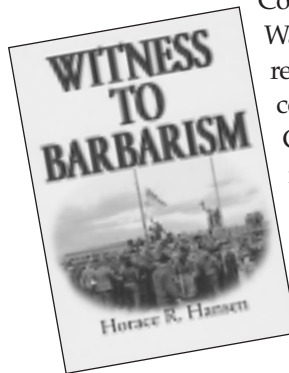


- An Illegal Alien's Right to Workers' Compensation Benefits
- HDBOB's Rising Stars
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- Aggravating Jury Instructions!!

HDBOB Founder to be Featured at Human Rights Lecture Series

On November 1, 2005, the University of Minnesota Law Library's Distinguished Lecturer Series and Exhibition will commemorate the 60th anniversary of the war crimes trials at Dachau and Nuremberg. The centerpiece of the exhibition, "Defending Human Rights: The Legacy of Dachau and Nuremberg", is a unique collection of photographs and documents collected by Horace R. Hansen, founding partner of *Hansen, Dordell, Bradt, Odlaug & Bradt*.

Horace R. Hansen graduated from the St. Paul College of Law in 1933. While in law school, he became a friend of former U.S. Supreme Court Chief Justice, Warren Burger. They remained friends and corresponded after Chief Justice Burger moved to Washington D.C.



Horace joined the Ramsey County Attorney's staff as a

prosecuting attorney in the early 1940s, but World War II interrupted his practice. He served as a lieutenant in an Army replacement troop. At the war's conclusion, he became a Captain in the Judge Advocate General's Corp. Horace became part of the legal team that prosecuted the Germans for war crimes. He worked on the Nuremberg trials but his efforts were primarily focused on the prosecutions at Dachau where he served as chief



prosecutor. During this time, Horace detailed his many interesting war-time experiences in long letters home to his friends. These letters were widely circulated and were published in the St. Paul Dispatch. The letters are now part of the permanent record of the Ramsey County Historical Society as are the many photographs he took while traveling through

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The Medicare Dilemma

Medicare issues have increasingly become a stumbling block on the road towards voluntary resolution of certain workers' compensation claims in Minnesota and elsewhere. Simply put, Medicare does not want to pay for medical expense benefits that arguably should have been paid by a workers' compensation carrier pursuant to the Medicare as Secondary Payer Act.

Medicare's potential involvement should be taken into consideration as part of all settlements involving the closure of any medical expenses. When Medicare involvement is required, it is recommended that a Medicare Set-Aside (MSA) account be created. Failure to do so may result in Medicare denying benefits to eligible employees until such time as they can demonstrate that they have exhausted all of their settlement proceeds. Various penalties may also be levied against insurers.

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Horace Hansen

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Europe. His experiences are further detailed in his book, "Witness to Barbarism", published in 2002.

After completing his prosecution duties, Horace returned to St. Paul and continued his private law practice. Although a general practitioner, Horace was widely recognized as an expert in insurance, banking and health law. His work in banking law sent him to Washington D.C. on numerous occasions to testify before congress on pending legislation.

As an outgrowth from his early days in the Cooperative Movement, Horace obtained authorization from then-Minnesota Attorney General Miles Lord to charter the first health maintenance organization in Minnesota. Horace was one of the founders of the Group Health Association of America, now known as HealthPartners, and served as its counsel for many years. During the tenure of Minnesota Governor Orville Freeman, Horace declined an invitation to consider an appointment to the Minnesota Supreme Court.

In May 2005, the Horace R. Hansen Archives were donated by the Hansen family to the University of Minnesota Law Library. The documents include the charge sheet of the Military Government Court at Dachau as well as a variety of printed materials such as Stars and Stripes, Nazi propaganda magazines, and original newspapers chronicling many key events of World War II. Of particular interest are the original transcripts of interviews conducted by Horace with five of Hitler's war-conference recorders.

For information regarding the upcoming Distinguished Lecturer Series and Exhibition, contact Benita Johnson at 612-625-5526 or b-john@umn.edu.

An Illegal Alien's Right to Workers' Compensation Benefits: An Evolving Issue in Minnesota

Whether an illegal alien is entitled to workers' compensation benefits is a hot topic nationwide. Public interest and minority rights groups have been lobbying state legislatures for the liberalization of state benefit systems, particularly in California where the alien immigrant population makes up a substantial share of the minimum wage work force. Even in Minnesota, the courts have addressed illegal aliens and their rights to benefits. However, the courts have, for the most part, deferred to the legislature, which, as yet, has failed to act.

INS informed the employer that the employee had provided falsified documents indicating his ability to work in the U.S. Correa was subsequently terminated.

Correa was released to return to work, but was unable to secure employment due to his illegal alien status. As such, he claimed temporary total disability benefits. The employer argued that Correa was not entitled to temporary total disability benefits because he could not perform a reasonable and diligent job search since Federal Law made it illegal for him to attempt to obtain work as an illegal alien.

The definition of employee under Minn. Stat. § 176.011 includes "alien," however, no case provided an expansion of that term to include or exclude "illegal alien."

Before 1999, there was no reported Minnesota case addressing whether an illegal alien is entitled to workers' compensation benefits. The definition of employee under Minn. Stat. § 176.011 includes "alien," however, no case provided an expansion of that term to include or exclude "illegal alien."

In 2002 the Minnesota Supreme Court was asked to decide whether an illegal alien can conduct a reasonable job search in *Correa v. Waymouth Farms*.

Correa, an illegal alien, sustained an admitted injury for which he received various benefits until the

The Minnesota Supreme Court affirmed the decision of the Workers' Compensation Court of Appeals, finding that an illegal alien is not, as a matter of law, precluded from receiving temporary total disability benefits when those benefits are conditioned upon the employee's ability to perform a diligent search for employment.

The Court's decision created the somewhat paradoxical rule that an employee can still conduct a diligent job search even when it would be unlawful for any employer to hire the employee under the Immigration Reform and Control Act of 1986.

Release of Medical Records for Independent Exams

The Court of Appeals' decision in *Newman v. Brendel & Zinn* (2005) confirms what most of us already assumed: that a law firm has a right to forward a plaintiff's medical records to an independent medical examiner prior to the examination.

Following the trial relating to a motor vehicle accident, plaintiff sued the defense firm, alleging that the firm violated Minn. Stat. § 144.335, Subd. 3a(a), which prohibits the release of medical records without consent. The authorizations that the plaintiff signed did not authorize the re-release of her records to a third party.

The Court of Appeals affirmed the district court's dismissal of plaintiff's claim. The Court reasoned that Rule 35.04 required the plaintiff to permit the inspection of her medical records related to the condition she placed in controversy and that the independent medical examiner, possessing the expertise to review such records on behalf of the defense firm, was the firm's representative as the term was used in the medical authorizations.

Medicare CONTINUED FROM PAGE 1

The need for an MSA will arise most often in those claims where the employee has reached maximum medical improvement (i.e., his condition as stabilized) so that "it can be determined, based on past experience, what future medical expenses may be." Regardless, an MSA is mandatory when there is a settlement of future medical claims and the employee is currently a Medicare beneficiary and the total settlement proceeds are in excess of \$10,000. An MSA is also mandatory if the employee is not currently a Medicare beneficiary but the settlement in total exceeds \$250,000 and there is a "reasonable expectation" that the employee will enroll in Medicare within 30 months of the settlement date. However, even in those cases where a formal review by Medicare is unnecessary, Medicare's rules require that its interests be taken into account as part of any settlement

involving the closure of some or all future medical benefits.

Naturally, the question arises: "how much should be set aside?" The Centers for Medicare and Medicaid Services (CMS), the federal agency that administers Medicare, has agreed to review proposed settlements including MSAs and give a written opinion on which the employee, his attorney and the insurer can rely. Unfortunately, it can take several months to obtain such an opinion.

Employers and insurers should be aware of the impact Medicare could have on settlements with injured employees who are, or may soon become, eligible for Medicare benefits. Guarding against unforeseen future Medicare claims can be a tricky endeavor and a matter you should discuss with legal counsel.

HDBOB's Rising Stars

Minnesota Law & Politics recently released its list of "Rising Stars." To qualify as a Rising Star, an attorney must be under forty years of age or have practiced less than ten years, and be nominated by other attorneys in the area. Only the top 2.5% of attorneys who fit this criteria are selected as Rising Stars.

Included in the list are three HDBOB attorneys: Joseph Twomey, Jason Schmickle, and Karen Hatfield.

Joseph Twomey is a 1996 graduate of Hamline University School of Law and has been an associate attorney at HDBOB since 1998. His practice focuses primarily on workers' compensation defense and automobile liability defense.


Jason Schmickle, also a 1996 graduate of Hamline University School of Law, joined HDBOB in 2002. He practices in the areas of workers' compensation defense and general insurance litigation.

Karen Hatfield graduated from William Mitchell College of Law in 2002 and joined HDBOB in 2003. She is licensed in both Minnesota and Wisconsin and practices in the areas of personal injury and insurance defense.

Provided by the law firm of Hansen, Dordell, Bradt, Odlaug & Bradt, P.L.L.P. Quarterly is only a general summary of the topics discussed here and is not a substitute for legal advice. If you have any questions regarding these topics, please call us at (651) 482-8900.

Jason Schmickle
Editor

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Illegal Aliens

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The Court of Appeals' 2004 decision in *Rivas v. Car Wash Partners* appears to have limited the reach of the *Correa* decision. In *Rivas*, the injured employee was offered a job within his physical restrictions conditional upon his ability to demonstrate eligibility to work in the U.S. The employee was forced to turn down the job because he was an undocumented worker. The compensation judge denied the employee's claim for temporary total disability benefits on the grounds that the employee had turned down a suitable job offer. The Court of Appeals affirmed the decision, reasoning that *Correa* was not controlling because the employee in *Rivas* was offered a job within his physical restrictions and noted no statutory basis for concluding that the cessation of temporary total disability benefits should apply only to persons that can legally work in the country.

Until the legislature acts to expressly include or exclude "illegal" or "undocumented" aliens from the list of employees who are entitled to benefits, cases will continue to be appealed. Perhaps *Rivas* is a sign of things to come. Although not a departure from *Correa*, its holding provides employers a limited opportunity to avoid temporary total disability benefits through a post-injury job offer conditioned upon the employee providing proof of his or her legal immigration status.

Aggravating Jury Instructions!!

Since the 1999 revision of the civil jury instructions, parties have been feuding over the proper instruction for claims involving an aggravation of a pre-existing condition.

The old jury instruction (CIVJIG 163) placed the burden on the plaintiff to establish the extent to which the accident caused an aggravation of the existing condition. The new instruction (CIVJIG 91.40), however, provides that if the jury cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, the defendant is liable for all of the damages.

In *Heine v. Simon* (2004), the Court of Appeals affirmed the district court judge's decision to provide the old instruction, concluding that it is the plaintiff's burden to prove the extent of damages caused by the defendant's conduct. The Court stated, "The plaintiff's recovery against the defendant who aggravated the injury is limited to the additional injury caused by this aggravation over and above the consequences that the preexisting injury would have caused absent the aggravation." The Court stressed the idea that damages for the aggravation of a preexisting condition are simply a means to assure that defendants pay only for the harm they cause, not the harm from a preexisting condition.

However, the Court did not address whether CIVJIG 91.40 was an incorrect statement of the law.