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

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MINNESOTA WORKERS' COMPENSATION UPDATE

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NEW FACES IN THE ARTHUR CHAPMAN WORKERS' COMPENSATION GROUP

MEET JESSICA L. RINGGENBERG, MICHAEL J. FLOWER, AND ALICIA J. SMITH

JESSICA L. RINGGENBERG

Jessica assists insurers, self-insureds, and third-party administrators with navigating the workers' compensation claims process in both Minnesota and Wisconsin. Clients know Jessica to be the quiet force working for them behind the scenes and advocating on their behalf.

Jessica's experience working with the Conflict Resolution Center mediating cases in both Spanish and English serves her current clients well. She brings strong, active listening skills paired with the critical thinking skills to each case, working to find the best resolution possible.

With a travel list that includes Australia, Spain, China, Morocco, Italy, the United Kingdom, Ireland, France, and Germany, Jessica also brings international knowledge and acute curiosity to all she does.

MICHAEL J. FLOWER

Along with his colleagues, Michael represents the interests of insurance company clients, their insureds, self-insured entities, and third-party administrators in developing strategies to avoid and deal with Minnesota workers' compensation claims.

Michael's diverse background, with experience in sales, disability claims management, and public health law research provides a unique perspective with which Michael serves his clients.

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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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New Faces in the ACKSP Workers' Compensation Group *continued*

Alicia J. Smith

Alicia works with insurance companies, their insureds, third-party administrators, and self-insured entities, representing their interests in various Minnesota workers' compensation proceedings. Clients count on Alicia's research skills, which she developed through a Managing Editor position with the Minnesota Law Review. Clients and colleagues turn to Alicia because of her drive to resolve cases efficiently and effectively.

Outside of the office, Alicia enjoys traveling, cooking, reading historical non-fiction, and taking her two Labrador Retrievers to the park.

Permanent Total Disability (PTD) Benefits Following *Ekdahl* and *Hartwig*

by Gregory B. Lawrence

Since 1953 insurers have been able to offset Minnesota workers' compensation permanent total disability benefit payments against "old age and survivors insurance benefits" received by the injured employee. Originally this offset began after $18,000 of PTD had been paid; currently it begins after $25,000 of benefits has been paid. This provision is codified in Minn. Stat. §176.101, Subd. 4: "[PTD] compensation shall be paid during the permanent total disability of the injured employee but after a total of $25,000 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision. This reduction shall also apply to any old age and survivor insurance benefits."

While the precise language of the statute has evolved over time, the Minnesota legislature has never addressed specifically what is included in "any old age and survivor insurance benefits." Historically, the Minnesota courts, including the Workers' Compensation Court of Appeals, have taken a broad view as to what non-workers' compensation benefits were covered by this language. Traditionally included in these benefits were non-disability, retirement awards, pensions, and benefits from the Teachers Retirement Association (TRA) and the Public Employees Retirement Association (PERA).

On August 13, 2014, the Minnesota Supreme Court filed two opinions which reversed the decades-old understanding of which benefits are included under the "old age and survivor insurance benefits" provision of §176.101, Subd. 4. In *Ekdahl v. Independent School District #213*, 851 N.W.2d 874 (Minn. 2014) and *Hartwig v. Traverse Care Center*, 852 N.W.2d 251 (Minn. 2014), the Court held that neither TRA retirement benefits, nor PERA retirement benefits, respectively, are included under the language "old-age and survivors insurance benefits" contained within §176.101, Subd. 4. As such, the Court held that insurers can no longer offset PTD benefits by the amount received in TRA or PERA retirement benefits.

In both cases, each authored by Justice Alan Page, the Court determined that "old age and survivors insurance benefits" refers solely to Social Security benefits under the Social Security Act, 42 U.S.C. §§401-434 (2012), and not to other forms of old-age (i.e., retirement) benefits. Justice Page concluded that in 1953, when the statute was first enacted, the phrase "old age and survivors insurance benefits" referred exclusively to Social Security benefits under the Social Security Act. It was

also determined that the technical, Black's Law Dictionary definition of the phrase, refers specifically to Social Security Act benefits. Finally, the Court held that its determination in the present cases was consistent with its findings in a 1967 case where the Court allowed an offset for federal Social Security retirement benefits, but not disability benefits. *See Telle v. Northfield Iron Co.*, 153 N.W.2d 270 (Minn. 1967).

So how will these rulings change the way that permanent total disability cases are analyzed and handled going forward? There are three areas where potential challenges for employers and insurers exist based upon these two cases: 1) An employee may attempt to vacate a previous stipulation for settlement; 2) An employee is currently receiving PTD benefits and the offset for either TRA or PERA benefits is being applied; 3) In calculating potential exposure risk for current and future cases where PTD has been alleged, but benefits have not yet been paid.

Vacation of Previous Awards

Under Minn. Stat. §176.461 the Workers' Compensation Court of Appeals is authorized to vacate and set aside a previously approved award "for cause." The definition of "for cause" is limited by the statute to one of only four instances: a mutual mistake of fact; newly discovered evidence; fraud; or 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. Based upon the four allowable circumstances for setting aside an award, it seems highly unlikely that newly discovered evidence, fraud, and/or a substantial change in medical condition would apply in any attempt by an employee to reopen a PTD settlement based upon these new cases. The only area where we anticipate an argument being made would be in a mutual mistake of fact. Even that seems highly unlikely, as at the time these settlements were entered into and the awards approved, the state of the law as understood by all parties, including the Office of Administrative Hearings, was that TRA and PERA retirement benefits were subject to the offset provision of §176.101, Subd. 4. Furthermore, it is arguable that a mutual mistake of understanding the law is not the same as a mutual mistake of fact. We have not seen any such attempts to vacate awards filed, and in informal discussions with members of the plaintiffs' bar, it does not appear that there will be a wholesale attempt to vacate previous awards based upon these two new cases.

Employee is Receiving On-Going PTD Benefits

Situations in which an injured employee is receiving ongoing PTD benefits may ultimately become the area of greatest litigation in the short-term. The Court did not specifically address how situations where an employee's PTD benefits are already subject to an offset because of TRA or PERA benefits should be handled. While the rulings make it clear that going forward new findings of PTD cannot benefit from TRA or PERA retirement benefit offsets, it did not lay down a hard and fast provision as to what would happen in cases where the offset had already been applied and was ongoing. It is possible that the plaintiffs' bar will file clams to pay employees benefits which have been and currently are being offset by receipt of TRA and PERA retirement benefits. Employers and insurers can argue that these benefits were calculated using the accepted understanding of the offset rule that applied at the time, and therefore, the workers' compensation insurance policies and contracts were drafted based upon the understood risk as it then existed.

Of greater interest are situations where an employee is already receiving PTD benefits, and TRA or PERA benefits have not yet begun, or where the $25,000 PTD benefit threshold has not yet been met. In both *Ekdahl* and *Hartwig*, the Court was clear that its determination that TRA and PERA benefits were not "old age and survivors insurance benefits" did not apply solely to matters in the future where PTD had not yet started. In *Ekdahl* the Court reinstated the compensation judge's determination that the offset did not apply towards PTD benefits already being received. In *Hartwig* the Court remanded to the WCCA for further proceedings consistent with its opinion, in effect requiring the WCCA to issue an order that the offset did not apply towards the employee's ongoing PTD. Based upon this, it is reasonable to assume that we will see litigation surrounding these situations. Given the Supreme Court's orders in these two cases, insurers should brace themselves for the probability that future PTD benefits in these situations will increase. In addition, it is anticipated that in situations where there are ongoing PTD benefits, and there is already an offset for TRA or PERA retirement benefits occurring, that subsequent PTD benefits paid will not be able to take advantage of the offset. Additional litigation to formally determine whether or not this

is accurate is anticipated, but as of now it does not appear any has been filed or decided.

A final area of anticipated litigation in this regard involves situations where an employee is currently receiving either TRA or PERA disability benefits that are expected to change into retirement benefits once the employee reaches a certain age. Both TRA and PERA are controlled by Minnesota statute; Chapters 354 and 353, respectively. As such, any disability benefits paid by either would continue to be subject to §176.101, Subd. 4, which allows PTD reduction for "any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to" the PTD payments. In many instances where an employee is receiving disability benefits from either TRA or PERA, those benefits transform into retirement benefits once the employee reaches a certain age. Based upon the holdings of *Ekdahl* and *Hartwig* it seems likely that once the disability benefits become retirement benefits, any offset will cease to exist.

Calculating Future PTD Exposure

While all of the above scenarios are important to consider, and will certainly impact a number of current files, the effect that these two cases will have on future PTD matters is perhaps the most important area going forward.

Prior to *Ekdahl* and *Hartwig*, PTD risk exposure was analyzed with the expectation of the offset provision applying to TRA and PERA retirement benefits; insurance company reserves were formulated based upon this analysis and settlement evaluation was performed using such. The difference in the level of exposure risk that insurers will be subject to going forward can easily add significant potential expense to a PTD case. By way of example, consider the following hypothetical scenario: A 55-year-old employee sustains a work injury on October 1, 2007. He continues to work for a few more years, but is determined permanently and totally disabled on October 1, 2012. At the time of his permanent disability determination, his PTD compensation rate was $566.67. In addition, this employee receives $700 per month in retirement benefits from either TRA or PERA. Assuming the employee is eligible for PTD until age 67, the potential gross PTD exposure under the old system, including the offset, would be approximately $359,000. Post *Ekdahl* and *Hartwig*, under this same scenario, but without the offset provision, the gross PTD exposure climbs to approximately $464,000.

Given the significant exposure difference illustrated in the above hypothetical, it is vitally important that this new reality be taken into account when performing initial risk exposure calculations on PTD cases. A thorough investigation into the types of benefits being received by an injured employee is of the utmost importance. Mistaking retirement benefits and disability benefits could cause a significant error in the calculation of the total exposure of a PTD case.

As with any evolving area of the law, we will continue to follow and alert you to changes as they occur. Please feel free to contact us with any questions you may have. ✦

Mark Your Calendar!
2015 Workers Compensation Seminars

Thursday, June 11, 2015
McNamara Alumni Center, Minneapolis, Minnesota

Thursday, June 18, 2015
Crowne Plaza, Wauwatosa, Wisconsin

Contact Marie Kopetzki at
612 225-6768 or mkkopetzki@arthurchapman.com for more details or to register.

Case Law Update

Decisions of the Minnesota Supreme Court

176.82 Actions

Schmitz v. United States Steel Corporation, File No. A12-0709 (Minn. August 27, 2014). (For a more detailed factual background of this case, please refer to the summary of the Minnesota Court of Appeals' decision in the June 2013 *Workers' Compensation Update*.) The employee allegedly sustained a work-related injury in October 2006. After reporting the injury to his employer, he was essentially told that the employer would "take a dim view" of the situation. When he asked for clarification as to whether he would be fired, he was told that he would. Later in December 2006, the employee further injured his back at home which resulted in him being unable to return to work. He eventually filed a workers' compensation claim seeking benefits, which was denied by the employer. Ultimately, a compensation judge found the matter not compensable. The employee then brought suit in district court for retaliatory discharge and threat-to-discharge under the Workers' Compensation Act. After two separate appeals, the issues before the Court in the case were: 1) whether a retaliatory discharge claim under the Workers' Compensation Act, Minn. Stat §176.82, subd. 1 (2012), that seeks only money damages, is legal in nature and therefore carries an attendant right to a jury trial under the Minnesota Constitution; and 2) whether an employer may assert a *Faragher/Ellerth* affirmative defense to vicarious liability for a threat-to-discharge claim under Minn. Stat. §176.82, subd. 2. The Court examined the types of cases that carry an attendant right to a jury trial and ultimately stated that even though the legislature separated out workers' compensation in tort law, it codified a civil action for damages for retaliatory discharge, and therefore, an employee seeking money damages for retaliatory discharge is entitled to a jury trial. As to the second issue regarding the *Faragher/Ellerth* defense, the Court would not expand the use of that defense beyond hostile-environment sexual harassment cases.

Attorney's Fees

Braatz v. Parsons Electric Company, 850 N.W.2d 706 (Minn. 2014). In July 2007, the employee alleged a low back *Gillette* injury, which was denied. He filed an original and Amended Claim Petition seeking temporary total disability benefits and medical benefits. On October 26, 2012, four days before the hearing, the employee's attorney indicated his intention to narrow the issues to primary liability for the injury and medical benefits, and that he would not address the claim for indemnity benefits. The employer and insurer did not object. The compensation judge found that the employee sustained a *Gillette* injury and awarded medical benefits in the amount of $11,893.69, entitling the employee's attorney to $2,578.74 in statutory contingent fees under Minn. Stat. §176.081, subd. 1(a). The employee's attorney filed a statement of attorney fees and costs, asking for an additional $33,740 *Irwin* fee under Minn. Stat. §176.081, subd. 1(a)(1). In *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132 (Minn. 1999), the Supreme Court held that a reasonable attorney fee in workers' compensation cases should be determined by applying the statutory guidelines along with consideration of several factors, including time, expense, difficulty of the issues, and the results obtained. Based on the *Irwin* factors, the employee's attorney argued that although the actual amount of medical expenses was modest, it was necessary to establish primary liability so the employee could seek future medical care. The employee's attorney also filed for an additional $10,047 in attorney fees under subdivision 7, which applies if the employer or insurer resists payment for medical expenses and the employee's attorney prevails. The compensation judge awarded $10,000 "in addition to the contingent fees," for a total fee award of $12,578.74, as well as $3,698.62 in subdivision 7 fees. The employer and insurer appealed, and the WCCA affirmed. The matter was then appealed to the Minnesota Supreme Court. First, the employer and insurer argued that the plain language of Minn. Stat. §176.081, subd. 1(a)(3) precludes an award of attorney fees when the employee fails to join and address all reasonably related claims at the same time at the hearing. However, the Court (Justice Gildea) indicated that the language of the statute allows for attorney fees when all outstanding

issues are merely *filed* concurrently, and when the issues for which fees are sought cannot reasonably be addressed during the pendency of other issues for the same injury. The employee's attorney met both requirements. Because the employer and insurer did not object to the division of issues, the Court had no basis to consider whether all of the issues raised in the petitions could reasonably have been addressed at the hearing. Second, the employer and insurer argued that the compensation judge failed to consider the holding of *Green v. BMW of North America, LLC*, 826 N.W.2d 530 (Minn. 2013). In *Green*, the Court concluded that it was an abuse of discretion when the district court failed to consider the amount at issue in the consumer protection litigation and awarded $221,499 in attorney fees for a $25,157 damage award. The employer and insurer argued that no reasonable person "would pay an attorney $12,578.74 to recover $11,893.69." However, the Court stated that the employer and insurer's approach relied on a dollar value proportionality approach that was specifically rejected in *Green*. It was noted that rejecting the attorney fee award simply because it exceeds the amount obtained for the client could hamper the ability of injured workers to find counsel. The Supreme Court affirmed the decision of the WCCA.

David v. Bartel Enterprises, Case No. A13-2141 (Minn. November 26, 2014). (For a more detailed factual background of this case, please refer to the summary of the Minnesota Workers' Compensation Court of Appeals' decision in the March 2014 *Workers' Compensation Update*.) In this case, the Minnesota Supreme Court had another opportunity to address the statutory provisions addressing attorney fees, enacted by the Minnesota Legislature in 1995. That legislative enactment sought to limit attorney fees by introducing a statutory scheme to address so-called *Roraff* and *Heaton* fees. The legislature indicated that attorney's fees for recovering medical and rehabilitation benefits would be subject to the same 25/20 formula for contingent fees up to a total maximum of $13,000 per injury. In a decision issued in 1999 (*Irwin v. Surdyk's Liquor*, 599 N.W.2d 132 (Minn. 1999)), the Minnesota Supreme Court stated that the statutory limitations on attorney's fees were unconstitutional, since they impinged on the "judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees." In *Irwin*, the Supreme Court indicated that, when reviewing determinations of attorney's fees, a reviewing court shall consider the statutory guidelines, as well as "the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained." Therefore, in *Irwin*, the Minnesota Supreme Court ruled that if an attorney could show that the contingent fee was "inadequate," the statutory limit on attorney fees would not apply.

In *David*, the opposite situation occurred. The plaintiff's attorney sought a fee of $46,810.90, based upon a mechanical application of the statutory 25/20 formula, applying it to medical benefits recovered in the amount of $233,054.50. The compensation judge concluded that $13,000 would be an appropriate fee, based upon the application of the statutory formula and the 13.1 hours that the attorney worked on the matter. The WCCA affirmed. The employer and insurer appealed to the Minnesota Supreme Court, arguing that the attorney fee awarded was still excessive, and that the Court should apply the "*Irwin* factors" outlined above to determine a reasonable fee. The Minnesota Supreme Court (Justice Anderson) affirmed the decision of the WCCA, concluding that, "as a matter of comity, we will recognize the Legislature's statutory formula as presumptively reasonable, and that absent exceptional circumstances, further judicial review of a presumptively reasonable, correctly calculated attorney-fee award is unnecessary." The Supreme Court stated that, "because this case does not invoke the statutory maximum [to reduce the attorney fee], we need not employ *Irwin's* reasoning."

Comment: The decision by the Minnesota Supreme Court in the *David* case confirms what has generally been the practice regarding attorney's fees following the 1995 legislative changes and the prior *Irwin* case: that is, the 1995 legislative changes, which were enacted for the purpose of providing a "ceiling" on attorney fees, have, in reality, provided a "floor" for attorney fees. In other words, an attorney for the employee can choose which avenue is most advantageous. If an hourly fee produces the greater fee, the attorney can pursue that route. If the contingent formula in the statute produces a higher fee, they can go that route. The inherent inconsistency by the Minnesota Supreme Court between the *Irwin* and *David* decisions cannot be adequately explained. The dissent in *David*, authored by Justice Stras, said it best: "Our task is simply to clarify whether *Irwin's* holding that we must retain 'final, independent review' over an award of attorney fees

that is too *low*..., extends to instances in which an award is too *high*. As the court recognizes, the answer to that question is straightforward, because 'the central point of *Irwin*...applies regardless of whether a statutory formula establishes a ceiling or a floor for a fee award.' In my view, the foregoing analysis fully answers the question presented and I would proceed no further." (Emphasis added.)

Interveners

Gamble v. Twin Cities Concrete Products, 852 N.W.2d 245 (Minn. 2014). (For additional background information, please refer to the summary of the Minnesota Workers' Compensation Court of Appeals' decision in the November 2013 *Workers' Compensation Update*.) The employee sustained a work-related injury, and his doctor recommended surgery. The employer and insurer objected on the grounds of reasonableness and necessity. The employee proceeded with the surgery under his union-sponsored health plan. At a hearing on the requested surgery, the compensation judge concluded that the surgery was not reasonable and necessary, and ordered the employer and insurer to reimburse the union-sponsored health plan, with the further order that they could seek reimbursement from the surgical provider, Lakeview Hospital. Lakeview was not put on notice of the hearing. A second hearing was held following Lakeview's intervention in the matter. Following the second hearing, the compensation judge again found the surgery was not reasonable and necessary, and ordered Lakeview to reimburse the employer and insurer. Lakeview appealed to the WCCA. The WCCA reversed the compensation judge's order, and concluded that the "automatic-reimbursement" rule found in *Brooks v. A.M.F., Inc.*, 278 N.W.2d 310 (Minn. 1979) should be extended to situations where the potential intervener was not given advance notice of the hearing. The employer and insurer appealed. The Minnesota Supreme Court (Justice Dietzen) reversed. The Court held that a medical provider is not entitled to automatic payment of unpaid medical charges due to a lack of notice of its right to intervene *unless* the provider can show that the lack of notice resulted in prejudice. Here, the medical provider was granted, and took part in, a hearing on the merits as to whether the treatment was reasonable and necessary and was not prejudiced by the previous lack of notice.

Permanent Total Disability

Stevens v. S.T. Services, 851 N.W.2d 52 (Minn. 2014). (For additional background information, please refer to the summary of the Minnesota Workers' Compensation Court of Appeals' decision in the March 2014 *Workers' Compensation Update*.) The employee entered into a stipulation for settlement with the employer regarding permanent total disability status and subsequently received PTD benefits for 17 years. He then started working in Alaska as a plumbing specialist and the employer petitioned to discontinue PTD benefits since he was working. The employee had disclosed his job to the investigator and was never fraudulent or dishonest about working. The compensation judge found that the employee was no longer permanently and totally disabled from working and allowed discontinuance of those benefits, but denied the employer and insurer reimbursement, as the employee had not received benefits in bad faith. The WCCA affirmed the decision, and Judge Hall dissented. The dissenting judge concluded that an employer's petition to discontinue is precluded by statute when an employee has been adjudicated permanently totally disabled. The Supreme Court (Justice Lillehaug) reversed the decision to discontinue permanent total disability benefits. The Court acknowledged that statutorily, Minn. Stat. §§176.461 and 176.521, subd. 3, permit an employer to petition the WCCA to set aside an award on stipulation for cause. "For cause" includes mutual mistake of fact, newly discovered evidence, fraud, or a substantial change in medical condition that was not anticipated by the parties at the time of the stipulation. The employer and insurer did not challenge the award under these statutes, so the Court did not review the award under the statutes. The Court next looked to Minn. Stat. §176.238, subd. 5, which states an employer that has been paying workers' compensation benefits "may serve on the employee and file with the commissioner a petition to discontinue compensation." However, under Minn. Stat. §176.238, subd. 11 (2012), "[t]his section shall not apply to those employees who have been adjudicated permanently totally disabled." The Court identified two cases, *Ramsey* and *Robinson*, which seemed to provide loopholes to the statute. The Court rejected *Ramsey* to the extent that it created an extra-statutory procedure for a petition to discontinue benefits. The Court noted that the parties in *Robinson* did not stipulate that the employee was permanently and totally disabled. In either case, both *Robinson* and *Ramsey* had open awards. *Ramsey's* stipulation stated that benefits would be paid "for so long as warranted." *Robinson's* language stated benefits would be paid "so

long as the employee's disability shall warrant." The Court held that the present case was different in that the stipulation, as a valid adjudication, found the employee to be permanently and totally disabled pursuant to Minnesota Chapter 176, including the statute that prohibits discontinuance of PTD benefits. Additionally, the settlement in the present matter did not contain language making it an open award, similar to *Robinson* and *Ramsey*.

Ekdahl v. Independent School District #213, 851 N.W.2d 874 (Minn. 2014). (For additional background information, please refer to the summary of the Minnesota Workers' Compensation Court of Appeals' decision in the March 2014 *Workers' Compensation Update*.) The employee sustained an injury while working for the employer and was ultimately awarded permanent total disability. The employer requested an offset to the PTD benefits it was required to pay by the amount of the benefits received under the employee's government-service pension pursuant to Minn. Stat. §176.101, subd. 4, which allows an offset for amounts received from "old age and survivor benefits" once $25,000 in PTD benefits have been paid. Here, the benefits were from employee's Teachers Retirement Association (TRA) pension. The compensation judge denied the requested offset as not being part of the old age benefits listed; the WCCA reversed. The Minnesota Supreme Court (Justice Page) reversed. The Court determined that when the offset provision was enacted as part of the Minnesota workers' compensation "regime" in 1953, "old age and survivor benefits" referred only to Social Security benefits under the Social Security Act, 42 U.S.C. §§401-434. The Court therefore held that the offset provision, with respect to retirement benefits, refers only to federal Social Security retirement benefits, and not to TRA benefits. Of some note, this is one of two cases decided by the Minnesota Supreme Court on August 13, 2014, addressing what benefits are allowed to be offset. Justice Page authored both opinions determining that neither Teachers Retirement Association (TRA) benefits nor Public Employees Retirement Association (PERA) retirement benefits are subject to the offset. (*See also Hartwig v. Traverse Care Center*.)

Hartwig v. Traverse Care Center, 852 N.W.2d 251 (Minn. 2014). (For additional background information, please refer to the summary of the Minnesota Workers' Compensation Court of Appeals' decision in the March 2014 *Workers' Compensation Update*.) The employee was employed as a certified nursing assistant by employer, and sustained various work-related injuries over a number of years. She was ultimately determined to be permanently and totally disabled as of May 5, 2010, and had received PTD benefits since that time. Employee was also receiving a retirement annuity from the Public Employees Retirement Association (PERA), which began on August 1, 2012. The employer sought an offset of benefits after it had paid $25,000 in PTD benefits pursuant to Minn. Stat. §176.101, subd. 4, which allows an offset in PTD benefits for amounts received from government disability benefits once $25,000 in PTD benefits have been paid. The compensation judge granted employer's request, concluding that PERA benefits were within the meaning of "old age and survivor benefits" as defined by Minn. R. 5222.0100, subp. 4. The WCCA affirmed. The Minnesota Supreme Court (Justice Page) reversed and remanded, citing to its decision in *Ekdahl v. Independent School District #213*, 851 N.W.2d 874 (Minn. 2014), filed the same day as the instant case. The Court determined that PERA benefits are not "old age and survivor benefits" as stated in Minn. Stat. §176.101, subd. 4, and not subject to the offset provision. ✦

Decisions of the Minnesota Court of Appeals

Common Enterprise

Speltz v. Interplastic Corporation, Case No. A13-2185 (Minn. Ct. App. September 8, 2014). The employee was hired as a contractor for Egan Company to complete specialized welding work on Interplastic Corporation's piping system for commercial acid. To comply with OSHA "hot work" regulations, an Interplastic employee was informally assigned the duty of "fire watcher" to ensure that the site was safe for welding. However, Interplastic failed to specifically define this job to the fire watcher, who thought he was there to do various types of "gopher work" for the employee. On the fourth day of the welding job, the fire watcher did not inspect the site before the employee began welding, but gave the signal that welding could proceed, and the acid tank exploded. The employee was injured and subsequently received workers' compensation benefits. Additionally, he brought a personal injury action against Interplastic. Interplastic moved for summary judgment seeking dismissal of the action on the ground that the personal injury action was barred by the common enterprise doctrine of the workers' compensation act. Under the act, if the employer and a third party are engaged "in the due course of business in . . . furtherance of a common enterprise," an injured employee may either seek workers' compensation benefits from the employer or bring a personal injury action against the third party, but not both. Minn. Stat. §176.061, subds. 1, 4. The district court found that there were issues of material fact with respect to each of the three elements of the test for a common enterprise, and thus denied summary judgment. The Minnesota Court of Appeals (Judges Peterson, Schellhas and Johnson) examined the three elements for a common enterprise: (1) the employer and the third party must be engaged on the same project; (2) their employees must be working together on a common activity; and (3) the employees must be exposed to the same or similar hazards. (*Citing LeDoux v. M.A. Mortenson Co.*, 835 N.W.2d 20, 22 (Minn. App. 2013)). Given the indistinct role of Interplastic's fire watcher, the court concluded that it was factually uncertain whether the employee and Interplastic were engaged on the same project, working together on a common activity, and exposed to the same or similar hazards. Thus, the court upheld the district court's denial of summary judgment and agreed that there was no clear common enterprise. The employee's personal injury suit against Interplastic was allowed to move forward, despite his receipt of workers' compensation benefits. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Atkins v. Calvin Chase, File No. WC13-5643, Served and Filed July 14, 2014. The employee sustained an alleged work-related traumatic brain injury as the result of falling from a front end loader and hitting the pavement. He contended that he worked for the employer either as an individual or as an individual doing business as a tree service. The alleged employer had no insurance. The employee was unable to recall any events prior to the accident and his case was presented through circumstantial evidence. Evidence showed that the employee did work for the alleged employer at least in 2011 for a period of time. He also did errand-type "work" for the owner of the alleged employer in 2012 for which he was paid. The front end loader involved in the accident was not the property of the alleged employer and that fact was uncontested. The loader belonged to a construction company doing improvements on the employer's property and was simply being stored there while not in use on the project. Further evidence was presented that the employee had made friends with the father of the owner of the employer who lived in the shop on the employer's premises. He would come every day to just hang out with the father. On the date of the accident, the employee had been offsite with the father doing some work at the father's girlfriend's home. Upon their return to the shop, in a manner unknown to anyone, the employee apparently climbed up the front end loader, and somehow fell, landing on the pavement below. No one witnessed the fall. No one knew why the employee was on the front end loader. Compensation Judge Brenden found that while the employee may have been employed by the employer in 2011, he was not employed by the employer on the date of injury. Further, the employee seemed to have been climbing on the front end loader for "personal" reasons and not in furtherance of any business interest of the employer. The WCCA (Judges Hall, Cervantes and Milun) affirmed.

Kainz v. Arrowhead Senior Living Community, File No. WC14-5701, Served and Filed August 6, 2014. As the employee was walking down lighted stairs to obtain supplies in the basement of the employer, her ankle inverted and twisted and she sustained an avulsion fracture. She described the stairs as "kind of steep" and consisting of two flights of carpeted stairs separated by a short landing. She agreed there was a "handy" railing, although she was not holding it at the time of the incident. She was not carrying anything. There were no defects in the carpeting, and there was nothing on the stairs. However, there was a discrepancy in whether the hand railing on the stairs stopped near where the employee was injured. The employer denied liability, arguing the injury did not arise out of her employment. Compensation Judge Arnold determined that the injury arose out of the employment. The employer appealed to the WCCA, which affirmed. The employer then appealed to the Supreme Court, which remanded it back to the WCCA for proceedings consistent with *Dykhoff*. The WCCA (Judges Milun, Wilson and Hall) affirmed based on its interpretation of the *Dykhoff* case. The WCCA noted that the employee must show that the injury was caused by an increased risk to which the employee was subjected by her employment beyond that experienced by the general public. *See Kirchner*. The WCCA noted that 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. *See Dykhoff*; *Nelson*. The WCCA noted that the employee's work duties, and not her personal activities, were the source of her exposure to the risk of a misstep associated with the altered gait required when descending stairs. Even assuming that the use of a stairway is not inherently dangerous or risky, the arising out of requirement can be satisfied even when the workplace condition connected to the injury is not obviously hazardous. The WCCA held that there were several factors which potentially increased the risk of injury from the employee's use of this specific stairway, including her description that the stairs were "kind of steep", and that no handrails were on that portion of the stairway where the employee inverted and twisted her ankle. These facts were supported by evidence in the record and were affirmed. The WCCA also held the "increased risk" standard does not

require a compensable work injury to occur in a solely non-public work area.

Comment: The earlier case was summarized in the June 2013 *Workers' Compensation Update.* We are now entering the era where compensation judges and the WCCA will be applying the *Dykhoff* increased risk test for "arising out of." Read narrowly, *Kainz* simply indicates that there was evidence of increased risk on this particular set of stairs, and that the findings were supported by the record. More worrisome are statements from the WCCA that it was the employee's work duties that were the source of her exposure in the risk of a misstep associated with the altered gait required when descending stairs, as well as its holding that the increased risk test can be met even where the general public is exposed to the same risk.

Fraud

Frederick v. Divine Home Care, Inc., File No. WC13-5654, Served and Filed July 1, 2014. The employee, a personal care attendant, claimed a bilateral wrist injury while repositioning a client. The employee complained of "Charlie horse-like pain in both wrists and forearms." She saw multiple specialists and underwent diagnostic testing, but none of the doctors were able to find anything objectively wrong with her. The employee complained of worsening pain to the point where she could allegedly not drive because she could not hold onto the steering wheel. The employer and insurer conducted surveillance of the employee driving on multiple occasions, carrying items with her hands, lifting her dog, lifting a pet carrier, and smoking. The employee also had a three-phase bone scan of her upper extremities which was interpreted as normal. One of the employee's doctors stated the employee's "studies and work up do not support an objective sympathetically mediated source of pain [or] discomfort. I do not identify any other focal orthopedic disorder that I can localize, treat or identify." The employer and insurer obtained an IME report that opined the employee was a "clear-cut case of malingering." The employer and insurer filed a notice of intent to discontinue benefits due to the employee being at MMI and that benefits she had received were done so through her own fraud. The employee returned to one of her treating doctors for a strength test, and the provider noted on two separate tests that she did not think the employee gave her best effort. The employee went to a pain management treatment which similarly found the employee would exhibit inconsistent effort. Compensation Judge Wolkoff held the employee did not sustain any injury arising out of or in the course of employment, but that the employer and insurer had not established their case for fraud. The WCCA (Judges Cervantes, Hall and Milun) affirmed in part the decision to terminate rehabilitation and wage loss benefits and vacated in part the findings of Compensation Judge Wolkoff that there was no work injury. The WCCA affirmed the compensation judge's denial of fraud based on a finding of fact based on employer's medical expert conceding some treatment was reasonable and necessary and that Rule 5220.2580 was not satisfied. Specifically, the employer's assertion that a NOID satisfied the requirements for fraud was denied because it lacked the specificity and contained just general statements.

Job Offer

Petermeier v. Centimark Corp., File No. WC14-5716, Served and Filed October 14, 2014. For a summary of this case, please refer to the Rehabilitation category.

Maximum Medical Improvement

Ilemskyi v. Japs-Olson Company, File No. WC14-5663, Served and Filed July 17, 2014. The employee was treated for low back pain and carpal tunnel syndrome. The employee's doctor attributed his condition to a work-related injury, recommended therapy, and indicated the employee would be considered for surgery if he did not improve after four weeks. Subsequently, his doctor did not address the surgery, maximum medical improvement for his carpal tunnel syndrome, or provide him with a permanent partial disability rating to his wrist. The independent medical examiner opined the carpal tunnel syndrome was not related to his work, but instead was related to the employee's past career as a musician. The IME also noted the employee was not at maximum medical improvement for his carpal tunnel syndrome and stated the employee "chose not to undergo carpal tunnel release surgery." Compensation Judge Kelly found the employee sustained a *Gillette* injury to his neck, low back and right wrist and was entitled to temporary total disability benefits. The WCCA (Judges Cervantes, Wilson and Stofferahn) affirmed. The WCCA determined that because: (1) maximum medical improvement was not addressed by the employee's doctor; (2) it had not yet been reached according to the independent medical examiner; and (3) because notice of MMI had not been served on the employee -- he had not reached MMI and his temporary total disability benefits would

continue. The WCCA also determined that, because the employee had not yet undergone carpal tunnel release surgery, he had not yet reached MMI for his wrist injury. As a result, the WCCA affirmed the award of temporary total disability benefits.

Permanent Partial Disability

Roskos v. Bauer Electric, Inc., File No. WC14-5699, Served and Filed September 23, 2014. The employee sustained catastrophic work-related injuries. The employer and insurer accepted liability and paid benefits. His average weekly wage was $1,083.98, and his compensation rate was $722.65. The parties agreed the employee had a 99 percent permanent partial disability. The total value of his PPD rating was $509,850. The employee, through his guardian, requested one lump sum for his permanent partial disability. The employer and insurer applied a five percent discount rate to calculate the present day value of his PPD and paid out $373,079. The employee filed a Claim Petition alleging the discount percentage should have been 1.59 percent. The employer and insurer argued Compensation Judge Behr did not have authority to determine the present day value and appropriate discount rate. Compensation Judge Behr held he had the authority to determine both the discount rate and present day value of the PPD benefits. He also held the five percent discount rate was appropriate to determine the present day value of the employee's PPD benefit. The WCCA (Judges Wilson, Hall and Stofferahn) affirmed. The WCCA found that "present value" recognizes that money today is worth more than future money because the person who has that money today can invest it for a return. It determined that when an employee demands a lump sum payment, the employer and insurer lose the ability to invest the money. The WCCA also found that it was appropriate to use the statutorily prescribed five percent discount rate based on the financial expert's testimony. The WCCA also held the legislature likely did not intend to give insurers sole authority over what discount to use and/or how much an employee would receive for a permanent disability pursuant to Minn. Stat. §176.101, subd. 2a(b) (2000). The WCCA questioned whether an insurer would ever apply a discount rate that was less than five percent, but did not address the issue here because the facts were not relevant.

Permanent Total Disability

Sanden v. Northern Contours, Inc., File No. WC13-5631, Served and Filed May 13, 2014. The employee sustained an admitted injury to her neck and right shoulder while working for Northern Contours in 1996. The insurer paid various benefits, including 10 percent permanent partial disability for a cervical disc herniation, for which the employee treated until 2011. In late 2006 or early 2007, while employed at The Work Connection, the employee also sustained an admitted low back injury. She treated conservatively until 2009, when she underwent a lumbar spinal fusion. In 2011, the hardware from the spinal fusion was surgically removed, but the employee still experienced severe low back pain thereafter. Three of the employee's treating physicians recommended that the employee consider a spinal cord stimulator for pain relief, despite the employee's fear due to her perceived metal allergy. All of the treating physicians suggested that the employee see an allergy specialist to determine whether placement of the spinal cord stimulator would be an issue, but she failed to do so. Additionally, an independent medical examination was performed, through which it was determined that the employee was not permanently and totally disabled, in part because she had not exhausted available treatment. Compensation Judge Behounek was persuaded by the IME report, noting that "a number of treatment options are available to the employee that have not been pursued," including a pain clinic, therapeutic injections, and consideration of a spinal cord stimulator. Thus, the employee failed to prove that she was permanently and totally disabled. The WCCA (Judges Milun, Stofferahn and Cervantes) affirmed, indicating that Judge Behounek's assessment of the medical opinions supported the conclusion that the employee failed to meet her burden of proving her permanent total disability claim.

Allan v. RD Offutt Company, File No. WC14-5667, Served and Filed August 12, 2014. The employee sustained a work-related injury to his low back, and filed a claim petition alleging that the back injury had resulted in a 21 percent permanent partial disability rating, thereby making the employee eligible for permanent total disability. The compensation judge found the low back injury to be permanent, but with only a 10 percent PPD rating. The employee claimed additional PPD of 10 percent based upon an unrelated loss of his teeth under Minn. R. 5223.0320, subp. 7. Compensation Judge Cannon denied the employee's claim for PTD, holding that the non-work-related disability could not be used to meet the PTD threshold. The WCCA (Judges Stofferahn, Milun and Cervantes) reversed. The WCCA reiterated the holding of *Frankhauser v. Fabcon*, Inc., 57 W.C.D. 239 (WCCA 1997), allowing for a non-work-related

PPD rating to be combined with a work-related PPD rating to reach the PTD threshold. The WCCA also rejected the employer's arguments that a correctable condition, i.e. the loss of teeth that can be corrected by dentures, may not be used to establish PTD and that the non-work-related PPD must represent a functional loss that affects the employee's employability.

Procedural Issues

Breeze v. FedEx Freight, File No. WC14-5687, Served and Filed August 26, 2014. For a complete summary of this case, please refer to the Rehabilitation category.

Rehabilitation

Breeze v. FedEx Freight, File No. WC14-5687, Served and Filed August 26, 2014. The employee sustained work-related injuries while employed by the employer. He started receiving rehabilitation benefits in the summer of 2009. Over three years later on October 25, 2012, the employer filed a Rehabilitation Request to terminate the Rehabilitation Plan or in the alternative, change the QRC. The employer failed in its attempt to terminate the plan but prevailed on changing the QRC. The employee requested a formal hearing. The matter was heard by Compensation Judge Rykken, who concluded that a change of QRC was in the best interests of the parties. The employee did not appeal. The original QRC filed a rehabilitation request seeking payment for her bills from December 26, 2012, through June 14, 2013 (the day she claimed to have received the decision of the compensation judge). A rehabilitation decision was filed on September 16, 2013, denying most of the QRC's bills except for a small portion of time that was billed for preparation for the conference that was held on terminating the plan. The employee then filed a request for formal hearing regarding the denial of the QRC's bills. The matter went to hearing before Judge Rykken who denied the employee's claim for payment of the QRC's bills. The employee appealed. On appeal, the employer argued two procedural issues: 1) the employee did not have standing to appeal on behalf of the QRC, as he would not be held personally responsible for payment of the bills; and 2) the employee's appeal should be dismissed, as the employee's attorney filed the appeal brief one day late. The WCCA (Judges Wilson, Cervantes and Hall) rejected the standing argument. The WCCA found that whether or not the employee could be held responsible for payment of the QRC bills in question, he clearly had adequate connection to the matter to claim payment of those bills and to dispute the compensation judge's order denying payment. In fact, employees routinely bring claims for both medical and rehabilitation bills. The WCCA also did not find that the employer advanced any basis for dismissal on the late filing that would show prejudice, so dismissal was denied. The WCCA then went on to affirm the compensation judge's decision regarding continued rehabilitation benefits and her interpretation of *Parker v. University of Minnesota*, slip op. (WCCA Sept. 16, 2003). The WCCA agreed with the compensation judge's reading of *Parker* in that a QRC who continues to provide rehabilitation services during the pendency of a dispute over rehabilitation eligibility runs the risk of non-payment in the event that the employer prevails at a hearing on the merits.

Petermeier v. Centimark Corp., File No. WC14-5716, Served and Filed October 14, 2014. The employee sustained an admitted injury as a roofer and was unable to return to his same job. He had custody of his child on certain weekends, and the previous employer had known about his need to have those weekends free to spend with his child and had accommodated his scheduling needs. The employee subsequently accepted a flooring job with a subsidiary of the employer that required travel and work on the weekends. The employee testified he gave notice to the flooring employer that he would need certain weekends off to be with his child, but the flooring employer was not always able to accommodate this. The employee then filed a Rehabilitation Request seeking a change in his Rehabilitation Plan to include a job search in Minnesota on the basis that his flooring job was separating him from his son. The WCCA (Judges Milun, Hall and Cervantes) reversed Compensation Judge Rykken's decision that the date-of-injury employer provided "suitable skilled laborer work," holding that "rehabilitation assistance is available so long as an employee is precluded from returning to his or her previous work duties as a result of the work injury." *Read v. Ford Motor Co.*, 45 W.C.D. 487 (WCCA 1991); *Richardson v. Unisys Corp.*, 44 W.C.D. 199 (WCCA 1990). The WCCA remanded the issue as to whether the flooring position was "suitable gainful employment," as it found the compensation judge did not address it. The WCCA noted Minnesota courts have "long recognized that an injured employee is not required to dramatically alter a reasonable and responsible pattern of living to be eligible for workers' compensation benefits." The WCCA remanded to the compensation judge to determine if the employee was entitled to revision of the Rehabilitation Plan to include

job placement assistance on the basis that his post-injury job prevented him from maintaining established, regular weekend visitation with his son.

Temporary Total Disability

Ilemskyi v. Japs-Olson Co., File No. WC14-5663, Served and Filed July 17, 2014. For a summary of this case, please refer to the Maximum Medical Improvement category. ✦

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