RECENT DEVELOPMENTS IN WORKERS’ COMPENSATION AND EMPLOYERS’ LIABILITY LAW

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I. INTRODUCTION

One of the most interesting and significant cases during the reporting period is a decision by the U.S. Circuit Court of Appeals for the Sixth Circuit that potentially exposes self-insured employers in Michigan to RICO charges in workers' compensation cases. Other cases during 2009–10 reflect concerns that surface more typically in workers’ compensation and employers’ liability law, such as issues relating to “arising out of and in the course and scope of employment,” statutory defenses, and temporary and permanent disability. However, some interesting and surprising cases follow below, including Iowa’s expansion its second injury fund (SIF) at a time when other states are dismantling their SIFs; a Kansas law that exempts employers with a payroll of less than $20,000/year, excluding family members; and Wyoming’s hernia statute.

II. U.S. SUPREME COURT DENIES CERTIORARI IN RICO ACTION

The Supreme Court denied certiorari in Brown v. Cassens Transport\(^1\) in an interesting intersection between workers’ compensation law and the Racketeer and Corruption Influenced Organizations Act (RICO).\(^2\) In the underlying case, the Sixth Circuit held that self-insured worker’s compensation plans do not constitute insurance as defined by the McCarran-Ferguson Act,\(^3\) and therefore the plaintiffs could proceed with their RICO suit against Cassens Transport.\(^4\)

The plaintiffs specifically alleged that the defendants “selected and paid unqualified doctors . . . to give fraudulent medical opinions that would support the denial of worker’s compensation benefits, and that defendants ignored other medical evidence in denying them benefits.”\(^5\) They further

\(^1\) 546 F.3d 347 (6th Cir. 2008), cert. denied, 130 S. Ct. 795 (2010).
\(^3\) 15 U.S.C. § 1012(b) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance.”).
\(^4\) Cassens, 546 F.3d at 364–65.
\(^5\) Id. at 351.
argued that “WDCA [Michigan Worker’s Disability Compensation Act] was not enacted to regulate the business of insurance and that RICO will not ‘invalidate, impair, or supersede’ the WDCA.”

The Sixth Circuit agreed, pointing out that “at first blush worker’s compensation benefits may seem to act as a form of insurance, . . . closer scrutiny reveals that this insurance-like impression is solely a matter of appearance.” Unlike an insurance policy, the WDCA is not a contract but rather “public regulation of the employment relationship that is a substitute for the tort system.” Its focus on “providing certain recovery to employees for workplace injuries . . . is underscored” by the fact that the WDCA was placed in the chapter of the Michigan statutes that addresses labor matters rather than insurance. Moreover, the Michigan “Worker’s Compensation Agency rather than the Office of Financial and Insurance Services administers the WDCA.” And finally, Cassens Transport is self-insured. Self-insurance, according to the Sixth Circuit decision, “does not relate to the ‘business of insurance’ under the McCarran-Ferguson Act because there is no relationship between an insurer and an insured.”

The Sixth Circuit’s decision in Cassens has widespread implications for nearly 600 self-insured employers in Michigan, including General Motors, Chrysler, Ford Motor Co., AT&T, DTE Energy, as well as many county governments and public universities in the state. Self-insured employers “collectively account for nearly half of all workers’ compensation paid each year.” “As the result of [Cassens],” according to one Michigan practitioner, “all are now subject to a lawsuit under RICO for denying a claim for workers’ compensation.”

III. ARISING OUT OF AND IN THE COURSE AND SCOPE OF EMPLOYMENT

A. Going-and-Coming Rule

A claimant in Rhode Island was injured while driving a company van from the parking lot of his apartment when he stopped to help a stranded motorist who was blocking the exit from the lot. He was on call on a 24/7 basis.

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6. Id. at 357–58.
7. Id. at 359.
8. Id.
9. Id. at 360.
10. Id.
11. Id. at 361.
13. Id.
He worked out of the van and always kept the van with him. Although he was not on a work call at the time of the accident, he testified he was going to a central location to await a work call. His claim was not barred by the going and coming rule, which denies workers’ compensation benefits to employees who or going to or leaving work. On the contrary, the Rhode Island Supreme Court found that “[i]n light of the nature of employee’s work, it is reasonable that [the employer] could have expected [his] employment activities to begin the moment he got into the cargo van—whether on the public roadways or in his own apartment parking lot.”

In *Fortney v. Airtran Airways, Inc.*, the widow of an Airtran pilot who was killed while flying home from his base in Atlanta appealed a decision by the Kentucky Court of Appeals, which had upheld the denial of workers’ compensation benefits. Airtran argued that “Fortney’s death was not work-related because he was simply commuting to work; provided no service to the employer in doing so; and benefited personally from being able to commute free or at a reduced fare. . . .” The administrative law judge and the state appellate court agreed but the state supreme court ruled that the law clearly had been misapplied because the ALJ “fail[ed] to consider all factors material to concluding whether Fortney’s death came within the service to the employer exception.”

**B. Horseplay**

In *Xenia Rural Water District v. Vegors*, the Iowa Supreme Court reversed in part and affirmed in part a trial court’s decision that denied workers’ compensation benefits to an employee who was “struck and injured by a truck driven by a co-worker after claimant wiggled his rear end toward the co-worker.” The injury, according to the court, was not based on a personal as opposed to a work-related relationship. Therefore, recovery was not barred by recovery by “statutory prohibition on injuries caused by willful act . . . for reasons personal to claimant.”

The court further found that a determination of whether horseplay is a “substantial deviation from the course of employment” should be based on

1. the extent and seriousness of the deviation,
2. the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty),
3. the extent to which the practice of horseplay had become an accepted part of the employment, and
4. the extent

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15. *Id.* at 886.
17. *Id.* at 328.
18. *Id.* at 327.
19. 86 N.W.2d 250 (Iowa 2010).
20. *Id.* at 256.
21. *Id.*
to which the nature of the employment may be expected to include some such horseplay.\textsuperscript{22}

C. Post-Termination

In a slip-and-fall case involving an employee who suffered a serious injury while cleaning out his office three days after being fired, the Louisiana Supreme Court quoted a standard commentary with approval:

Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee. The employee is deemed to be within the course of employment for a reasonable period while winding up his or her affairs and leaving the premises. The difficult question is: what is a reasonable period?\textsuperscript{23}

The injured employee definitely fell within a reasonable period, ruled the court, citing the facts that he had been fired in one location on a Friday and received permission to return to his office in another location the following Monday.\textsuperscript{24}

D. “Positional” Risk

In \textit{Cyr v. McDermott’s, Inc.},\textsuperscript{25} the Vermont Supreme Court found that a claimant, who ingested a caustic agent that was stored in a bottle of Mountain Dew, had been in a “positional-risk” situation and “but for his employment, the instrument of his injury would never have arrived in his hands.”\textsuperscript{26} A co-worker gave the claimant the bottle by mistake. After keeping it in the employees’ refrigerator for several days, the injured worker took it home and consumed it after drinking two cans of beer. His blood alcohol level was high because of the beer intake, and his workers’ compensation claim had been denied because he was “intoxicated.”\textsuperscript{27} The court reversed and remanded the decision of the workers’ compensation board after finding that the claimant’s injury “arose out of his employment.”\textsuperscript{28}

E. Personal Comfort Doctrine

Without getting permission to leave her job or punching out, a woman moved her car so that she would be better able to leave work after a snow-
storm. Walking back to work, she fell and was injured. This injury did not arise out of or occur in the course of employment, but the claimant argued the personal comfort doctrine provided an exception. The Idaho Supreme Court disagreed, finding that the personal comfort doctrine does not apply to acts which depart greatly from the employment or cannot be considered a part of the job.

F. Bunkhouse Rule

A migrant worker at a remote tomato farm alleged he broke his ankle by falling on wet pavement outside housing supplied by his employer. Finding that the claimant was eligible for workers’ compensation benefits, the South Carolina Supreme Court held that the so-called bunkhouse rule applies, even if the worker is not contractually required to live in the provided housing. What matters are the actual circumstances of the case: “It is clear from the record that [the claimant] was required, not by contract, but by the nature of his employment, to live on-site near the packing facility as there was no reasonable alternative. . . .”

Under the bunkhouse rule, “when an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, . . . the entire period of his presence on the premises . . . is deemed included in the course of employment.” Injuries would thus be compensable.

G. Material Deviation

The Wyoming Supreme Court ruled against a worker who was injured while taking a more scenic route home from a mandatory training session. The employee and two co-workers decided to ride their motorcycles and arrived at the program without incident. However, the three decided to take an alternative route home, during which the claimant was injured. The court ruled that “[w]hen an employee is on a work-related trip for which he is reimbursed, but takes a side trip for personal reasons, he is no longer acting within the scope of his employment.”

A lengthy dissent argues, among other things, that the majority opinion “ignored the unique geography of Wyoming,” i.e., wide open spaces.
The claimant’s return trip was approximately 55 percent longer. “If this had been a case about blocks,” according to the dissent, “then an alternate route which extended six blocks to nine blocks would operate to deprive a worker from worker’s compensation benefits.”

H. Lunch Break

In order to be compensable under worker’s compensation insurance in West Virginia, “three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment.” During her lunch break, a loan clerk ran across the street to buy something to eat, tripped and fell while returning to work, and suffered from a torn rotator cuff as a result. She claimed that she was forced to hurry because, among other reasons, the bank was understaffed. The court was not sympathetic and found that her injury satisfied only the first prong of the requirement.

I. Psyche Injuries

In Alaska, a physical injury is a prerequisite for recovery for a psyche injury unless the stress is extraordinary and unusual. In Kelly v. State Department of Corrections, a prison guard was found to be “permanently and totally disabled” as the result of a series of threats by an armed prisoner who had been convicted of murder. He received benefits for five years, but nine years after the threat, the workers’ compensation board “filed a notice of controversion, raising for the first time the defense that the employee’s claim was not compensable.” The board claimed that the work-related stress suffered by the guard was not unusual, given his occupation. However, the state supreme court reversed and remanded the case after finding that the “guard satisfied all of the elements required to show that he had suffered mental injury, as defined by the Workers’ Compensation Act.”

J. Liability of Successive Employers

A veteran of numerous heavy duty jobs, including lumber jacking, was found to have “suffered from an occupational disease (OD)” whose major contributing cause was a lifetime of heavy lifting. Turning to the ques-

37. Id.
39. Id. at 10–11.
41. Id. at 293.
42. Id. at 291.
tion of which employers to hold liable in cumulative trauma or OD cases, the Montana Supreme Court reaffirmed the rule of “last injurious exposure,” finding that the “OD occurs during the last employment at which the claimant was exposed to working conditions of the same type and kind which gave rise to the OD.”

IV. STATUTORY DEFENSES

A. Less Than $20,000 Annual Payroll

Not all work-related injuries are compensable, at least in Kansas. The Wonderful House Chinese Restaurant was exempt from workers’ compensation requirements when it opened in December 2007 because its expected payroll, excluding family members, was less for $20,000 for the year. On December 26, Alfred Slusher fell while at work and shattered his elbow. The administrative law judge (ALJ) ordered the restaurant, which had no money at the time, and ultimately the state compensation fund to pay benefits to Slusher on the assumption that the new business would have a gross payroll of more than $20,000 during 2008.

The Kansas Court of Appeals found that the ALJ misread the law. Although the result was “harsh,” the court ruled that Slusher was ineligible for benefits: “Even though the Kansas statute is unique, it must be enforced as written. Here, the Board correctly held Wonderful House was exempt from the Workers Compensation Act under the language set forth in K.S.A. 44-505(a)(3).”

B. Hernias

Reversing a district court decision, the Wyoming Supreme Court found that the “phrase ‘in the course of the employment’ means a hernia is compensable if it is found to be causally related to the employee’s original work injury.”

At issue in Ball v. Wyoming was an incident in 2007 in which James Ball fell out of bed as the result of leg pain. He ultimately was found to have a hernia, which had occurred when he tried to stand up after the accident. But the cause of the leg pain was the sudden malfunction of a spinal cord stimulator that was implanted after a 1993 compensable work-related injury.

44. Id. at 1274.
46. Id. at 12.
47. Id. at 15.
49. Id. at 623.
The workers’ compensation division had denied benefits based on Wyoming’s so-called hernia statute, which requires that to be compensable, hernias must be: (a) “of recent origin,” (b) “accompanied by pain,” (c) “immediately preceded by some strain suffered in the course of employment,” and (d) the pain must not have manifested before the alleged injury.\(^{50}\)

The division argued that the hernia statute should trump the second injury rule which it described as common law. But the supreme court reasoned that because the second injury rule was based on the basic work injury statute, it was not a common law rule: “[T]he second compensable injury rule is a causation analysis, and not a court-created benefit or remedy.”\(^{51}\) Therefore, the hernia suffered thirteen years after the original work-related accident was compensable.

C. Notice of Work-Related Incidents

North Carolina requires work-related incidents to be reported within thirty days.\(^{52}\) If the claimant files after the deadline, regardless of whether the employer was aware of the injury, the state industrial commission cannot award benefits unless it: “(1) concludes as a matter of law that the lack of timely written notice was reasonably excused and that the employer was not prejudiced and (2) supports those conclusions with appropriate findings of fact.”\(^{53}\) In *Gregory v. W.A. Brown & Sons*, the commission did neither before awarding benefits to a claimant who filed notice four months after her alleged injury. The late notice was partially due to miscommunication with her human relations department. After rebuking the commission for transferring the burden of notice from the employee to the employer, the North Carolina Supreme Court reversed and remanded the case.\(^{54}\)

The Iowa Supreme Court also remanded a case to determine whether the claimant had met the state’s notice requirement.\(^{55}\) The issue of timely notice in *IBP, Inc. v. Burress*, however, hinged on whether brucellosis, which is caused by exposure to pig blood, is an injury or an occupational disease. The court held that brucellosis in an injury despite its listing as an occupational disease in the state code.\(^{56}\) If it were an occupational disease, the employer’s liability would have ended one year after the claimant’s last exposure.

The brucellosis did not become symptomatic for almost six years.\(^{57}\) Finding that no substantial evidence suggested that the claimant was aware

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51. *Id.* at 628.
54. *Id.* at 439.
55. *IBP, Inc. v. Burress*, 779 N.W.2d 210 (Iowa 2010).
56. *Iowa Code* § 85.11.
57. *Burress*, 779 N.W.2d at 210
of the compensable nature of his disease, the court remanded the case to determine if he satisfied the ninety-day notice requirement.58 The court also upheld a change in the claimant’s disability from permanent partial to permanent total.59

V. TEMPORARY DISABILITY

Actions by the claimant were a factor in several cases involving temporary disability during the past year.

In Schujer v. Algona, the Iowa Supreme Court vacated a judgment in favor of an employee who had been awarded temporary disability after her treating physician noted that she had achieved maximum medical improvement (MMI).60 The appellant had injured her lower back at work on December 2, 2002, and voluntarily left her job in early January. The employer paid temporary benefits until the end of February when her physician “released her for regular duty and directed her to continue taking her anti-inflammatory medication.”61 Despite having taken a full-time job, she saw a series of chiropractors and orthopaedic surgeons and ultimately underwent a spinal fusion.

Under the Iowa Code, the court was not required to examine the evidence de novo, but instead had to determine “whether the evidence supports the findings actually made [by the worker’s compensation commissioner].”62 Thus, the court did not evaluate the claimant’s credibility but looked for evidence that the commissioner had valid reasons for “accept[ing] or reject[ing] testimony based on his assessment of witness credibility.”63 The court concluded that the “commissioner’s decision on causation [was] supported by substantial evidence” and vacated the decision of the appellate court.64

In an Ohio case involving allegations of fraud and overpayment, a claimant received temporary total disability benefits from late 2004 through November 2006.65 After learning that he had worked for approximately one week in mid-June 2005, the state industrial commission vacated all compensation during the period between June 2005 and November 2006 and asked for a finding of fraud.66

58. Id.
59. Id.
60. 80 N.W.2d 549 (Iowa 2010).
61. Id. at 554.
62. Id. at 557–58.
63. Id. at 558.
64. Id. at 562.
66. Id. at 196–97.
The case was appealed to the Ohio Supreme Court after the state appellate court had overturned the commission’s decision and ordered it to make the disability payments for the entire period less the one-week period in June. Like the lower court, the state supreme court discussed two prior cases of fraud at some length, reaching the conclusion that the case at bar did not reach the level of fraud in the earlier cases and that “no evidence indicates that [the claimant] engaged in any activities incompatible with his medical restrictions [between June 2005 and November 2006].” The court held that his misrepresentation on the state form requesting disability payments barred benefits only for the week he worked in June.

In another case, the Ohio Supreme Court held, not surprisingly, that sleeping on the job was a voluntary departure from employment that barred temporary total disability. The claimant knew or should have known that napping at work was prohibited conduct and grounds for termination. She had been written up before and advised that she would be terminated if she slept on the job. The employee was found to be not eligible for temporary disability benefits.

VI. PERMANENT DISABILITY

A. Loss of Earning Capacity

The Mississippi Supreme Court reversed a finding of a loss of earning capacity because the claimant had failed to rebut the presumption that she suffered no loss. After an eighteen-year veteran of Omnova Solutions, Inc. was struck by a forklift, she returned to work in her pre-injury job at the same wage, but not before filing a “Petition to Controvert with the Mississippi Workers’ Compensation Commission asserting ‘[t]otal loss of wage[-]earning capacity.’” Five months later, she was moved to a lower paying job when an employee with more seniority took her position during a series of company layoffs. The claimant’s demotion was “totally unrelated to her work injury,” and she apparently had not tried to find another job.

An administrative law judge awarded compensation benefits for 450 weeks, and the decision was upheld by the state circuit court and appellate court. But the supreme court found that “[no] substantial evidence was presented that her wage-earning capacity had been diminished as a
result of the work-related injury,” and that the worker failed rebut the presumption by showing incapacity or the unreliability of her post-injury earnings.

B. Res Judicata, Collateral Estoppel, and Video Tapes

Timothy Carnahan is no longer smiling for the camera as the result of a New Hampshire Supreme Court decision issued in April 2010. The court upheld a decision by the state compensation board to reduce his rate from temporary total disability to diminished earning capacity. Carnahan had been a self-employed truck driver and furniture mover when he injured his lower back in September 2000. The New Hampshire Compensation Appeals Board (CAB) reviewed his case several times at the insurance carrier’s request, culminating in a May 2008 finding that Carnahan had, “at the least, a full-time, light duty work capacity” and “a significant earning capacity.”

Carnahan appealed the decision, and in October 2008, the CAB found that he was capable of returning to full-time work although probably not at the same earning capacity as before the accident. The CAB also found that Carnahan was “self-limiting, uncooperative, and not credible,” an assessment that was supported by a video taken the day of the May hearing that showed him walking without a limp. Another concealed video in July 2008 showed Carnahan setting up a backyard pool.

In his appeal to the supreme court, Carnahan argued that the doctrines of res judicata and collateral estoppel precluded the change in his benefits without evidence of a change in his work capacity. The court disagreed on several grounds. Contrary to Carnahan’s argument, the CAB had determined a change in his work capacity. Although the board had relied on erroneous information from the insurance carrier in an earlier determination, it corrected the mistake in its October 2008 hearing. The supreme court also dismissed Carnahan’s arguments that “gainful employment” and “earning capacity” have the same meaning. Both overlap by relating to “age, education, and job training,” according to the court, but the “terms are distinct.”

C. Earnings versus Earning Capacity

Sargeant Bob Straub of the Scottsbluff Police Department earned more when he was reassigned to a desk job after being struck by another vehicle

73. Id. at 941.
74. Appeal of Timothy Carnahan, 993 A.2d 224 (N.H. 2010).
75. Id. at 227.
76. Id.
77. Id. at 231.
78. Id. at 228.
79. Id. at 230.
during a routine traffic stop. But the Nebraska Supreme Court found that that he was still able to establish a 35 percent loss of earning capacity through reports from an orthopaedist and a court-appointed vocational expert.  

The court noted that earnings are not equivalent to earning power:

Earning power, as used in Neb. Rev. Stat. § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

The court went on to note that “[t]he fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity.” A report submitted to the worker’s compensation commission by a court-appointed vocational case manager predicted that Straub would be restricted to desk duty for the foreseeable future, presumably with a negative impact on his earnings.

D. Gas Exposure Linked to Somatoform Disorder

In *Steppi v. Conti Electric, Inc.*, the Delaware Supreme Court reinstated an award of permanent total disability due to a somatoform disorder that the claimant alleged was related to exposure to hydrogen sulfide. Somatoform disorders are “characterized by physical symptoms that suggest physical illness or injury—symptoms that cannot be explained fully by a general medical condition, direct effect of a substance, or attributable to another mental disorder.”

While working at a petroleum refinery, James Steppi, an electrician, “became very warm and suddenly felt very woozy.” Neither the ambulance attendants nor the hospital where Steppi was taken mentioned a possible “chemical exposure, confusion, or similar conditions,” all of which were raised during the workers’ compensation hearing and subsequent appeals. Steppi went to a series of doctors because of increasingly severe breathing, heart, and liver problems, confusion, and lack of focus. At a hearing before the industrial board, expert witnesses agreed that “something” happened at work and that Conti’s symptoms were “consistent with hydrogen sulfide exposure.” The board granted permanent total disability benefits. But the

80. Straub v. City of Scottsbluff, 784 N.W.2d 886 (Neb. 2010).
81. *Id.* at 892 (quoting Davis v. Goodyear Tire & Rubber Co., 696 N.W.2d 142, 147 (Neb. 2005)).
82. *Id.*
86. *Id.* at *4.*
superior court overturned the board’s decision after finding no evidence of a gas leak and no causal connection between the incident and the employee’s disability. The supreme court reinstated the board’s decision.

The supreme court’s decision appears to have been based on two prongs, i.e., exposure and causation. Conflicting evidence had been presented to the board regarding the reliability of the sensors that workers carried as well as stationary monitors. No one reported any alarms around the time of the incident but Conti testified that the sensors were not reliable. The board and the supreme court upheld the questionnable proposition that the absence of positive findings from any sensors was controlling. The board and the supreme court also relied heavily on the testimony of three experts, who found, respectively, that (1) Conti presented a textbook case of hydrogen sulfide exposure; (2) hydrogen sulfide exposure was more likely than not; and (3) the symptoms were consistent with hydrogen sulfide exposure.

However, the determination of causation, initially by the board and upheld by the supreme court, is based almost entirely on inference. None of the expert opinions suggested a direct link between Conti’s possible hydrogen sulfide exposure and the somatoform disorder. Other factors in Conti’s background, including the facts that he had prior exposure to asbestos and had low back pain before the incident, were mentioned in passing and discounted. Instead, the supreme court cited a 1960 case for the proposition that with “other credible evidence tending to show that the injury occurred directly after the trauma and without interruption, we think such evidence would be sufficient to sustain an award.” Given the number of possible contributing factors to Conti’s pain, citing a fifty-year old case seems to be inadequate at best.

In brief, permanent total disability has been reinstated for a questionable exposure whose only clear link to a somatoform disorder is that the disorder came after the date of the exposure because the decision of the board was supported “by the minimum quantity of evidence required.”

E. Permanent Total Disability Awarded After Initial Denial Despite No Change in Physical Condition

Seven years after the South Dakota Supreme Court upheld the state labor department’s (DOL) denial of permanent disability benefits, the DOL

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87. Id. at *4–5.
88. Id. at *4.
89. Id. at *2–3.
91. Id. at 688.
granted the claimant’s petition for review and ultimately determined that he was entitled to permanent total disability benefits and certain medical expenses. On appeal, the circuit court reversed the determination of permanent total disability but affirmed the payment of medical expenses. Both parties appealed the decision to the supreme court.

The supreme court found that the threshold issue was whether its 2001 decision could be reviewed. In its initial decision, the court had upheld the DOL’s denial of benefits because the claimant refused to undergo a pain management program. Under South Dakota law, the DOL may review a claimant’s status if there is a change in his condition. Based on its 2007 review, the DOL noted that, despite the absence of any change in his condition, the claimant had met the burden of proof by completing a pain management program.

The court agreed, after noting that the DOL had correctly interpreted its earlier holding to mean “that [the claimant] had to undergo a pain management program before his claim for permanent total disability could be accepted or evaluated.”

F. Total Incapacity Benefits Granted After Permanent Partial Award

The Connecticut Supreme Court upheld an award of total incapacity benefits despite a prior voluntary agreement as to permanent partial disability. The court found that the award was allowable with or without a change of condition and that the absence of the claimant’s formal motion to reopen was not germane. Her application for total incapacity benefits was sufficient, and defendants had not shown prejudice.

The claimant had injured her right elbow at work in 1999. After several operations, in 2002 she entered into a voluntary agreement with her employer of permanent partial disability of 41 percent. A medical forensic examiner concluded that she had reached maximum medical improvement. In between the first and second operations on her elbow, she tripped while going up the stairs at home and injured her right knee, resulting in two knee operations.

95. Id. at 824–25.
96. Id. at 825.
97. Id. (citing S.D. Codified Laws § 62-7-33).
98. Id.
99. Id.
100. Marandino v. Prometheus Pharm., 986 A.2d 1023 (Conn. 2010).
101. Id. at 1024.
102. Id. at 1028–29.
103. Id. at 1029.
After entering the voluntary agreement, she sought benefits for total incapacity. The commissioner ruled that she “had a compensable 41 percent permanent partial disability of her master right arm, that her knee injury was compensable, and that she was totally incapacitated and entitled to benefits in accordance with [Connecticut General Statutes] § 31-307.”

The employer appealed to the workers’ compensation board, which upheld the decision, and the defendants filed an appeal with the intermediate state court.

The 41 percent disability to the elbow was not in dispute and at oral argument, the employer conceded that the court could sustain the commissioner’s award of total incapacity, but argued that the knee injury was not compensable. The Connecticut Appellate Court affirmed the commissioner’s recommendations with one exception. The knee injury was not compensable “as the medical reports relied on by the commissioner were not competent evidence.”

On further appeal, the state supreme court found that: (1) “[the claimant’s] receipt of permanent partial disability benefits under Conn. Gen. Stat. § 31-308 did not disqualify her from total incapacity benefits,” (2) the commissioner “properly” relied on expert opinion that knee injury was “casually related to her arm injury,” and (3) the absence of medical facts “supporting [the expert’s] conclusion was immaterial.”

The court reached back to the 1920s to find cases where total incapacity benefits were awarded to claimants who had already received permanent partial disability benefits. It further noted that the “legislature has not amended the statute for total incapacity benefits” to preclude a claimant’s seeking benefits for a second injury, despite the fact that it had seventy-five years to do so. In a concurring decision, Justice Rogers would have awarded total incapacity on more narrow grounds, suggesting that the change in the claimant’s condition would have justified the subsequent award. The Connecticut Trial Lawyers Association filed an amicus brief in which it contested the defendants’ contention that the claimant would not have been entitled to the incapacity benefits absent a changed condition. Justice Rogers pointed out, however, that they cited no case in opposition to the defendants’ position.
G. Second Injury Fund—Now Easier to Qualify in Iowa

With three justices dissenting, the Iowa Supreme Court interpreted Iowa’s second injury fund (SIF) statute\(^\text{112}\) to allow recovery when the first injury involved more than just one of the body parts enumerated by the statute and both scheduled and unscheduled disabilities.\(^\text{113}\) In Gregory v. Second Injury Fund of Iowa, the claimant underwent carpal tunnel surgery on both arms in separate operations in December 2000 and February 2001, which left her with functional impairments of 2 percent in her left hand and 6 percent in her right hand. As the result of additional surgeries during the spring and summer of 2001 to treat shoulder pain, she sustained a 10 percent impairment in both arms, “secondary to the surgical treatment of her clavicles.”\(^\text{114}\) The claimant went back to work but fractured her right foot in October 2002.\(^\text{115}\)

In July 2004, she filed a claim for workers’ compensation insurance for the foot injury and also sought benefits from the SIF fund, “alleging the 2000 injury to her left hand constituted a first qualifying injury and the 2002 injury to her right foot constituted a second qualifying injury.”\(^\text{116}\) The workers’ compensation claim was settled, but the commissioner denied the SIF claim and the claimant sought judicial review.

The supreme court liberally interpreted the SIF requirements, noting that

[the claimant’s] entitlement to benefits from the Fund is dependent upon proof of the following propositions: (1) she sustained a permanent disability to a hand, arm, foot, leg, or eye (a first qualifying injury); (2) she subsequently sustained a permanent disability to another such member through a work-related injury (a second qualifying injury); and (3) the permanent disability resulting from the first and second injuries exceeds the compensable value of “the previously lost member.”\(^\text{117}\)

The court held the SIF statute applied as long as there was a permanent partial loss of at least two enumerated body parts in successive injuries. Interpreting the statute by considering its legislative intent, reasonableness, and public policy, the court “applied the statute broadly and liberally in keeping with its humanitarian objective.”\(^\text{118}\) Not surprisingly, the court reversed and remanded the district court’s decision, finding that the 2000 injury to the left hand constituted the first qualifying injury.\(^\text{119}\)
In a vigorous dissent, Justice Cady argued that the claimant did not sustain a first qualifying injury and that the majority decision “continued the unfortunate trend” of “an overly broad interpretation of our Second Injury Fund over the years.”\textsuperscript{120} According to Justice Cady, SIFs were not “conceived to encourage employers to hire disabled workers” but to resolve a fundamental conflict between employees, for whom the ideal compensation system would compensate for the collective impact of the second injury, and employers, for whom the perfect system would limit liability to the second injury only.\textsuperscript{121}

New York State adopted the first SIF in 1916, a scant three years after it adopted its workers’ compensation statute.\textsuperscript{122} Few states followed its lead until the early to mid-1940s when most states adopted SIFs to encourage the employment of veterans, who “were not being hired due to employers’ fears of being held financially responsible for the cumulative effect of an injury suffered on the job coupled with a pre-existing war injury.”\textsuperscript{123} SIF approaches among the states were far from uniform with some requiring the employer to bear the cost of the entire disability and others compensating only for the injury that would have existed without the pre-existing injury. Iowa’s SIF was adopted in 1945. Ironically, as Justice Cady points out, because the SIF did not lower the cost to employers of benefits for second injuries, it would not have encouraged Iowa employers to hire the disabled.\textsuperscript{124}

The majority’s liberal interpretation of Iowa’s SIF policy comes at a time when many states are discontinuing the program.\textsuperscript{125} As of July 2008, nineteen states had abolished SIF programs altogether, and others, such as South Carolina, enacted laws that call for the phase out of SIFs over a period of several years. A more recent example is the State of Missouri, where Attorney General Scott Koster predicted in February 2011 that the state SIF would owe more than $20 million in benefits by the end of the calendar year.\textsuperscript{126}

\textsuperscript{120} Id. at 401–02 (Cady, J., dissenting).
\textsuperscript{121} Id. at 402.
\textsuperscript{123} Id.
\textsuperscript{124} Gregory, 777 N.W.2d at 402.
\textsuperscript{125} Boggs, supra note 120.