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A Review of Recent *Irwin/Roraff* Fee Case Law

By: Matthew P. Bandt

The Minnesota Workers' Compensation Court of Appeals recently decided two cases that highlight the process for judicial review of *Roraff* fees.

Jurgensen v. Dave Perkins Contracting, Inc. (WCCA 3/5/24)

In *Jurgensen v. Dave Perkins Contracting, Inc.,* the Employee sustained an admitted work injury to his left shoulder which required surgery. He retained an attorney to represent him. Consistent with Minn. Stat. §176.081, Subd. 1, the retainer agreement provided that his attorney was entitled to 20% of the first $130,000.00 in benefits the Employee received through the efforts of his attorney. In addition, his attorney would also be entitled to 20% of any compensation obtained above and beyond the initial $130,000.00, with no limit, pursuant to the attorney filing an Application for Excess Fees with the Department of Labor and Industry.

The parties proceeded to mediate and the Employee agreed to accept $150,000.00 for a full, final, and complete settlement, including a close out of future medical and rehabilitation benefits. The Stipulation for Settlement provided the Employee's attorney would receive $26,000.00 as a contingent fee under Minn. Stat. §176.081, Subd. 1, plus an additional $4,000.00 as an excess fee.

Along with the Stipulation for Settlement, the Employee's attorney filed an Excess Fee Exhibit, which showed that he and his paralegal spent 24 hours representing the Employee, for a total value of $9,972.50. The compensation judge issued a partial Award on Stipulation, awarding the Employee's attorney $26,000.00 in contingency fees. The compensation judge then held an attorney fee hearing regarding whether the Employee's attorney was entitled to the excess fee of $4,000.00. After reviewing the *Irwin* factors, the compensation judge held that the maximum statutory contingency fee of $26,000.00 adequately compensated the Employee's attorney, and denied the excess fee. The Employee's attorney appealed.

On appeal, the Employee's attorney argued that because the excess fee was agreed to by the parties in the Stipulation for Settlement, the compensation judge was obligated to approve the $4,000.00 excess fee. The WCCA disagreed and held that in order to receive an excess fee over the $26,000.00 maximum, an attorney must file a Petition for Excess Fees under Minn. R. 1415.3200, Subd. 3(B), and then a compensation judge must review the claim under the factors set forth in *Irwin.*

In *Irwin*, the Minnesota Supreme Court set forth seven factors to go into a determination of the reasonableness of an excess fee award. While none of the *Irwin* factors alone are determinative, the factors include "the amount at issue, time and expense necessary to prepare for trial, responsibility assumed by counsel, experience of counsel, difficulty of the issues, proof involved, and results obtained."

The WCCA found that the compensation judge did not abuse her discretion in denying counsel's excess fee claim. The WCCA noted the only pleading filed by the Employee's attorney was a Notice of Appearance, and the matter involved "less than a typical amount of discovery, no depositions, and no competing medical expert reports or medical depositions." The judge determined the matter to be of average complexity, and the matter settled at mediation without the need for an evidentiary hearing.

Further, under Minn. Stat. § 176.081, Subd. 1(1), evaluating a Petition for Excess Fees requires consideration of the contingency fee to determine whether the Employee's attorney was reasonably compensated. The appellate court held that the compensation judge appropriately considered the $26,000.00 contingency fee to be adequate to fairly compensate the Employee's attorney.

Finally, the Employee's attorney argued that the statutes governing attorney fee awards violated Article I, section 11 of the Minnesota Constitution, which prohibits laws impairing the obligation of contracts. The WCCA held that issues of constitutionality were outside its jurisdiction and preserved the issue for consideration in the appropriate tribunal.

Bjornson v. McNeilus Cos., Inc. (WCCA 3/11/24)

In *Bjornson v. McNeilus Cos., Inc.*, the Employee suffered two work injuries while working for his Employer. Each

injury occurred while the Employer was covered by a different Insurer. The first injury, which involved the lower extremities, low back, and right hip, was an admitted injury for which benefits were paid. The second injury, involving the low back and right hip, was not an admitted injury, and the Employer and Insurer denied primary liability. The Employee underwent surgery at Mayo Clinic Health Systems (MCHS) after the second alleged injury, suffered complications, and required extensive medical treatment.

The Employee's attorney filed a Claim Petition seeking medical benefits of at least $317,063.47 and other benefits for both dates of injury. A list of the Employee's medical expenses was attached to the Claim Petition, but there were no bills or treatment notes that established a "causal connection to the dates of injury, the billed amounts, whether the bills were paid, and if so, the amount paid."

The Employer and Insurers agreed to pay $15,000.00 to settle the Employee's to-date claim, including medical benefits. The Employee's attorney was to receive 20% in contingency fees, which equaled $3,000.

Shortly after reaching the settlement, the Employee's attorney filed a Statement of Attorney Fees, claiming $26,000.00 in attorney fees for each date of injury, minus $3,000 paid under the Stipulation for Settlement. The Employee's attorney claimed he was entitled to a contingency fee of 20% for medical bills from MCHS, subject to the $26,000 statutory cap for each injury. He further claimed the bills totaled $327,257.37.

The parties had stipulated that "the treatment the Employee received at MCHS was causally related to cure or relieve the effects of his [second] work related incident." However, the Employer and Insurers objected to the Statement of Attorney Fees arguing there was no evidence ascertaining the amount of medical benefits recovered, and that the fees sought were unreasonable and excessive. The compensation judge found that medical benefits were "recovered" under Minn. Stat. §176.081, Subd. 1(a)(1) and ordered that the Employee's attorney be paid $49,000.00 in attorney fees. The Employer and Insurers appealed to the Workers' Compensation Court of Appeals.

On appeal, the standard of review was whether the compensation judge's findings of fact and order were "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, Subd. 1(3). The issue to be determined was whether the compensation judge erred in awarding the Employee's attorney fees based on recovering medical benefits on behalf of United Healthcare, despite the Employee's attorney submitting no evidence that any medical expenses were incurred or paid.

The WCCA found that the compensation judge did not err in finding that the Employee's attorney recovered a benefit for his client. The WCCA noted that under the terms of the settlement, the Insurer for one of the dates of injury admitted liability, after initially denying primary liability. The WCCA held this constituted a benefit under Minn. Stat. § 176.081, Subd. 1(a), and therefore, the Employee's attorney was not barred from receiving an award of attorney fees altogether.

However, the WCCA found that the amount of attorney fees awarded to the Employee's attorney was not based on substantial evidence and failed to comply with the language of Minn. Stat. Section 176.081. The Employee's attorney failed to submit evidence to show the dollar amount of medical benefits paid and/or reimbursed by the Employer and Insurer on behalf of the Employee. The WCCA noted that in cases where the dollar value of the medical benefits is not reasonably ascertainable, the maximum attorney fee is the amount charged in hourly fees for the representation, subject to a maximum fee of $500.00. See Minn. Stat. §176.081, Subd. 1(a)(2). Therefore, the WCCA awarded a fee of $500.00, but remanded the matter back to the compensation judge to apportion the attorney fees between the two Insurers.

The WCCA further noted that the Employee's attorney had not raised a claim for excess fees under *Irwin,* and that he may do so in accordance with the statute. Presumably, the WCCA left the door open for the Employee's attorney to argue for fees based on the *Irwin* factors, which take into account the attorney's hourly rate and time spent, minus fess already received.

Congratulations

In *Olson v. City of Cambridge, et. al.*, Elisa Hatlevig and Tessa McEllistrem obtained dismissal on behalf of the City of Cambridge and its City Planner in relation to claims brought by a landowner asserting abuse of process and intentional interference with contractual relations as it pertained to the City's actions in 2013 regarding platting requirements for rezoning the landowner's property. The Court found that Plaintiff's claims of fraudulent concealment to toll the statute of limitations were unfounded and held that the statute of limitations barred the entirety of Plaintiff's claims.

By Blood or By Law: *Menards v. Farm Bureau*'s Effect on Intrafamily Exclusion Policies

By Benjamin Albert Halevy

On February 7, 2024, the Eighth Circuit Court of Appeals issued a ruling in *Menards v. Farm Bureau* discussing the legal meaning of the term "family" within the context of insurance policies. Reversing the Southern District of Iowa's interpretation of the insurance term under Iowa law, the Eighth Circuit determined that "family" does not inherently mean blood relation but instead must be read within the context of the agreement. In issuing this decision, the Eighth Circuit clearly intends to signal that technical definitions of terms are favored when interpreting insurance policies. This article will discuss the facts and legal reasoning of *Menards* and highlight some takeaways from the Eighth Circuit's broad reading of "family."

In April 2019, in West Burlington, Iowa, Cynthia Bowen went to Menards to purchase treated lumber. Upon loading the lumber, Menards employee David Beeler dropped one of the pieces onto Bowen, injuring her in the process. On February 16, 2021, Bowen filed a personal injury action against Menards; with the parties ultimately settling the case in April 2023. Despite Bowen and Menards settling their dispute, Menards' accompanying litigation against Bowen's automobile insurer continued.

Bowen's pickup truck, which she was using to pick up the boards, was covered by Farm Bureau Property & Casualty Insurance Company. To this end, Menards sought indemnification against Farm Bureau, with Menards representing themselves as an "insured" under Bowen's policy. In response, Farm Bureau declined indemnification, stating that "incident did not take place near or around Ms. Bowen's [vehicle]" and the "lumber was not being loaded into the truck when the incident occurred." Following Farm Bureau's refusal to indemnify Menards, the hardware store filed suit in the Southern District of Iowa, claiming they were entitled to Farm Bureau's indemnification in Bowen's suit as an unnamed insured.

The District Court found that Farm Bureau was required to indemnify Menards according to the language of Bowen's insurance agreement and longstanding Iowa law. Bowen's policy explicitly stated that Farm Bureau insured against bodily injury caused by loading and unloading items on and off the vehicle. Furthermore, the District Court cited *Dairyland v. Concrete Prods.*, where the Iowa Supreme Court indicated that "[c]overage exists if there is an immediate causal connection between the loading operation or the way it is carried out and the injury-causing mishap." With this rule in mind, the Southern District of Iowa noted that an immediate causal connection existed between Beeler's mistake loading the lumber and Bowen's injuries, making Farm Bureau liable to indemnify Menards barring any exclusion.

Among other defenses, Farm Bureau argued in both District Court and at the Eighth Circuit that Menards is excluded from coverage under the Intrafamily Immunity Clause of Bowen's policy. The District Court solely focused on the language of the Intrafamily Immunity Clause itself, which stated that "[t]here is no coverage for any 'bodily injury' to any 'insured' or any member of an 'insured's' family residing in the 'insured's' household." The District Court matter-of-factly determined the merits of the Farm Bureau's defense by looking at the plain language definition of the term "intrafamily" and indicating that: "The plain meaning of 'intrafamily' is inside of the family. Beeler is not related to Ms. Bowen and is therefore outside of the family. The exclusion does not apply." The court then goes onto note that omnibus coverage would be significantly undermined if they were to adopt the Farm Bureau's broader definition of "intrafamily" to cover Menards. Nevertheless, in reversing the District Court's decision, the Eighth Circuit does exactly that.

On appeal, the Eighth Circuit outright rejects the District Court's plain language definition of "intrafamily." Indeed, the court noted that the Black's Law Dictionary definition of "family" includes those "connected by law" and used the definition as evidence that Menards and Bowen could be "family" within the legal context of Bowen's policy. In addition, the Eighth Circuit's analysis highlights the definition of the term "insured" included within the definition of "intrafamily." Within the context of Bowen's policy, the definition of "insured" includes "any other 'person' while using '[the policyholder's] personal vehicle,' … if its use is within the scope of [the

policyholder's] consent." Reading the two provisions of Bowen's policy in tandem, the Intrafamily Immunity Clause excludes coverage for any bodily injury to any other person using Bowen's personal vehicle with Bowen's consent. As such, Menards, through Beeler as their employee, qualifies as an "insured." Therefore, under the plain and unambiguous language of Bowen's policy, Menards is excluded from coverage under the Intrafamily Immunity Exclusion. Further appeals of the Eighth Circuit's decision by Menards have been denied.

Although the Eighth Circuit appears to have significantly broadened the definition of the term "family" in *Menards*, this decision does not significantly break from precedent. For example, in *Rodman v. State Farm*, the Iowa Supreme Court acknowledged there was no dispute as to whether the Plaintiff was excluded from coverage for injuries resulting from an accident caused by someone else driving the Plaintiff's car under an intrafamily exclusion clause. Additionally, the Iowa Supreme Court essentially affirmed the enforceability of broad intrafamily exclusion clauses on public policy grounds in *Walker v. American Family Insurance*. Moreover, the District Court's narrower reading of the term "family" may in fact be contrary to Iowa precedent, and the Eighth Circuit's ruling simply reaffirmed prior constructions of intrafamily exclusion clauses.

In short, the Eighth Circuit's recent ruling in *Menards* affirmed a longstanding legal tradition in Iowan insurance contracts employing a broad reading of the term "family" when analyzing intrafamily exclusion clauses in auto insurance policies. Generally, when reviewing insurance policies with exclusionary provisions, Eighth Circuit attorneys should be wary of applying common parlance definitions to legal terms and should instead consider more technical, legal definitions.

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