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ARTHUR CHAPMAN
KETTERING SMETAK & PIKALA, P.A.
ATTORNEYS AT LAW

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MINNESOTA WORKERS' COMPENSATION UPDATE

IN THIS ISSUE

A NEW FACE IN THE ARTHUR CHAPMAN WORKERS' COMPENSATION GROUP

MEET EMILY A. LACOURSE

Emily LaCourse assists workers' compensation clients on the various aspects of Minnesota cases. Known for her research and writing skills, she works with clients to develop strategies to best handle cases effectively. Emily enjoys meeting and speaking with clients, and her friendly and personable style is appreciated by attorney colleagues and clients alike.

Emily is an avid runner and is often found training for her next marathon. She enjoys watching Twins baseball and all Gopher sports. As a native of northern Minnesota, Emily appreciates any opportunity to explore all Minneapolis has to offer. ✦

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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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Case Law Update

Decisions of the Minnesota Supreme Court

There were no decisions from the Minnesota Supreme Court during this reporting period. ✦

Decisions of the Minnesota Court of Appeals

Arising Out Of

St. Aubin v. Casey's Retail Company, unpublished, File No. A15-1306, Filed February 29, 2016. Appellant went to buy doughnuts at Respondent's store. It was freezing rain. While she was inside, two other cars had parked next to her vehicle, one of which was parked close to her driver's side door, and she fell down trying to enter her vehicle. She declined the assistant manager's offer to help her up and drove home, but later went to the emergency room. The manager later said he salted the sidewalks before the store opened that day. Both the assistant manager and Appellant acknowledged that it was still freezing rain when she fell. Appellant brought a negligence action against Respondent arguing that the *Mattson* standard should only apply to "heavy precipitation" and that the store had an obligation during the storm to keep the sidewalks clear of ice. The Minnesota Court of Appeals (Judge Rodenberg) cited *Mattson v. St. Luke's Hospital of St. Paul*, 252 Minn. 230, 89 N.W.2d 743 (1958), and held that "since a storm produces slippery conditions as long as it lasts, it would be unreasonable to expect the possessor of the premises to remove the freezing precipitation as it falls." The Court of Appeals held that it was reasonable for the store to remove the ice/snow, or take other appropriate corrective action, within a reasonable time after the storm ended, but not while the storm was still going on. Thus, Respondent did not have a duty to Appellant to get rid of the ice on the parking lot while it was still storming. Respondent also did not assume a duty to the Appellant when the manager salted the sidewalks while it was still storming that morning, as to create such a rule would be against public policy. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Kubis v. Community Memorial Hospital Association, File No. WC15-5842, Served and Filed February 5, 2016. The employee, a nurse, had worked 15 minutes past her scheduled shift. At that point, the hospital called a code that required all available staff to respond. She responded, but it was a mock code drill. After the drill ended, she called an elevator, but when it arrived it was full of equipment from the mock code. Instead of using the elevator, she rushed up the stairs to go back to her nursing station, fell, and injured her shoulder. The employee acknowledged that the stairs were not defective, but asserted that she was tired from working seven shifts in a row and her work environment caused her to fall. The employee also testified she felt pressured to log out timely and report to the next shift, but also felt rushed to respond to the mock code. The employer and insurer denied liability for the injury, contending that it did not arise out of the employment pursuant to the *Dykhoff* rationale that there was no increased risk related to the employment. Compensation Judge Baumgarth held the employee's testimony that she felt rushed to log out timely was not credible and denied that the employee's injury arose out of her employment. The WCCA (*en banc*, with Judge Sundquist writing the opinion) reversed, noting that the employee was hurrying to report to the next shift and fell on the stairs, which established that the employee was hurrying to complete a task which arose out of her employment. In *Dykhoff*, the employee fell for no identified reason. Here, the employee offered two reasons - hurrying and fatigue. Her testimony that she was hurrying to report to the next shift was uncontroverted and was not addressed by the compensation judge. This provided the basis for the reversal. The WCCA also noted that fatigue arising out of an employee's work activities and resulting in an injury has been found to meet the arising out of requirement. *See Hed v. Brockway Glass Company*, 224 N.W.2d 28 (Minn. 1976). However, in this case there was no "independent verification" that the employee was fatigued due to her work activities and that such fatigue caused her injury.

Williams, Sandra v. ISD 2396, File No. WC15-5820, Served and Filed February 17, 2016. The employee was setting up the school gymnasium for a basketball game, which involved setting up the bleachers. The stairs on the bleachers were higher and deeper than an ordinary stairway. As the employee was walking down the stairs on the bleachers, she heard a pop and felt pain in her left foot. She was later diagnosed with a Jones fracture. The bleachers were not defective and there was no water or other substance on them. The employee was also not carrying anything on them. Compensation Judge Bouman held that the injury arose out of her employment. The WCCA (*en banc*, with Judge Hall writing the opinion) affirmed, citing its recent decision in *Hohlt v. University of Minnesota*, File No. WC15-5821 (WCCA February 3, 2016). The WCCA again held that "a personal injury is compensable if the employee encounters an increased risk of injury on the employer's premises because she is an employee and the injury follows from that risk. It is irrelevant if members of the general public might encounter the same risk because they were not brought to that risk by employment. This circumstance has been labeled 'increased risk' rather than 'special risk'." Here, the employee was brought to the risk by her employment, not by her activities of daily living. The steps were deeper and higher than regular steps and she was rushed in setting up the bleachers, both of which could lead the compensation judge to reasonably conclude the employee's injury was caused by a risk that was increased by the requirements of her employment, beyond the risk she would otherwise have faced in her daily life. With regard to the *Dykhoff* case, the WCCA noted that the employee in that case had sustained an unexplained fall while walking on a dry, level floor. There was no evidence that the floor increased the risk of injury.

Groetsch v. Kemps, LLC, File No. WC15-5844, Served and Filed April 4, 2016. The employee developed pain in his forearm while filling and stacking cases of liquid or other food products. The employee was subsequently involved in a motor vehicle accident while traveling to

a medical appointment for the admitted injury and sustained additional cervical injuries. The employee was also performing personal errands on this trip. The WCCA (Judges Stofferahn, Milun and Hall) affirmed Compensation Judge Tate's determination that the employee's automobile accident was in the course of her employment. The WCCA found the judge properly relied on the medical opinions in deciding the original *Gillette* injury to the arm was caused by his work activities. The employee was traveling to a medical appointment for that admitted injury at the time of the motor vehicle accident, and the WCCA found that either the special errand or dual purpose doctrines could be applied, depending on the facts. The WCCA noted the special errand approach may not be applicable due to that rule usually involving the employer's premises as one point of the trip. The WCCA applied the dual purpose trip analysis and found that seeking medical care for an admitted injury was the primary purpose, although the employee was also running errands as well. Any deviation for personal errands was not so substantial as to obviate the purpose of the trip for the medical appointment. *See Rau v. Crest Fiberglass Industries*, 148 N.W.2d 149 (Minn. 1967). The WCCA agreed with the employer's argument that there could be situations in which a personal deviation is so substantial so as to obviate the business purpose of a trip, but that is a question of fact for the compensation judge to decide. Such was not the case given the evidence.

Interveners

Xayamongkhon v. ISD 625, File No. WC15-5852, Served and Filed April 19, 2016. After injuring herself at work, the employee was treated for headaches, neck pain and low back pain by a chiropractor at Moe Bodyworks for six months. After the six months, the employer denied payment of the Moe Bodyworks bills because the treatment was not providing significant relief for the employee. The employee filed medical requests seeking payment of the bills. Moe Bodyworks filed a motion to intervene. The employer filed an objection to the motion to intervene. A hearing was held on the sole issue of whether treatment at Moe Bodyworks was reasonable, necessary, and causally related to the work injury and whether a departure from the treatment parameters was warranted. No one appeared on behalf of Moe Bodyworks at the hearing. The employer's attorney argued that the Moe Bodyworks bill should be denied based on its failure to appear. Compensation Judge Bouman ordered partial payment of the Moe Bodyworks bill. The WCCA (Judges Stofferahn, Cervantes and Sundquist) reversed, holding that Minn. Stat. §176.361, subd. 4, and *Sumner v. Jim Lupient Infiniti*, 865 N.W.2d 706, 75 W.C.D. 263 (Minn. 2015), required that the claim for reimbursement be denied. The WCCA concluded that the statute and *Sumner* make clear that an intervener is a party to a case, meaning they are required to attend conferences and hearings, unless a stipulation has been signed, or their intervention interest has otherwise been resolved. The WCCA rejected the employee's argument that an injured worker has the right to directly claim reimbursement for medical expenses incurred by the injured worker, making it irrelevant that the intervener was not present, finding that there was no evidence that Moe Bodyworks was relying on the employee's attorney to recover its bill. Instead, the WCCA held that because Moe Bodyworks made no appearance at the hearing, its claim must be denied in its entirety.

Job Offer

Gilbertson v. Williams Dingmann, LLC, File No. WC15-5878, Served and Filed May 2, 2016. The employee was a mortician with an admitted low back injury. She had provided her notice to resign her position prior to the date of injury. She was injured and subsequently received benefits and had restrictions. Initially, the employer could not accommodate the restrictions. The QRC noted on the Rehabilitation Plan that the employee would like to return to the same industry and a different employer, and indicated on the form that the vocational goal was to "RTW different employer." The employee was eventually given moderate work restrictions, and the date of injury employer wanted to hire her back and made a job offer within her restrictions. The employee rejected the job offer, and the employer and insurer discontinued temporary total disability benefits. Compensation Judge Kelly found that the employee was not entitled to TTD benefits on the basis that she refused a job offer from the employer that she could do in her physical condition. The WCCA (Judges Sundquist, Milun and Hall) reversed the denial of TTD benefits, reasoning the job offer was not consistent with the rehabilitation plan. The employer and insurer did not object to the employee not wanting to return to the date of injury employer at the origination of the plan. The WCCA applied Minn. Stat. §176.101, subd. 1(i), and found the language was unambiguous.

Jurisdiction

David v. The Heavy Equipment Company, File No. WC15-5802, Served and Filed February 17, 2016. Compensation Judge Marshall issued a Findings and Order on

August 17, 2012, determining injuries sustained by the employee were the result of an activity not related to his employment with the employer. Judge Marshall also found the employee did not intentionally or knowingly misrepresent, misstate, or fail to disclose material facts, so he was not guilty of theft and did not receive benefits in bad faith. The employer and insurer subsequently filed petitions for recovery against the providers. The WCCA (*en banc*, with Judge Hall writing the opinion) affirmed Judge Marshall's dismissal of the petitions for recovery of erroneously paid medical benefits. The WCCA held once there was a final determination that there was no compensable work injury, there was no longer any basis for action under the Workers' Compensation Act. Therefore, the argument over whether the action was permitted under Minn. Stat. §176.291(a) was irrelevant. The claim lacked subject matter jurisdiction, which the WCCA could determine, even if that issue was not brought up on appeal by the parties.

Medical Issues

Hagel v. Barrel O' Fun Snack Foods Company, File No. WC15-5831, Served and Filed March 21, 2016. The employee injured her hand on October 12, 2007, while working in Perham, MN, 180 miles away from the Twin Cities. She was airlifted to the Twin Cities for medical treatment, where she treated from October 2007 to May 2008. While treating in the Twin Cities, the employee lived with her former sister-in-law and her significant other. During that same period of time, the employee's 16-year-old son lived with the employee's father in Perham. In a subsequent action commenced by the employee to recover medical expenses, the employee's former sister-in-law intervened for $5,675, representing lodging expenses for the employee at a rate of $50 per day from October 2007 to May 2008. The employee's father intervened for $2,400, representing child-care expenses for that same period. Compensation Judge Olson awarded the interveners' requests for payment of lodging and child care expenses. She awarded $50.00 per day for lodging in the Twin Cities as "reasonable," holding that any commercial options would have been more expensive. The employer argued that the employee could not seek reimbursement for staying at a non-licensed facility per Department policy. The WCCA (Judges Hall, Milun and Stofferahn) affirmed the reimbursement, holding that Minn. Rule 5221.0500, subp. 2E, did not apply as it relates to travel expenses. The evidence supported the conclusion that the frequency of the employee's medical visits required her to temporarily relocate to the Twin Cities. The judge could reasonably conclude that the lodging was a reasonably necessary service required by the employee for medical care prescribed to cure and relieve the effects of her work injury. Judge Olson held that the employee's father was entitled to payment of child care expenses for the same period of time, citing *Volner v. Cub Foods*, 41 W.C.D. 319 (WCCA 1988), in which an injured employee was awarded day care expenses while she treated at an inpatient pain clinic as part of her rehabilitation plan. The WCCA reversed this part of the decision, holding that Minn. Stat. §176.102, subd. 9, was amended to specifically exclude physical rehabilitation from rehabilitation services. Further, the WCCA and the Minnesota Supreme Court had previously held that Minn. Stat. §176.135, subd. 1, does not provide for payment of child care expenses incurred while an employee is receiving medical treatment. *See Langa; Ryks.*

Permanent Total Disability

Carlson, Richard v. Lakeside Foods, Inc., File No. WC15-5863, Served and Filed April 20, 2016. The employee injured his low back in November 2010. Due to the injury, he was not able to return to work with the employer. His only meaningful employment following the injury was as a personal care attendant (PCA) for his grandmother, with whom he lived. The employee worked four hours a day, five days a week, as a PCA, until his grandmother passed away. According to the employee, his grandmother needed very little assistance from him. At the hearing, competing medical and vocational opinions were provided on the issue of whether the employee was permanently and totally disabled. The employee's treating physician rated the employee's permanent partial disability at 22 percent and limited the employee to part-time work and lifting no more than ten pounds, while the IME doctor opined that the employee had no PPD beyond the 13 percent previously determined by the compensation judge, could return to full-time work, and could lift up to 25 pounds. The employee's QRC agreed with the treating physician's assessment and testified that due to the restrictions, the employee was not employable. The independent vocational evaluator agreed with the IME doctor's opinion and testified that because the employee had previously worked as a PCA for his grandmother, he could obtain employment as a PCA for other individuals. The PCA services company provided a job description to the court which stated that employment as a PCA required heavy physical demands, including, among other things, lifting clients. Compensation Judge Brenden accepted the treating physician's opinion that the employee had

sustained a 22 percent PPD, but denied the employee's claim for PTD. The judge found that part-time PCA work was available and that there were PCA positions within the treating physician's work restrictions. The WCCA (Judges Stofferahn, Hall and Cervantes) reversed. The WCCA did not disrupt the compensation judge's acceptance of the treating physician's opinion and noted that a finding of 22 percent PPD placed the employee over the statutory threshold for PTD benefits based on his age at the time of the injury. *See* Minn. Stat. §176.101, subd. 5. The WCCA reversed on the issue of whether the employee's physical condition caused him "to be unable to secure anything more than sporadic employment resulting in insubstantial income." *Id.* The WCCA found that the compensation judge's decision that the employee could find employment was not based on substantial evidence, because the employee's work restrictions from the treating physician were inconsistent with PCA job requirements, and there was no evidence that there were PCA positions available that could accommodate the employee's restrictions.

Rehabilitation

Halvorson v. B&F Fastener Supply, File No. WC15-5869, Served and Filed May 9, 2016. The employee had a history of working in unskilled jobs in a bakery, restaurants, and in assembly positions. She injured multiple body parts while working for the employer in an assembly position and was unable to return to work with the employer. The employee underwent neck surgery, and her doctor gave her work restrictions that first included working only 20 hours per week and then were increased to 30 hours per week. She worked at various fast food restaurants within her restrictions, claiming that she "loved" her jobs and wanted to work in a managerial position at a fast food restaurant. This would have required her to work over 30 hours per week. After a few years, the employee's back began to worsen, she was taken off of work, and eventually she underwent a laminectomy. She then began working for McDonald's within similar restrictions as prior to her laminectomy and began treating at a pain clinic. The employer and insurer filed a request to terminate the employee's rehabilitation benefits because she was no longer a "qualified employee" under Minn. Rule 5220.0100, subp. 22, as her job at McDonald's was suitable gainful employment, and there was "good cause" to terminate her rehabilitation under Minn. Rule 5220.0510, subp. 5, because she would not likely benefit from further rehabilitation services. At the hearing, however, the only issues the parties argued were: (1) whether the employee was still a qualified employee; and (2) whether she had returned to suitable gainful employment. The issue of whether "good cause" existed to terminate rehabilitation services pursuant to Minn. Rule 5220.0510, subp. 5, was withdrawn by the employer and insurer. Compensation Judge Behr held that the employee's job at McDonald's was suitable gainful employment and that she was not a qualified employee under Minn. Rule 5220.0100, subp. 22, and he allowed the rehabilitation plan to be terminated. The employee appealed arguing that the compensation judge committed an error of law by finding the employee's work at McDonald's was suitable gainful employment and that he improperly expanded the issues at hearing to include whether there was good cause to terminate her rehabilitation services. The WCCA (Judges Sundquist, Milun and Stofferahn) reversed, holding that it was necessary to evaluate the plain language of the statute and rules for vocational rehabilitation services, and that the compensation judge had improperly expanded the issues at hearing and also applied an incorrect standard to terminate rehabilitation benefits. Under Minn. Rule 5220.0100, subp. 22, the definition of "qualified employee" does not provide a specific provision to terminate rehabilitation benefits. Instead, to terminate rehabilitation benefits, the standards are found under Minn. Rule 5220.0510, subp. 5 (stating that to terminate or suspend rehabilitation benefits, the employer and insurer can bring a rehabilitation request for good cause under one of four criteria), and Minn. Stat. §176.102, subd. 8 (stating that to terminate rehabilitation, one of five different criteria can be met to meet "good cause"), but none of the factors laid out in this rule or statute were raised at the hearing. Because the definition of a "qualified employee" does not provide a basis to terminate rehabilitation benefits, and the proper standards under Minn. Rule 5220.0510, subp. 5, and Minn. Stat. §176.102, subd. 8, were not

before the compensation judge, the compensation judge's decision was reversed.

Washek v. New Dimensions Home Health, File No. WC15-5861, Served and Filed May 16, 2016. The employee was rendered a paraplegic in 2002 when her vehicle was struck by a semi-truck while she was in the course of her employment. The employer admitted liability and paid various benefits to the employee. In October 2014, the employee filed a claim petition seeking reimbursement for the base cost of a 2003 Dodge Caravan handicap accessible van purchased in 2004, and for the purchase of a replacement handicap accessible 2014 Toyota Sienna. The 2003 Dodge Caravan had been converted to make it a handicap accessible vehicle. The employer and insurer paid for the conversion costs, but denied the claim for the base cost of the vehicles. At the hearing, the employee argued that she should be reimbursed for the base cost of both vans as rehabilitation expenses. Compensation Judge Behr denied reimbursement finding that the employee failed to show that the 2003 Dodge Caravan enabled the employee to seek or engage in employment and that there was insufficient evidence to show that the 2014 Toyota Sienna would assist the employee with employment or education going forward. The WCCA (Judges Milun, Stofferahn and Sundquist) affirmed. Although the WCCA previously found in the case of *Wong v. Won Ton Foods*, 50 W.C.D. 289 (WCCA 1993), *summarily aff'd* (Minn. April 12, 1994), that the full cost of a handicap van may be appropriately awarded as a rehabilitation expense under Minn. Stat. §176.102, subd. 1(b), the WCCA distinguished this case. Here, there was substantial evidence that the purchase and use of the vehicles did not and would not assist the employee in returning to appropriate work. Due to her significant medical condition, a handicap vehicle was not part of the employee's rehabilitation plan, the employee only attempted to work for five months over the past ten years, and the employee was no longer capable of or expected to return to work. ✦

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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This publication is intended as a report of legal developments in the workers' compensation area. It is not intended as legal advice. Readers of this publication are encouraged to contact Arthur, Chapman, Kettering, Smetak & Pikala, P.A. with any questions or comments. ✦

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