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Summer 2011

General Legislative Update
by Nancy M. Aboyan

Governor Mark Dayton (DFL) vetoed the entire budget from Minnesota's Republican controlled legislature on May 24, 2011, setting into motion a series of events leading to a government shutdown that went into effect on July 1, 2011.

The legislative session also ended with some changes impacting the insurance industry.

Zoning Variances

In response to last summer's Minnesota Supreme Court ruling in *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010), the legislature amended Minn. Stat. § 394.27 subd. 7 and § 462.357 subd. 6, effective May 6, 2011.

In *Krummenacher*, the court narrowly interpreted the definition of "undue hardship" and indicated that cities cannot grant variances to property owners if their properties could be put to a reasonable use without a variance. This ruling held cities and townships to a much stricter standard, and effectively limited cities and townships to granting variances in only rare circumstances.

Minn. Stat. § 394.27 subd. 7 was amended to allow for variances to be granted when the applicant establishes that there are practical difficulties in complying with official control. "Practical difficulties" is specifically defined to mean "that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality". "Practical difficulties" include, but are not limited to, inadequate access to direct sunlight for solar energy systems. Economic considerations alone do not constitute "practical difficulties".

Likewise, Minn. Stat. § 462.357 subd. 6, regarding appeals to the board of appeals and adjustments, was amended to reflect these changes.

Recreational Immunity

The legislature amended Minn. Stat. § 466.03 to provide civil immunity for any claim for loss or injury arising from the use of school property or a school facility made available to public recreational activity. The amendment applies to causes of action arising on or after May 25, 2011. It does not limit the liability of a school district for conduct that entitles a trespasser to damages against a private person, or reduce any existing duty owed by the school district. *See* Minn. Stat. § 466.03 subd. 23.

Insurance Claims for Residential Roofing/Siding

As a result of last year's legislative session, effective August 1, 2010, a contractor providing residential roofing goods and services was prohibited from advertising or promising to pay or rebate all or part of the insured homeowner's insurance deductible. If the contractor violated this prohibition, then the insurer was not obligated to consider the contractor's estimate, and the insurer or insured could bring an action for damages against the contractor. *See* Minn. Stat. § 325E.66 subd. 1.

This statute has now been extended to all residential contractors providing repair or replacement of residential roofing or siding, and has been broadened to prohibit the residential contractor from directly or indirectly offering to compensate the insured for providing any service to the insured.

A person who has entered into a written contract with a residential roofing or siding contractor to provide goods and services to be paid by the insured from the proceeds of an insurance

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Subscription Information

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Comments or inquiries may be directed to Shannon Banaszewski.

WC Legislative Update
by Matthew P. Bandt

Despite being unable to pass a timely budget bill resulting in a government shutdown, the legislature passed significant workers' compensation legislation. On May 22, 2011, the legislature passed Senate Bill 1159 by a vote of 126-4. The governor signed the bill into law on May 27, 2011. The bill addresses recent issues that have arisen regarding the assignment of workers' compensation matters to compensation judges. The provisions went into effect on August 1, 2011.

Petitioner attorneys were united with the defense bar, employers and insurers in an effort to clarify the proper procedure for assigning cases to the compensation judges. Prior to the new legislation, Minn. Stat. § 176.307 provided: "The chief administrative law judge must assign workers' compensation cases to compensation judges using a block system type of assignment that, among other things, ensures that a case will remain with the same judge from commencement to conclusion…" (*Emphasis added.*) The statute further provided that the block system "must be the principal means of assigning cases, but it may be supplemented by other systems of case assignment to ensure that cases are timely decided."

Historically, cases were not block assigned until after a petition for a formal hearing was filed, which allowed different judges to conduct administrative and settlement conferences before the matter was assigned to a compensation judge for a formal hearing and a final determination. However, during roughly the last year, the chief administrative law judge interpreted Minn. Stat. § 176.307 as requiring all matters to be immediately block assigned, as soon as they were referred to the office of administrative hearings. This included administrative conferences arising from medical requests, rehabilitation requests, and requests following service of a notice of intent to discontinue benefits (NOID).

The recent system for assigning cases was met with significant opposition by both petitioners and the defense. They had two primary concerns.

First, cases were much more likely to be assigned to compensation judges before one or both of the parties were represented by an attorney. As a matter of right, under Minn. Stat. § 176.312, each party is entitled to have a matter re-assigned to a different compensation judge, as long as the request is made within ten days of the assignment. In some circumstances, deciding to request re-assignment can be crucial to the outcome of the case. Unrepresented parties, in particular, cannot be expected to know whether it is in their best interest to request re-assignment. Therefore, parties that are unrepresented when a matter is assigned are often at an unfair disadvantage. The chances of that happening were greatly increased under the recent system. Cases were being block assigned upon the filing of a medical request, rehabilitation request, or request for an NOID conference. Often parties are unrepresented at these administrative conferences. The attorneys do not get involved until after there is a request for a formal de novo hearing. However, at that point, under the recent system it was too late to request re-assignment.

The second major concern with the recent system was that it resulted in the same judge presiding over a de novo hearing after the judge already issued a decision following the administrative conference. The party that lost the administrative conference would have to convince the same compensation judge to reverse his or her own prior ruling. For example, the purpose of an NOID conference is to provide a prompt, though preliminary, decision as to whether there is a "reasonable" basis to discontinue benefits. A NOID conference allows for a determination as to whether the Employer/Insurer should have to continue paying the Employee while the parties undergo the discovery process. NOID decisions are typically based on an incomplete picture and often some of the parties, if not all, are unrepresented. If not for the right to a de novo review before an impartial judge, NOID conferences may even lack sufficient due process to survive a constitutional challenge. Though the compensation judges are certainly capable of remaining impartial under the recent system, in light of human nature, it is understandable that the party who lost at the NOID conference may have some concern about having the same judge preside over the de novo hearing.

The legislature addressed both of the above concerns. The legislature amended Minn. Stat. §§ 176.106 subd. 7(a) and 176.238 to provide that all de novo hearings following an administrative conference must be heard by a different judge than the judge who presided over the administrative conference.

The legislature also amended Minn. Stat. § 176.307 to provide that the chief administrative law judge "may", rather than "must", block assign cases to compensation judges. The legislature further deleted the language that the block system "must be the principal" means of assigning cases, and replaced that with language indicating it "shall be the preferred" means.

These legislative changes assure that the same judge will not preside over both a de novo hearing and the underlying administrative conference. The changes also assure that a petition for a formal hearing will not be assigned to a compensation judge until after the petition is filed.

In addition to addressing the two primary concerns discussed above, the legislature clarified the procedure for scheduling settlement conferences and hearings. Under the recent system, settlement conferences were not scheduled unless specifically requested by the parties, and hearings were not scheduled until a "certification of readiness" was filed. A party could not successfully file a certification of readiness until they contacted the other parties to confirm the matter was ready for hearing. If a party objected to the certification, they were required to outline what needed to be done to further prepare for hearing and then the compensation judge would determine whether the matter should be certified. A hearing would not be scheduled until after the compensation judge certified the matter was ready.

The legislature effectively eliminated the

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Firm News

Congratulations to **Lawrence M. Rocheford** for successfully defending the operator of a log splitter in a Wisconsin premises liability case. In *Westerham v Agger, et al.*, St. Croix County Case Number 09-CV-347, June 2011, the plaintiff sued the owner of the splitter as well as the operator of the splitter at the time of the accident. The plaintiff's fifth digit was pinched and crushed between an oversized log and the splitter's end plate, and ultimately plaintiff underwent an emergency amputation of her fifth digit. Liability was vigorously contested as were non-economic damages. The plaintiff denied any responsibility for her own damages. After three days of jury trial, the 12-person jury found the plaintiff 25 percent casually negligent and her net damages were less than the last offer from the defense. •

Congratulations to **Lawrence M. Rocheford** for being appointed to the Judiciary Committee of the Minnesota State Bar Association for 2011-2012. •

Congratulations to **Eugene J. Flick, Joseph E. Flynn, Pierre N. Regnier, Lawrence M. Rocheford** and **Leonard J. Schweich** for being named 2011 Super Lawyers. •

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policy still has the right to cancel the contract within 72 hours after receiving notice that the claim has been denied. *See* Minn. Stat. § 326B.811 subd. 1.

Hannah's Law

Minn. Stat. § 245A.40, subd. 4, was amended to require all teachers and assistant teachers in a child care center governed by Minnesota Rules, and at least one staff person during field trips and when transporting children, to satisfactorily complete cardiopulmonary resuscitation (CPR) training that includes techniques for infants and children. The CPR training must be completed within 90 days of the start of work, unless the training had been completed within the previous three years.

This legislation was prompted when a four year old died after choking on a grape while at a child care center. The previous law only required one person in the child care center to be trained in CPR.

Vulnerable Adults

Minn. Stat. § 609.2231 was amended to indicate that, effective August 1, 2011, anyone who assaults and inflicts demonstrable bodily harm on a vulnerable adult, knowing or having reason to know that the person is a vulnerable adult, is guilty of a gross misdemeanor. •

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"certification of readiness" requirement when it amended Minn. Stat. § 176.305 subd. 1(a) to require the chief administrative law judge to schedule a settlement conference before a compensation judge within 180 days after the filing of a claim petition, or 45 days after the filing of a Petition to Discontinue, Objection to Discontinue, or Request for Formal Hearing. If a settlement is not reached, the new legislation requires hearings to be scheduled within 90 days of the settlement conference. The hearing must be held before a different compensation judge than the judge who presided over the settlement conference.

Pursuant to Minn. Stat. § 176.341 subd. 4, hearings may still be continued upon a showing of good cause. In addition, the legislature supplemented subdivision 4 with a provision providing that settlement conferences shall be cancelled if all the parties agree.

It is clear the new legislation extinguishes the "certification of readiness" requirement for new claims. However, it is difficult to predict how the office of administrative hearings will apply the new law to pending petitions. All the notices of judge assignments that have gone out during roughly the last year have included the "certification of readiness" requirement. Presumably, in those particular cases, the requirement remains in place until further notice.

The majority of workers' compensation participants will likely be pleased with the legislative changes to the procedure for assigning compensation judges, but there may be some concern at the office of administrative hearings regarding compliance with the new scheduling deadlines, especially in light of the back log of cases created by the government shutdown. •

Case Law Update

MN Supreme Court to Review Employer Reduction in Force (RIF) Termination

by Marlene S. Garvis

On June 28, 2011, the MN Supreme Court granted review of *Hansen v. Robert Half International, Inc.*, 796 N.W.2d 359 (Minn. Ct. App. April 19, 2011).

Hansen began working for Robert Half (RHI) in 2004. She transferred to another division in 2006 after her first child was born. In January 2008, Hansen was promoted from a recruiting manager to a division director, but due to performance issues, was returned to her previous position.

In late January 2008, Hansen informed her manager that she was pregnant. Medical complications due to her pregnancy arose around July, at the same time there were concerns regarding her performance. She failed to meet production expectations in July and August. Her child was born on August 29, 2008.

RHI approved Hansen's request for a short-term Family and Medical Leave Act (FMLA)/disability leave of absence effective August 29. Hansen was eligible for 12 weeks of leave in a 12 month period and an extended personal leave was granted. Hansen returned to work on December 1 after more than 13 weeks of leave. Around the same time, due to the economic downturn, RHI made a decision to reduce its workforce. Hansen's position was eliminated.

Hansen initiated a lawsuit against RHI, claiming sex discrimination in violation of the Minnesota Human Rights Act (MHRA) and a violation of the Minnesota Parental Leave Act (MPLA) based on RHI's failure to reinstate her to her former or comparable position when she returned to work after her leave. The court concluded as a matter of law that Hansen had no claim under the MPLA because she never requested a leave under the Act; and, further, even if she had, her claim lacked merit because her position was eliminated "as part of a bona fide RIF and therefore reinstatement was not required." *Id.* at 364. Regarding Hansen's MHRA claim, the court concluded that she failed to state a prima facie case of discriminatory discharge because Hansen failed to show that sex was a factor in the decision to eliminate her position because the elimination was part of a legitimate RIF.

On appeal, the Minnesota Court of Appeals confirmed the district court's determinations. •

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Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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Coming in the Fall 2011 Issue...

Government Liability

Medical

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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