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WORKERS' COMPENSATION

Changes at OAH Affect Handling of Workers' Compensation Cases

The Office of Administrative Hearings (OAH) has made several significant changes to its operations in an effort to process workers' compensation cases more quickly. These changes were implemented as administrative edict and not pursuant to any new statutes or rules. The changes will impact hearings, pretrial conferences, motions, petitions and settlement conferences in all workers' compensation cases and officially took effect September 1, 2010. You may have already noticed some of these changes being implemented.

The Hearing and Settlement Divisions have been eliminated and replaced with a system in which all cases (including expedited cases) are block assigned to a particular judge. The assigned judge handles each case from beginning to end and is free to determine how to handle the setting of his or her cases and settlement conferences on the calendar. Judges are now able to schedule pretrial conferences and settlement conferences at their discretion. It is very likely that in most cases settlement conferences will not be set. In this new system, more judges will be conducting hearings, which is expected to speed up the litigation process.

Before a case is set for hearing, the parties must now file a Certificate of Readiness. Any party can file a Certificate of Readiness and the opposing party can object if they are not ready to proceed to Hearing. Counsel for the parties are required to contact one another to discuss readiness for hearing prior to filing the Certificate of Readiness. In practice, cases are currently being set for hearing prior to filing of a Certificate of Readiness, seemingly contradicting the new guidelines.

Although this new structure is designed to get cases on the hearing calendar sooner, cases could actually take longer from start to finish. If one or more parties are not prepared to proceed to hearing, then the case will be delayed and no hearing will be set until they are ready. Judges are required to hear cases within three months from the date the Certificate of Readiness is filed.

Judges are also now required to set two hearings per day unless the parties can show that a full day hearing is necessary. If a full day is necessary, the requesting party must attach an explanation to the Certificate of Readiness lay-

OAH CHANGES

| OLD SYSTEM | NEW SYSTEM |
|--|--|
| Two divisions at OAH: Settlement Division and Hearing Division. | No divisions – all judges handle hearings and settlement conferences. Judges grouped in teams and settlement conferences (if any) handled by team members. |
| Only regularly set hearings block assigned to a judge. | All cases are block assigned to a judge (including expedited cases). |
| Cases set for hearing after filing of a Claim Petition or Medical Request. | Parties must file Certificate of Readiness for hearing. |
| Initial setting of a hearing approximately 6 months from filing of Claim Petition. | Initial setting of a hearing within 3 months from date the Certificate of Readiness is accepted by the court. |
| Half-day hearings encouraged, but full day hearings common. | Judges set two half-day hearings per day unless the parties can show why a full-day hearing is necessary. |
| Decisions in expedited cases due within 30 days. Decisions in non-expedited cases due within 60 days. | Decisions in expedited cases due within 30 days. Decisions in non-expedited cases due within 45 days. |

ESTATE PLANNING & PROBATE

Safeguarding Your Estate

Part One: Wills

“A tornado is coming right toward our house – boy, do I wish I had homeowners’ insurance.” Fortunately, most responsible people do not find themselves in that predicament. Rather, as soon as their home is purchased, so is the insurance.

While most responsible people safeguard their tangible, personal possessions, the same is not true for their estate. It is extremely common to hear people say an estate plan is not necessary for them because they are not old, affluent or seriously ill. Contrary to this common belief, almost everyone needs an estate plan.

An estate plan consists of at least three documents: a Will or Trust, Health Care Directive and Power of Attorney. This Article is the first of four in a series explaining what is meant by the term “estate plan.” This article addresses two common estate plan documents: the Will and Trust.

Both Wills and Trusts allow people to set forth their wishes and distribute their assets accordingly. Without a Will or Trust, a person’s assets will pass under Minnesota intestacy law without any personal direction by the deceased person. Without a Will or Trust, a person is unable to make gifts at death (called “testamentary” gifts) to churches, schools, charitable organizations and/or friends. Thus, by creating a Will or Trust, every person is able to control the ultimate distribution of their assets.

Wills are commonly discussed within three distinct categories: basic Wills, Wills with trust provisions, and Wills with tax provisions.

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FAMILY LAW

Minnesota Divorce Basics

Divorcing is often more complicated and stressful than planning the wedding. The laws and procedures are numerous and vary from state to state. This article is the first in a two-part series providing an overview of what to expect when considering divorce in Minnesota. The winter Quarterly will outline the basics of filing a divorce in Wisconsin.

Residency:

To file for divorce in Minnesota, one spouse must have lived in the state for a minimum of 180 days. Papers for divorce usually need to be filed in the county where one spouse lives. If spouses reside in different counties, there may be advantages on selecting the county in which to file.



Beginning the Divorce:

In Minnesota, a divorce is called a Dissolution of Marriage. One spouse must start the dissolution by serving a Summons and Petition on the other spouse. There are specific rules that must be followed regarding how these documents are served. These rules become more complicated when the other spouse lives in another state or is a member of the military. The spouse that receives the Summons and Petition must review the documents and respond in writing with an Answer.

Minnesota law requires divorcing parents to attend a certified education program regarding custody and/or parenting time. The purpose of this class is to educate and guide parents in making decisions that are in the best interest of their child during the

divorce. Depending on the age and maturity of the child, he or she may benefit from attending a class for their needs. Each county’s education requirements and programs vary; therefore, parties should consult with an attorney or follow up with court administration.

Fees & Costs:

In Minnesota, there is a dissolution filing fee of approximately \$400 depending on the county. The spouse that files the Summons and Petition typically pays this fee. There are also additional court fees, possible attorney fees, and service of process fees depending on the case.

Over the last 20 years, the court system has made attempts to remedy the costs and length of divorce proceedings. If a party is low-income or cannot afford an attorney or court fees, help and forms are available at the Self Help Center in their county and on the web at <http://www.mncourts.gov/selfhelp/>. Parties are advised to proceed cautiously when attempting to represent themselves in a divorce.

Timeframe:

A divorce is more complicated if it involves real estate, various property, retirement assets and minor children. It often takes months for a divorce with these types of issues to become final. A divorce can be finalized quicker if the parties agree on how to assess and divide property, handle custody of the children and set child support and/or spousal support. In order to help facilitate early settlement, judges

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Minnesota Changes Law on Employee Time Off to Vote

The Minnesota Election Day Law was recently amended to expand the amount of time that employees may take to vote in “regularly scheduled” state primaries and general elections. The law was originally drafted to require that employees be given time off without penalty for voting during the morning of the election. In April, the Minnesota Legislature changed the law by removing the reference to election-day morning.

The new law grants employees the right simply to be absent “for the time necessary to appear at the employee’s polling place, cast a ballot, and return to work.”

Violation of the statute is a criminal misdemeanor that the county attorney can prosecute.

Unfortunately, the Minnesota Election Day Law provides little guidance to employers in implementing the law, and they often ask the following questions:

Can I require an employee to provide advance notice?

Probably. Requiring an employee to provide advance notice, at least at the time his shift starts, does not appear to interfere with his right to be absent from work to vote. However, lack of notice is not a valid basis for taking disciplinary action.

Can I limit the amount of time an employee is absent from work?

Yes, although implementing a policy dictating how long an employee may be out from work to vote will be difficult to enforce. The statute provides that the amount of time an employee is given must be adequate to (1) appear at the employee’s polling place, (2) cast a bal-

lot, and (3) return to work. It does not provide for time off to stop and eat on the way. From a practical standpoint, however, it will be difficult to determine whether an employee who seems to be taking a long time returning to work is doing anything other than simply waiting in a long line at the polling place.

Can I require the employee to use accrued vacation or paid time off (PTO)?

Probably not. While the statute does not specifically address the question, deducting an employee’s accrued leave or PTO may be viewed as a prohibited deduction or penalty.

Can I coordinate an employee’s time off with other employees so as to not disrupt the workflow?

Probably. Again the statute does not address whether an employer may coordinate employee work schedules with time off to vote in order to minimize disruption or ensure proper staffing. However, you can likely do so provided you give the employee sufficient time off to (1) appear at his polling place, (2) cast a ballot, and (3) return to work.

Employers should start planning now. Get an idea of when employees are planning to be gone; encourage employees to vote before or after work; have adequate staffing plans; and, be prepared to relax starting and ending times on Election Day. Fortunately, it’s only one day!



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will order parties to participate in settlement program such as Mediation or Early Neutral Evaluations.

Going to Court:

Depending on when and whether the parties reach an agreement, they may have to attend a court hearing. Appearing in court is a very important part of any case. The number of times the parties see a Judge or Referee depends on local court procedures and the contentiousness of the divorce. Sometimes it is necessary for one party to file a motion asking the Judge or Referee to decide an issue early on in the process regarding child custody, child support, spousal support, or certain property division. This decision of the Judge is called a Temporary Order. This Temporary Order expires with the entry of the final Divorce Decree.

Final Divorce:

A divorce is resolved by either agreement of the parties or by a final judicial decision after hearing. A Judge has 90 days from the hearing to issue a final Order. If the parties are able to reach an agreement, one or both of the parties prepare a Stipulated Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree. Even if the parties reach an agreement, if one party is not represented by an attorney and the agreement involves minor children, a hearing is required to finalize the divorce. The divorce is final when this document is signed by a Judge and entered by court administration.

Remarriage:

Minnesota law does not require a waiting period after the divorce before a party may remarry.

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ing out the reasons that additional hearing time is needed. Because the time for trying cases is limited to a half-day, it may be necessary in some cases to consider use of pre-hearing witness depositions to reduce the time needed for hearing testimony. Also, a case may have to be rescheduled to finish at a later date.

These changes will affect how claims representatives handle workers' compensation cases. In particular, claims representatives must be aware that they will receive a Notice of Judge Assignment shortly after a Claim Petition is filed. Once the Notice of Judge Assignment has been issued by OAH, parties have only 10 days to request reassignment to a different judge if they so desire. If reassignment is not requested within the initial 10-day window, the opportunity is lost for the remainder of the case. Because of this, it is important that claims representatives contact their legal counsel as soon as possible after receipt of the Notice of Judge Assignment to ensure that the opportunity to seek reassignment is not missed.

Finally, the last significant change at OAH involves the time in which judges have to issue a decision following a hearing. Under the old system, judges had 60 days to issue a decision. Now, judges are required to issue decisions within 45 days from the date of hearing. Expedited cases are still decided within 30 days from the date of hearing.

If you would like to learn more about the changes at OAH, you can watch a Webinar produced by HDBOB and posted on our web site at the following address: <http://www.hdbob.com/legal-resources/workers-compensation>.



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WILLS CONTINUED FROM PAGE 2

Basic Wills

Basic Wills are often called "I love you" Wills because everything is left outright to a spouse and then to the children who survive. Basic Wills are appropriate for people whose assets are below the threshold for Minnesota state (\$1 million) and federal estate taxes and where the beneficiaries are responsible adults or charitable organizations. Basic Wills are particularly important for unmarried people because state intestacy laws do not provide any inheritance for "significant others" of unmarried people.

Another important reason to create a Will when minor children are involved is to name guardian(s) to care for the children until they reach age 18. The Will may also include specific directions to the guardian(s) about the care of the child. Without language in a Will expressing one's intent for a person or persons to care for minor children, a court would appoint the guardian(s) based upon a relative or other interested person petitioning for appointment. The court-appointed guardian(s) may not be the ones the testator would have selected for the minor children.



at what age the children should receive the funds. For example, a common Trust provision in a Will might leave one-third (1/3) of the testator's estate assets to his or her child or children at age 25, one-half (1/2) of the remaining assets at age 30 and the remainder of the assets at age 35. Another option could be to distribute a percentage of estate assets annually. Along with choosing distribution amounts and ages, a testator is also able to choose a trustee who would manage the funds for his or her children until such children receive their final distribution.

Wills With Tax or Trust Provisions

If a person or couple's assets exceed either the state or federal estate tax threshold, then it may be necessary to include provisions in a Will to eliminate or minimize estate taxes. The Federal estate tax rates are approximately 45%, while Minnesota estate tax rates are

approximately 10-16%. There are a variety of planning techniques available to deal with minimizing estate taxes.

Whether you have a small or large estate, a Will or Trust is something everyone should have in place. It is your last opportunity to decide who should care for your minor children and it is your last chance to be sure that the fruits of your labor pass exactly as you wish.

Up Next: Different Types of Trusts.



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Wills With Trust Provisions

While almost everyone needs a Will or Trust, it is extremely important that those with minor children, children with special needs, or adult children who are dependent or viewed to be financially irresponsible have trust provisions. In the case of minor children, provisions are included in the Will that create a Trust for the minor children to ensure that funds are not depleted when the child turns 18. In creating a Trust, one can include specific information about the amount designated and

CIVIL LITIGATION

Big Changes in “Collateral Sources”

The Minnesota Supreme Court in *Swanson v. Brewster* has dramatically altered the landscape of personal injury litigation. The case interprets (some would say it “recreates”) Minnesota Statute § 548.251 (originally Minnesota Statute § 548.36) which was enacted by the legislature in 1986. This is the so-called “collateral source” statute.

Prior to 1986, if an injured plaintiff received medical insurance benefits, disability insurance benefits, or other money or services as a result of an injury, that had no effect on her entitlement to tort damages. In effect, she could recover twice for the same claim. Conversely, the negligent tortfeasor was not allowed to benefit from the fact that a plaintiff had purchased, or had available, other modes of compensation (i.e. insurance coverage).

The legislature addressed this “windfall,” “double recovery” or “collateral source” issue, overcoming the longstanding common law, by creating a post-verdict mechanism to reduce or “offset” jury awards for specific, identifiable benefits the plaintiff received before trial. Those specific benefits were labeled “collateral sources,” defined in the statute to mean “payments related to the injury or disability in question made to the plaintiff, or on the plaintiff’s behalf, up to the date of verdict” for:

- Disability or workers’ compensation benefits,
- Public programs providing medical or disability benefits,
- Health, accident or automobile insurance providing health or income disability coverage, and
- Employer-funded wage continuation plans.

The issue presented in *Swanson* was whether these “payments,” to be offset or subtracted from a plaintiff’s verdict, include amounts that no one pays — the “discount” or negotiated rate between the health insurer and the medical provider.

The Supreme Court in *Swanson* held that “payments related to the injury or disability” include the amount by which medical bills are discounted pursuant to the contract between the medical provider and the plaintiff’s health insurer. The Supreme Court characterized this holding as the “ordinary and plain meaning of the words “pay” and “payment....” However, it took Justice Paul Anderson thirty-five pages to explain the “plain meaning.” Rarely have opinions of the Minnesota Supreme Court contained such sharp exchanges between majority and dissenting justices. Further, in numerous pre-*Swanson* opportunities the Court read the statute quite differently.

Regardless, the impact will be enormous, especially in larger cases. Health insurers routinely negotiate discounts in the

range of 30% to over 50% of billed charges. An insurer for a severely injured accident victim might pay, for example, no more than \$600,000 to resolve \$1 million in doctor and hospital charges. The plaintiff in such a case no longer possesses the claim for the \$400,000 “discount” or differential between the amount paid and the amount billed.

There are several practical consequences of this decision, and likely many more strategies parties will devise to either counteract or take advantage of the new reading of the collateral source statute. Obviously, the decision cuts into the net value of many injury claims since the invoiced value of medical services can no longer be recovered if the bills have been paid at discounted value. Quite simply, with the stroke of a pen, the value of personal injury claims has been radically changed. As a result of this decision, defendants will have a lot less incentive to negotiate independently to resolve or buy an assignment of the lien so as to eliminate the subrogation claim for the discounted amount, if there is one. It may still be advantageous for either party to own the subrogation claim, but the value is likely to be much closer to the amount paid rather than the amount billed.

There are rare circumstances where the plaintiff might be in a position to bring a subrogation claim. For example, a plaintiff may partially resolve a claim with a primary layer of coverage, purchase the assignment of the subrogation claim and then present the injury claim, with enhanced value, to the secondary insurer. Some attorneys representing plaintiffs believe that since the “discount” had economic value they can purchase the assignment for that claim, as well. But *Swanson* does not appear to be consistent with such an effort, at least based upon its statement of the public policy promoted by the decision.

Plaintiffs will likely try to find new ways to position medical expenditures before trial. They may attempt to delay the presentation of bills to medical insurers or the appeal of denials.

Finally, plaintiffs will reconsider the presentation of claims for paid medical expenses at trial. Minnesota Statute § 548.251, subd. 5 prohibits the court or counsel from informing the jury of the existence of collateral sources and offsets; therefore, the jury might erroneously assume that the defendant will have to pay any amount awarded for medical expenses. If the entire bill is to be offset and the “discount” or “gap” cannot be claimed, the plaintiff may have no incentive to make a claim for the bill at trial. In some cases there still may be strategic reasons to offer evidence of the amount of the bill (e.g. to



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HDBOB's Karen Hatfield Runs for Bridge to Hope



Karen K. Hatfield, a partner at HDBOB, recently participated and finished first among all women in the First Annual River Run to Hope Half Marathon. The half marathon started in Colfax, WI and ended in Menomonie, WI. Karen was excited about her race results, but happier to participate in a race benefiting the Bridge to Hope. The Bridge to Hope is an organization that offers free services to survivors of domestic violence and sexual assault in Dunn and Pepin Counties in Wisconsin. Karen's husband, Jeff McCalla, also participated in the race and placed third for men in his age group.

CIVIL LITIGATION CONTINUED FROM PAGE 3

prove a "threshold," Minnesota Statute § 65B.51, subd. 3, or to give the jury a sense of case value) without actually making the claim for reimbursement of expenses. However, there is clearly risk in presenting a substantial claim that, unbeknownst to the jury, has no value. The biggest risk is that they will award that claim and, as a consequence or quid pro quo, negotiate a compromise or reduction of the claims that do actually have value to the plaintiff.



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