10, 1997, Federated Mutual Insurance Company [Federated], the employer's workers' compensation insurer, issued a notice of denial of liability, asserting that the employee's death did not arise out of and in the course of his employment. The employee's wife, the petitioner here, eventually retained counsel, and, in February of 1998, Joseph Guzinski, petitioner's then attorney, contacted Federated "concerning a possible workers' compensation claim." Federated responded

[1] See Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986).

by again taking the position that the employee's accident and resulting death were not related to his employment.

The petitioner obtained appointment as trustee for the employee's next of kin and pursued a wrongful death action against Dreyer, the driver of the other car, and American Family Insurance Company, which apparently provided liability coverage for Dreyer and/or the car he had been driving at the time of the accident. The parties settled this claim in August of 1999, for the policy limit of $50,000, in exchange for petitioner's execution of a release purporting to discharge Dreyer and American Family "and all other persons and organizations who are or might be liable, from all claims for damages which [the petitioner] sustained as a result of [the December 2, 1996, accident]." On August 24, 1999, Olmsted County District Court Judge James Mork issued an order for distribution, approving the settlement and distributing the funds to petitioner and the law firm of William D. Mahler, petitioner's counsel in that matter. The petitioner did not notify the employer or its workers' compensation insurer of the settlement negotiations with Dreyer and American Family.

At some point, the petitioner pursued a claim for underinsured motorist coverage against Federated, which, in addition to providing the employer's workers' compensation coverage, had insured the company vehicle that the employee had been driving. Michael Conroy, a claims supervisor for Federated for "pretty much everything but work-comp and property," negotiated the claim with Attorney Mahler, and a settlement was reached, with Federated agreeing to pay the petitioner the $50,000 policy limit, pursuant to a trust agreement, in exchange for the petitioner's promise that she would

> never at any time make any demand or claim, or commence, prosecute, cause or permit to be prosecuted, any action at law or in equity, or any proceeding of any description against Federated Mutual Insurance Company (hereinafter called the company) and Isenberg Equipment Co., Inc. because of any or all damages, costs, loss of services, expenses and/or compensation, on account of, or in any way growing out of, any and all known and unknown personal injuries and property damage resulting, or to result from an accident that occurred on or about the 12the day of December, 1999 [2] at or near County Road #14, LeRoy MN, Mower County.

In a November 2, 1999, cover letter sent to the petitioner's counsel along with the trust agreement, Mr. Conroy reiterated that Federated had agreed to pay its "$50,000 single underinsured motorist liability limits in exchange for a release of this matter from [the petitioner] as it relates to the wrongful death of [the employee]." The petitioner executed the trust agreement on November 8, 1999, and received the proceeds on that date or shortly thereafter. Federated also paid the petitioner $20,000 in no-fault death benefits.

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[2] The reference to a December 12, 1999, accident is apparently a typographical error; there is no contention that the agreement covers anything other than the employee's December 2, 1996, accident.

In late October 1999, just a week or two prior to execution of the trust agreement, the petitioner had retained Charles Bird to represent her in connection with a claim against the employer and Federated for workers' compensation benefits related to the employee's death. On November 15, 1999, about a week after receiving the underinsured settlement proceeds, the petitioner filed a claim petition for workers' compensation dependency benefits. The employer and Federated again denied liability, claiming that the employee's accident was not work-related and that the petitioner's claim was in any event barred by the terms of the trust agreement.

The matter came on for hearing before a compensation judge on April 11, 2000. Primary liability remained at issue, as well as the effect of the settlement agreements with Dreyer and American Family and with Federated, and the petitioner's entitlement to Edquist fees in relation to the $20,000 in no-fault benefits paid by Federated.[3] The employer and Federated advanced various theories as to why the petitioner should be precluded, because of the settlement agreements, from pursuing workers' compensation dependency benefits. Evidence included testimony by the petitioner and by Mr. Conroy.

In a decision issued on July 3, 2000, the compensation judge determined that the employee's December 2, 1996, accident and resulting death had occurred in the course and scope of his employment with the employer, and this determination is undisputed on appeal. The judge also concluded that the two settlement agreements did not preclude the petitioner from claiming workers' compensation benefits, that the employer and insurer were entitled to a credit, pursuant to Minn. Stat. § 176.061, with respect to the settlement with Dreyer and American Family, and that the employer and Federated were liable for Edquist fees from their credit for the $20,000 no-fault payment made by Federated. The employer and Federated appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

[3] The parties agreed that the employer and insurer were entitled to a full credit, against any dependency benefits awarded, for the $20,000 no-fault payment; the only issue in this regard was the propriety of Edquist fees.

"[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

American Family/Dreyer Settlement

Minn. Stat. § 176.061 specifies in some detail the rights and obligations of employees, their dependents, and employers and their workers' compensation insurers, when third parties are liable in damages for an employee's injury or death. Minn. Stat. § 176.061, subd. 5, provides in pertinent part as follows:

> **Subd. 5. Cumulative remedies**. If an injury or death for which benefits are payable is caused under circumstances which created a legal liability for damages on the part of a party other than the employer, . . . legal proceedings may be taken by the employee or the employee's dependents in accordance with clause (a), or by the employer, or by the attorney general on behalf of the special compensation fund, in accordance with clause (b), against the other party to recover damages, notwithstanding the payment of benefits by the employer or the special compensation fund or their liability to pay benefits.
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> (a) If an action against the other party is brought by the injured employee or the employee's dependents and a judgment is obtained and paid or settlement is made with the other party, the employer or the special compensation fund may deduct from the benefits payable the amount actually received by the employee or dependents or paid on their behalf in accordance with subdivision 6. If the action is not diligently prosecuted or if the court deems it advisable in order to protect the interests of the employer or the special compensation fund, upon application the court may grant the employer or the special compensation fund the right to intervene in the action for the prosecution of the action. If the injured employee or the employee's dependents or any party on their behalf receives benefits from the employer or the special compensation fund or institutes proceedings to recover benefits or accepts from the employer or the special compensation fund any payment on account of the benefits, the employer or the special compensation fund is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party. The employer or the attorney general on behalf of the special compensation fund may maintain a separate action or continue an action already instituted. . . .

> (b) If an employer, being then insured, sustains damages due to a change in workers' compensation insurance premiums, whether by a failure to achieve a decrease or by a retroactive or prospective increase, as a result of the injury or death of an employee which was caused under circumstances which created a legal liability for damages on the part of a party other than the employer, the employer, notwithstanding other remedies provided, may maintain an action against the other party for recovery of the premiums. This cause of action may be brought either by joining in an action described in clause (a) or by a separate action. Damages recovered under this clause are for the benefit of the employer and the provisions of subdivision 6 are not applicable to the damages.

Minn. Stat. § 176.061, subd. 5. Subdivision 6 sets forth how third-party damages and settlement proceeds are to be allocated, as follows:

> **Subd. 6. Costs, attorney fees, expenses**. The proceeds of all actions for damages or of a settlement of an action under this section, except for damages received under subdivision 5, clause (b) received by the injured employee or the employee's dependents or by the employer or the special compensation fund, as provided by subdivision 5, shall be divided as follows:
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> (a) After deducting the reasonable cost of collection, including but not limited to attorney fees and burial expense in excess of the statutory liability, then
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> (b) One-third of the remainder shall in any event be paid to the injured employee or the employee's dependents, without being subject to any right of subrogation.
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> (c) Out of the balance remaining, the employer or the special compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer or special compensation fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or the special compensation fund to the employee or the employee's dependents.
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> (d) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the special compensation fund for any benefits which the employer or the special compensation fund is obligated to pay, but has not paid,

> and for any benefits that the employer or the special compensation fund is obligated to make in the future.
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> There shall be no reimbursement or credit to the employer or to the special compensation fund for interest or penalties.

Minn. Stat. § 176.061, subd. 6.[4] Finally, subdivision 8a, concerning notice to the employer and insurer of third-party settlements, provides:

> **Subd. 8a. Notice to employer**. In every case arising under subdivision 5, a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer within a reasonable time. If the employer or insurer pays compensation to the employee under the provisions of this chapter and becomes subrogated to the right of the employee or the employee's dependents or has a right of indemnity, any settlement between the employee or the employee's dependents and the third party is void as against the employer's right of subrogation or indemnity. When an action at law is instituted by an employee or the employee's dependents against a third party for recovery of damages, a copy of the complaint and notice of trial or note of issue in the action shall be served on the employer or insurer. Any judgment rendered in the action is subject to a lien of the employer for the amount to which it is entitled to be subrogated or indemnified under the provisions of subdivision 5.

Minn. Stat. § 176.061, subd. 8a. In the present case, it is undisputed that the petitioner failed to give the employer and insurer notice of settlement negotiations with Dreyer and American Family, as required by Minn. Stat. § 176.061, subd. 8a. As such, the employer and insurer had no opportunity to intervene in the petitioner's action against Dreyer and American Family or to otherwise protect their interests.[5] However, the compensation judge rejected the employer and

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[4] The employee may in some cases choose a different allocation, between recoverable and nonrecoverable damages, pursuant to Henning v. Wineman, 306 N.W.2d 550 (Minn. 1981). This alternative method of allocation has no relevance here.

[5] At the time of the settlement with Dreyer and American Family, the petitioner had not yet received workers' compensation benefits nor had she initiated formal proceedings to obtain such benefits. However, notice to an employer and insurer of settlement negotiations is required even in cases in which the third-party agreement purports to settle only those claims not compensable under the workers' compensation act, see Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977), and even if workers' compensation benefits have not yet been paid or claimed, see McDonough v. Muska Elec., 486 N.W.2d 768, 47 W.C.D. 93 (Minn. 1992). In McDonough, the supreme court explained that an employer and insurer's subrogation rights arise prior to commencement of a workers' compensation action and that the employer and insurer should not be deprived of the opportunity to settle their subrogation claim at the same time the

insurer's argument that the petitioner should be estopped or precluded from claiming workers' compensation benefits under these circumstances, holding instead that the employer and insurer were entitled to a credit, under the allocation described in Minn. Stat. § 176.061, subd. 6, against their liability to pay the petitioner dependency benefits.

On appeal, the employer and insurer argue primarily that the petitioner should be estopped from pursuing workers' compensation benefits because, by signing the general release and receiving the American Family insurance policy limits, the petitioner wrongfully interfered with or "precluded" the employer and insurer's right of subrogation.[6] We are not persuaded.

In Paine v. Water Works Supply Co., the Minnesota Supreme Court explained as follows:

> Where the employee or his dependent maintains an action against a third-party tortfeasor upon claims to which the employer is subrogated and settled such action without notifying the employer, we have recognized that the employer is entitled to credit a portion of the settlement proceeds against its compensation liability, and to the extent the employer's subrogation claim exceeds the credit against compensation payments created by the settlement, its rights under subd. 5 to maintain an independent action against the third party are not cut off by the settlement. *Modjeski v. Federal Bakery of Winona, Inc.*, 307 Minn. 432, 240 N.W.2d 542 (1976) (credit against compensation liability created by settlement of wrongful death action against third party); *Lang v. William Bros Boiler & Mfg. Co.*, 250 Minn. 521, 85 N.W.2d 412 (1957) (reimbursement for compensation payments out of the employee's settlement with third-party tortfeasor, recognizing the employer's right to continue subrogation action against the third party). The employer has the option to forego an independent action and accept only the credit out of the employee's settlement of its subrogated claims against the third party in full or partial satisfaction of its subrogation rights. *Modjeski v. Federal Bakery of Winona, Inc. supra*.

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employee is settling his claims against the third party, despite the practical difficulties. 486 N.W.2d at 770-71, 47 W.C.D. at 97-98.

[6] The employer and insurer also appear to suggest that the release signed in connection with the Dreyer/American Family claim should be construed to cover petitioner's claim against the employer and insurer for workers' compensation benefits, by virtue of the language releasing "all other persons and organizations who are or might be liable" in connection with the employee's accident and death. However, the employer and insurer were not parties to the settlement and gave no consideration for it. As a rule, strangers to a contract acquire no rights under the contract, see Northern Nat'l Bank v. Northern Minnesota Nat'l Bank, 244 Minn. 202, 208, 70 N.W.2d 118, 123 (Minn. 1955), and it is evident that the employer and insurer were not intended third-party beneficiaries of the Dreyer/American Family release.

269 N.W.2d 725, 729 (Minn. 1978); see United Steelworkers v. Quadra Mountain Corp., 418 N.W.2d 723, 724-25 (Minn. 1988); Aetna Life & Casualty v. Anderson, 310 N.W.2d 91, 93-94 (Minn. 1981). See also Jackson v. Zurich American Ins. Co., 542 N.W.2d 621, 624-25 (Minn. 1996) ("without the employer's consent an employee cannot settle the entire [third-party] action, including the employer's subrogation interest," and a settlement that violates this premise "is void as against the employer's and insurer's right of subrogation") (emphasis added). Therefore, the compensation judge's award to the employer and insurer of a credit under Minn. Stat. § 176.061, subd. 6, appears to have been the appropriate remedy, as against the petitioner, for the petitioner's failure to notify the employer and insurer of the settlement with Dreyer and American Family, and the petitioner's release did not in any event affect the employer and insurer's right to further pursue their subrogation interest.[7]

The employer and insurer may have legitimate grounds for their complaint that they were harmed by the petitioner's actions here. However, we can find no authority for the proposition that the petitioner should be estopped from claiming dependency benefits based on her failure to notify the employer and insurer of her settlement negotiations with Dreyer and American Family. For this reason, and because the compensation judge's award of a credit under Minn. Stat. § 176.061, subd. 6, appears to be consistent with applicable case law, we affirm the judge's decision on this issue. Whether the employer and insurer may have additional civil remedies is not within the province of this court to decide.

Underinsured Insurance Settlement with Federated

The employer and insurer also argue that the petitioner is barred, under the terms of the trust agreement with Federated relative to the underinsured motorist claim, from seeking dependency benefits, because she agreed in that document that she would never make any other claims, related to the accident, of any kind, against the employer and Federated.[8] We acknowledge that the trust agreement contains no provision reserving the petitioner's right to make a workers' compensation claim. However, we are nevertheless unconvinced by the employer and insurer's argument on this issue.

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[7] At oral argument, the employer and insurer contended that the statute of limitations had expired, relative to their potential subrogation claim against American Family and Dreyer, only three weeks after the petitioner filed her claim petition for workers' compensation benefits. However, as a rule, we will not consider an argument made for the first time on appeal. Moreover, the employer and insurer were unsure whether the petitioner had ever filed an action against Dreyer and American Family, and there is insufficient information in the record to make any determination as to whether the statute of limitations did in fact expire as claimed. American Family's potential liability to the employer and insurer is, however, not entirely certain, statute of limitations issues aside. See Opal Corp. v. American Family Ins. Group, 518 N.W.2d 642, 644 (Minn. Ct. App. 1994) (limiting the third-party insurer's liability to the coverage provided under the insurance contract).

[8] It is apparently undisputed that no allocation is available under Minn. Stat. § 176.061, subd. 6, with regard to payments made under the trust agreement.

The trust agreement does not expressly cover workers' compensation claims and does not satisfy the statutory provision concerning workers' compensation settlements, Minn. Stat. § 176.521, in that the agreement was never approved by any court. Id., subd. 1. Federated prepared the agreement and should be presumed to know the requirements of the workers' compensation act. See also Alvord v. Hoffman Eng'g Co., 55 W.C.D. 47 (W.C.C.A. 1996) (it is the award on stipulation, not the stipulation itself, which gives the agreement binding force and effect). Just as importantly, it is virtually undisputed that neither the petitioner nor Federated intended the agreement to cover workers' compensation claims. The petitioner testified that she did not intend to settle her dependency benefit claim and that she was assured by her attorney that her ability to pursue that claim would be unaffected by the trust agreement. Mr. Conroy, the Federated claims supervisor who negotiated the underinsured settlement, did not handle workers' compensation claims work for Federated and testified that the potential for a workers' compensation claim never even entered his mind in the context of the trust agreement. As far as he was concerned, "all that was being settled was the underinsured motorist claim."

Because the trust agreement did not specify settlement of workers' compensation claims, because the agreement was never approved as required by Minn. Stat. § 176.521, and because neither party contemplated settlement of workers' compensation claims by virtue of that agreement, the compensation judge properly concluded that the trust agreement did not preclude the petitioner's claim for dependency benefits, and we affirm his decision on that issue as well.

Edquist Fees

The compensation judge concluded that the employer and Federated were responsible for Edquist fees in connection with the credit he awarded Federated for their $20,000 payment to the petitioner of no-fault benefits. The employer and Federated argue that the judge erred in awarding these fees, in that Federated was not an intervenor and essentially received no benefit from the judge's credit award. We understand the employer and Federated's point. However, this court has on numerous occasions held that Edquist fees are payable on amounts ordered reimbursed to a self-insured employer for benefits paid by them under a sickness and accident benefit plan, despite the fact that the self-insured employer is not a third party or intervenor in these circumstances. See, e.g., Nagel v. Ford Motor Co., No. [REDACTED SSN] (W.C.C.A. Aug. 8, 1988); McDaniel v. Totinos/Pillsbury, 40 W.C.D. 125 (W.C.C.A. 1987). The employer and insurer have offered no basis to distinguish those cases from the present case, and we see none. The fact that Federated happened to be both the no-fault carrier and the workers' compensation carrier was fortuitous and should not be determinative as to Federated's responsibility to pay its proportionate share of fees in connection with the credit award. We therefore affirm the judge's award of Edquist fees.