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ATTORNEYS AT LAW

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MINNESOTA WORKERS' COMPENSATION UPDATE

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CASE LAW UPDATE

DECISIONS OF THE MINNESOTA SUPREME COURT

SETTLEMENT

Ryan v. Potlatch Corporation, 882 N.W.2d 220 (Minn. 2016). In this case, the Minnesota Supreme Court completed a thorough review of the *Sweep* doctrine. The employee sustained a work-related back injury that was settled via a stipulation for settlement. She later came forward with a claim for consequential depression. She argued that this depression condition was not within the contemplation of the parties at the time of the settlement agreement, and thus, she could make a new claim based on the depression condition. The Court (Justice Dietzen) rejected this argument, fundamentally altering the way *Sweep* is interpreted. The Court listed several WCCA cases that have interpreted *Sweep* over the years, noting that, "The WCCA has misconstrued our *Sweep* decision. In *Sweep*, we decided that section 176.521 permits a settlement of workers' compensation claims based upon a known and admitted injury. . . In doing so, we affirmed the WCCA's determination that a settlement agreement could not close out other distinct, work-related injuries not at issue in the claim petition and, therefore, not in dispute at the time of the agreement. . . But *Sweep* did not address whether a settlement agreement may close out conditions or complications that arise from, or are a consequence of, the work-related injury that is the subject of the settlement." The Court concluded that a stipulation for settlement may close out not only the work injury that is the subject of the agreement, but also conditions and complications that emanate from that work injury. The Court noted that it is not necessary that the condition or complication be specifically referenced in the settlement agreement. The Court found that the employee's depression is a psychological condition that arises out of and is a direct consequence of her workers' compensation injury, so it falls within the scope of the settlement agreement. ✦

ABOUT OUR ATTORNEYS

Our group of workers' compensation law attorneys has extensive experience representing employers, insurers, third-party administrators, and self-insured employers in all phases of workers' compensation litigation. Contact us today to discuss your workers' compensation needs.

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Decisions of the Minnesota Court of Appeals

§176.82 Actions

Sanchez v. Dahlke Trailer Sales, Inc., File No. A15-1183 (Minn. Ct. App., June 6, 2016.) The employee, an undocumented worker, was employed by the employer and was injured while using a sandblaster. After filing a workers' compensation claim, his deposition was taken and the attorney for the employer asked about his immigration status. The employee acknowledged he was ineligible to work in the U.S. The next day, the employer put the employee on indefinite leave and made him sign a document indicating he was on unpaid, indefinite leave until he could show he could legally work in the U.S. The employee filed a claim for retaliatory discharge per Minn. Stat. §176.82. The employer filed a motion for summary judgment, which was denied. A second motion for summary judgment was filed, which was granted by the Anoka County District Court on the basis that there was no adverse employment action as a result of employee filing a workers' compensation claim. The Minnesota Court of Appeals (Judge Reilly) reversed on the basis that the district court did not address whether the employer articulated a legitimate, nondiscriminatory reason for its action, nor did it consider whether the employer's reason was pretextual. The employer argued that requiring it to continue to employ an undocumented worker after discovering his immigration status would violate federal law. The Court of Appeals held that *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) held that the Immigration Reform Control Act (IRCA) prevents employers from hiring illegal immigrants, but does not preclude an undocumented worker from filing a retaliatory discharge cause of action against the employer. To establish a prima facie case for wrongful retaliation under Minn. Stat. §176.82, the employee must demonstrate: 1) the employee engaged in statutorily protected conduct; 2) the employee suffered adverse employment action by the employer; and 3) the existence of a causal connection between the two. The filing of the workers' compensation claim satisfied the first prong. The parties were in dispute as to whether the employer's action satisfied the second prong, but the Court of Appeals held indefinite unpaid leave was an adverse employment action. With respect to the third prong, there was evidence the employer knew the employee was undocumented two years before the work injury and told the employee following the initiation of the workers' compensation claim that he did not like that the employee got an attorney involved. Because the appellants and the district court did not address the last two prongs, the order granting summary was reversed and remanded for further proceedings.

Common Enterprise

Kelly v. Kraemer Construction, Inc., File No. A15-1715 (Minn. Ct. App., July 25, 2016). The employee, Richard Washburn, was killed when he was electrocuted while working for Ulland Brothers, Inc. on October 4, 2012. Ulland was a general contractor which had subcontracted with Kraemer Construction for a project replacing steel culverts in order to allow a roadway to go over a stream. For the project, Ulland provided the rigging and four workers, while Kraemer supplied a crane and two workers. The employee had two minor children at the time of his death. The children's mother, Respondent Jessica Kelly, collected workers' compensation benefits through Ulland on behalf of the children. She also brought this suit in district court, for tort damages alleging Kraemer was negligent. In district court, Kraemer filed a motion for summary judgment arguing that the district court lacked subject matter jurisdiction under the Workers' Compensation Act and the common enterprise doctrine. The district court denied Kraemer's motion finding there were genuine issues of material fact regarding whether the two employers were involved in a common enterprise. Kraemer appealed. The Minnesota Court of Appeals (Judge Rodenberg) reversed and remanded to district court for entry of summary judgment in favor of Kraemer. Under the Workers' Compensation Act, if the employer and the third party were engaged "in the due course of business in … furtherance of a common enterprise" at the time of the injury, the employee or their representative if deceased, has the choice to either seek workers' compensation benefits from the employer or to sue a third party for damages." Minn. Stat. §176.061, subds. 1, 4 (2014); *LeDoux v. M.A. Mortenson Company*, 835 N.W.2d 20, 22 (Minn. Ct. App. 2013). A "common enterprise" occurs when all of the following factors are met: (1) two employers are working on the same project, (2) their employees are "working together on a common activity," and (3) their employees are

"exposed to the same or similar hazards." *LeDoux*, 835 N.W.2d at 22 (citing *McCourtie v. U.S. Steel Corp.*, 253 Minn. 501, 506, 93 N.W.2d 552, 556 (Minn. 1958)). The Court of Appeals found that there was no genuine issue of material fact on any of the three factors in this case. The two employers were indisputably working on the same project and the two employers could not have completed the project without each other as evidenced by their simultaneous and closely coordinated work. Finally, all employees were subject to similar general risks as evidenced by the precautionary efforts both employers took to avoid electrocution as well as the fact that both an Ulland employee and a Kraemer employee were electrocuted. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Erven v. Magnetation, LLC, File No. WC16-5903, Served and Filed June 20, 2016. (For additional information on this case, please refer to the Interveners category.) The employee worked as an electrician at an iron ore plant. One day, he received a call that slurry, a mix of iron ore and water, was leaking in the concentrator building and that if it was not stopped, it would leak onto the floor and delay production. The employee was to figure out the cause of the leak and stop it from continuing to leak. The employee testified he was hurrying to the slurry tank because he considered it to be an emergency situation. A witness for the employer and insurer agreed it was an emergency situation. Before he reached the slurry tank, the employee rolled his right ankle. The floor was flat, and although there were hoses on the floor, he did not trip or fall because of the hoses. He testified that he did not have a clue as to what happened. He testified that "if I had been looking at the floor and walking casually like normal, it wouldn't have happened like the other thousand times I have walked through there." He stumbled forward for another 25 feet and then sat down to wait for the pain to go away. It did not go away, and he went to the Emergency Room. Primary liability was denied, and the employee filed a Claim Petition. The WCCA (Judges Stofferahn, Milun, Hall, Cervantes, and Sundquist) affirmed Compensation Judge Baumgarth's finding that the employee's injury arose out of his employment. Pursuant to *Dykhoff* and *Nelson*, "if the injury has its origin with a hazard or risk connected with the employment, and flows therefrom as a natural incident of the exposure occasioned by the nature of the work, it arises out of the employment." The work environment encompasses more than simply the condition of the floor. The increased risk was the "totality of the circumstances existing at the time of the employee's injury." He was walking at an accelerated pace to get to the location of the leak in order to fix it before the leak adversely affected the employer's production process. Further, he was looking at the slurry tank as he was walking. This rose to the level of an increased risk.

Attorney Fees

Engren v. Majestic Oaks Golf Club, File No. WC15-5881, Served and Filed June 6, 2016. The employee entered into a Stipulation for Settlement leaving only medical benefits open with regard to two admitted work injuries against two separate employers. The employee then filed a medical request seeking injections and treatment from MAPS, which the employers and insurers denied. She then amended her request to include a request for a medication and orthotics. Both employers and insurers did not respond to this amendment. Compensation Judge Mesna held that the medication and orthotics were approved, but denied all the other treatment because it was not reasonable or necessary and did not comply with the treatment parameters. No one appealed Judge Mesna's decision, but there was no evidence of a bill showing the employee obtained the medication and/or the orthotics. The employee's attorney petitioned the court for *Roraff* fees and the employers and insurers objected. Because only one employer and insurer was found to be responsible for the medication and orthotics, the other employer and insurer were released from the attorney's fee request. The other employer and insurer argued

that the employee's attorney was not entitled to attorney's fees because the medication and orthotics were never in dispute and there was no evidence the employee actually obtained the medication. Judge Mesna granted the employee's attorney's request for attorney's fees. The employer and insurer appealed, arguing the medication and orthotics were not in dispute, there was no evidence the employee actually obtained the medication or orthotics, and that the employee's attorney's request was in excess of Minn. Stat. §176.081, subd. (1)(a). The WCCA (Judges Sundquist, Cervantes, and Stofferahn) affirmed that the request for the medication and orthotics was in dispute, but the WCCA also held that there was no evidence the employee actually obtained the medication or orthotics and remanded the matter back to the compensation judge for further determination. *See Crowley; Yennie.* The WCCA deferred to Compensation Judge Mesna regarding whether the employee's attorney's request for fees was reasonable under *Irwin.*

Average Weekly Wage

Giles v. Montu Staffing Solutions, File No. WC16-5904, Served and Filed July 29, 2016. (For additional information on this case, please refer to the Causal Connection category.) The employee was hired as a certified commercial driver by First Student, Inc. and "guaranteed" 20 hours of work a week at $15.50. The first two weeks she worked for First Student, she only worked 12.37 hours, and, due to lack of work, began to work for Montu Staffing as a truck driver. The employee worked for Montu Staffing, earning $14.00 an hour, from June 30, 2014, to July 10, 2014, for a total of 58.3 hours and was injured after she fell from her vehicle on July 10, 2014. She claimed she was entitled to a combined average weekly wage that included her wages from Montu Staffing and First Student. Compensation Judge Dallner calculated her average weekly wage only based on her Montu Staffing wages. The WCCA (Judges Hall, Stofferahn, and Cervantes) affirmed, holding that in order for an employee's income from a second job to be included in the average weekly wage, that second job must be "regular." The evidence showed the employee was not actually working for First Student from June 30, 2014, to July 10, 2014.

Bach v. Upper Mississippi Mental Health Center, File No. WC16-5911, Served and Filed August 15, 2016. The employee was working for the date-of-injury employer full-time, but then resigned to work for a different employer. She eventually returned to the date-of-injury employer part-time, but was also working for a start-up company full-time. Because there was no revenue at the start-up, she was only paid for two days. She gave notice that she would be resigning from the date-of-injury employer to work for the start-up full-time. On her last shift, she injured her low back when she fell retrieving a power cord from her car. The injury was accepted. The start-up went under, and she returned to her date-of-injury employer on a part-time basis, for less hourly pay. Compensation Judge Olson found she was not regularly employed by two employers and her work for the date-of-injury employer prior to her resignation before the injury was not relevant to the wage dispute. Judge Olson based the employee's average weekly wage solely on the five weeks she worked part-time for the date-of-injury employer, and found there was a lack of objective evidence to support what earnings she had from the start-up. The WCCA (Judges Cervantes, Milun, and Hall) affirmed. The WCCA cited *Bradley v. Vic's Welding* in finding the statutory method for wage calculation may result in a weekly wage which does not fairly reflect the injured employee's lost earning capacity, and the factfinder may use another method to make a fair approximation of the loss. The employee's employment with the start-up, which had two sporadic days of payment, was not regular employment. Whether an employee was regularly employed or not is a question of fact. *Ricke v. Plantenberg's Market, Inc.*, 68 W.C.D. 142, 146 (WCCA 2008). Wages from casual employment are excluded from weekly wages. The WCCA found Judge Olson was not unreasonable in declining to consider the employee's alleged wages from the start-up since the employee was unable to verify any of those earnings. The wage calculations were subject to the irregular earnings formula based on Minn. Stat. §176.011, subd. 18.

Causal Connection

Giles v. Montu Staffing Solutions, File No. WC16-5904, Served and Filed July 29, 2016. (For additional information on this case, please refer to the Average Weekly Wage category.) The employee worked for

Montu Staffing as a truck driver and struck her head, right knee and right shoulder on the pavement after she fell from her vehicle on July 10, 2014. She received treatment for her right knee, right shoulder, and low back. Liability appeared to be admitted for everything, including her right shoulder. Based on the employer and insurer's independent medical examination with Dr. Thomas and surveillance of the employee driving and using her right arm without any apparent difficulty, Compensation Judge Dallner held that the employee's right shoulder injury did not arise out of her work injury. On appeal, the employee argued that because her right shoulder was an admitted injury, the employer and insurer had the burden of proving that her right shoulder condition was not caused by the work injury. The WCCA (Judges Hall, Stofferahn, and Cervantes) disagreed with the employee and affirmed Judge Dallner's holding that the employee's right shoulder injury did not arise out of her work injury.

Interveners

Erven v. Magnetation, LLC, File No. WC16-5903, Served and Filed June 20, 2016. (For additional information on this case, please refer to the Arising Out Of category.) The employee was injured while working as an electrician at an iron ore plant. While hurrying to the scene of a leaking tank, he rolled his right ankle. He sought medical treatment. The employer and insurer denied primary liability for the injury. The employee placed the medical providers on notice of their potential intervention rights. One intervener failed to intervene on a timely basis, but Compensation Judge Baumgarth held it was entitled to seek payment of its bill, as there was no affidavit of service attached to the notice and he could not verify exactly when it had been served. The WCCA (Judges Stofferahn, Milun, Hall, Cervantes, and Sundquist) reversed. The WCCA acknowledged that there was no affidavit of service attached to the notice of right to intervene sent to the provider. However, an affidavit of service is not required by the rules or statute. The intervener in this case did not file a motion for more than 90 days after notice, so it was clearly outside the 60-day limit after notice was given. A health care provider is not required to intervene to have its bill paid. An employee may assert a claim for the treatment directly. *See Adams*. However, once a health care provider decides to intervene, it becomes a party to the litigation, and as a party, must follow the statute and rules in the same manner as any other party.

Goble v. Leisure Hills of Hibbing, File No. WC15-5900, Served and Filed July 11, 2016. The WCCA (Judges Hall, Milun, and Sundquist) affirmed Compensation Judge Brenden's award of claimed medical costs to intervener Medica, finding that Medica was not put on notice of the original 2012 proceedings and that the record from the 2012 proceeding was left open for filing of motions to intervene. In affirming the decision, the WCCA rejected the employer and insurer's argument that the common law principle of agency applies and that because Medica's principal, the Minnesota Department of Human Services, was properly provided with notice of its right to intervene, this notice should be imputed to Medica, the agent. The WCCA found that under Minn. Stat. §176.361, subd. 2(a), the only way an intervention interest can be extinguished is if the intervener fails to intervene within 60 days of service of notice of its right to intervene or 30 days of notice of an administrative conference. Because Medica was a potential intervener, it was entitled to notice. Notice was not provided, so the 60 day period did not run. Medica did not fail to timely intervene, and its intervention interest could not be extinguished.

Permanent Total Disability

Yupa v. Prime Home Construction, LLC, File No. WC15-5886, Served and Filed August 15, 2016. The employee worked as a roofer and was injured after he fell from a ladder. He underwent extensive medical treatment for a traumatic brain injury, right temporal bone fracture, and inner ear injury. The employer and insurer conceded 10 percent permanent partial disability as a result of mild memory impairment per Dr. Randa's independent medical examination. The employee's PM&R doctor, Dr. Lockman, gave him a 10 percent PPD rating for vertigo, additional work restrictions, and opined the employee was permanently and totally disabled as a result of his work injury. The employee's ENT doctor, Dr. Haberman, recommended surgery to the employee's inner ear, but as of the hearing, the employee did not know whether he would go through with surgery. Later, a second ENT doctor recommended the employee undergo ongoing treatment in the form of balance testing, repeat Dix-Hallpike and roll tests, an electronsystagmography, and an additional surgery. A third doctor, for his traumatic brain injury, recommended an updated neuropsychological evaluation and a consultation with an ophthalmology specialist. The employee's QRC found it was highly unlikely the employee would return to suitable gainful employment. The employee filed a claim petition seeking the

additional 10 percent PPD as assigned by Dr. Lockman and PTD benefits. Compensation Judge Behounek held it was premature to grant the employee the 10 percent PPD rating from Dr. Lockman, because he was not an ENT specialist and the employee was still actively treating for his vertigo. Judge Behounek also held the employee was not PTD because he did not meet the minimum PPD threshold for bringing a PTD claim, and he failed to prove that he was unable to obtain anything more than sporadic employment as a result of his disability in combination with his age, training, education, and experience. The WCCA (Judges Hall, Stofferahn, and Cervantes) affirmed the compensation judge's ruling that the 10 percent PPD rating was premature and, as a result, that the employee's claim for PTD benefits was premature, as he failed to meet the minimum PPD threshold. The WCCA reversed the judge's ruling that the employee was not PTD based on the statutory factors, as such a finding cannot be made until the employee has met the PPD threshold for bringing a PTD claim. *See Rezaie.*

Another settlement in 2001 settled claims for PPD up to 100%, PTD compensation, and supplementary benefits, with the purchase of an annuity. The settlement also settled the employee's claims for installation of an elevator and vehicle modification. Additional consequential medical conditions and benefits were subsequently litigated and medical benefits were awarded to the employee. In 2012, the employee's provider was astonished to see the employee no longer wheelchair bound and standing independently. The employee reported she had a spontaneous remission after falling out of her wheelchair and was miraculously able to walk. Dr. Gurin conducted an IME for the employer and found the employee's injury had completely resolved. The employee still claimed she had symptoms, and needed ongoing personal care services for 39 hours a week as opposed to 70 hours a week. Compensation Judge Mesna found that the employee was not credible, she had exaggerated and misrepresented her abilities and disabilities, her story about volunteer assistance no one else had met was not believable, and she was doing her own personal care and was not as disabled as she claimed. The WCCA (Judges Milun, Hall, and Sundquist) granted the employer's request to vacate the award on stipulation and addendum to award on stipulation on the grounds that there was an unanticipated substantial change in medical condition. Cause to vacate an award exists if: the award was based on a mutual mistake of fact; there was newly discovered evidence; the award was based on fraud; or there was a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the settlement. The WCCA found there had been a substantial change in medical condition since the time of the settlement, and the employer had established good cause to vacate the award. The WCCA declined to address mutual mistake of fact or fraud. ✦

Vacating Awards

McKinley v. Target Corporation, File No. WC15-5877, Served and Filed June 27, 2016. The employee struck her head and lost consciousness for two hours with her left arm pinned under her and left foot twisted and lodged among boxes. She was diagnosed with RSD in her left lower extremity initially and RSD in her left upper extremity later. Following litigation, a compensation judge found the employee had 52% permanent partial disability, was permanently and totally disabled, and the work injury was a substantial contributing cause. This was affirmed on appeal. The parties settled the PPD claim up to 52% and agreed the employee was PTD.

Arthur Chapman's Workers' Compensation Update is published by the attorneys in the Workers' Compensation Practice Group to keep our clients informed on the ever-changing complexities of workers' compensation law in Minnesota.

The experience of our workers' compensation attorneys allows them to handle all claims with an unsurpassed level of efficiency and effectiveness. Contact any one of our workers' compensation attorneys today to discuss your workers' compensation claims needs.

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