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MINNESOTA WORKERS' COMPENSATION UPDATE

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CASE LAW UPDATE

DECISIONS OF THE MINNESOTA SUPREME COURT

APPEALS

Blomme v. Independent School District No. 413, Case No. A16-0439 (Minn. 2016.) The employer filed a Writ of Certiorari on a timely basis. It did not file a cost bond on the WCCA. Instead, the employer filed a Stipulation of Waiver of Appeal Bond, signed by attorneys for both parties. In *Dennis*, the Supreme Court held that "review [of a WCCA decision] does not come into being – in other words, does not happen – unless and until... the cost bond [is] timely served" on the WCCA. The Court did not address the effect of a stipulated waiver of the cost bond. The employer argued that the Supreme Court should accept a stipulated waiver of cost bond for policy reasons and consistency. The Supreme Court (Justice Anderson) disagreed and dismissed the appeal. *Dennis* stands for the rule that the plain and unambiguous language of Minn. Stat. §176.471 – before its amendment – required service of a cost bond to "effect review" in an appeal from the WCCA. The parties cannot waive an unambiguous statutory requirement.

Note: The statute was amended effective May 13, 2016, to delete the bond requirement, but this appeal had been filed two months before that statutory amendment.

Gianotti v. Independent School District 152, Case No. A16-0629 (Minn. 2017). The employee worked as a school bus monitor for the employer. While riding in the bus one day, it unexpectedly braked, causing her to fall, strike the left side of her head on the front console, and land on her left arm. She went to the emergency room where a CT scan and X-rays were interpreted as being negative for signs of a concussion. She was diagnosed with a head

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injury and left arm contusion. The employee began treating with a number of health providers. She treated with a doctor who noted she did not have symptoms of a concussion. She was referred for psychological intervention with Dr. Hague, a licensed psychologist, who conducted a limited battery of tests and opined she had an "apparent concussive injury." The employer and insurer obtained an independent psychological examination with Dr. Arbisi, who reviewed pre-injury medical records for the employee that her treating doctors had not reviewed. These records showed the employee had not fully disclosed the medications she had taken prior to her date of injury. Dr. Arbisi opined that the employee had not suffered a concussion or post-concussive syndrome and that she responded to the questions in a way that deliberately presented herself as an "admirable individual who reports suffering from extreme and non-credible psychiatric symptoms, as well as non-credible memory problems." Two of the employee's treating doctors responded to Dr. Arbisi's report opining that her symptoms were "consistent with a traumatic brain injury and post concussive syndrome." Dr. Arbisi prepared a supplemental report based on additional post-injury medical records noting that his opinions had not changed. The employee filed a medical request seeking payment for various treatments for her claimed injuries, including alleged emotional and psychological conditions. Compensation Judge Baumgarth denied the employee's request for emotional and psychological treatment because she had not suffered a concussion or post-concussive syndrome. The employee appealed, arguing that Dr. Arbisi lacked factual foundation because he had not viewed a video of the accident scene or some of her post-injury psychiatric records. At the WCCA both parties agreed Dr. Arbisi was competent to provide an expert opinion, even though he was not an M.D. The WCCA reversed Compensation Judge Baumgarth's opinion and found that Dr. Arbisi was not a competent expert, he lacked factual foundation for his opinion because he did not view the video, and all other evidence indicated the employee had suffered from a post-concussive syndrome. The employer and insurer appealed.

The Minnesota Supreme Court (Justice Lillehaug) reversed. The employee's notice of appeal to the WCCA did not list Dr. Arbisi's competency as an issue for the WCCA. Instead the issue was whether the employee suffered a "concussion or other brain injury." None of the compensation judge's findings addressed whether Dr. Arbisi was competent, but one finding did address Dr. Arbisi's credentials, his examination of the employee, and his findings. However, the employee did not appeal this specific finding. In her briefs to the WCCA, the employee also did not raise the issue of Dr. Arbisi's competency or the fact that he was not an M.D. Instead, she argued that her treating doctors' opinions "outweighed" Dr. Arbisi's opinion, that he had not seen the video of the accident, and that he had not viewed certain post-injury psychiatric records, so he lacked foundation under Minnesota Rule of Evidence 702. At the Supreme Court, the employee argued her citation of Minnesota Rule of Evidence 702 in her brief to the WCCA opened the door to an argument that Dr. Arbisi was not competent. Because the employee's notice of appeal failed to raise the issue of Dr. Arbisi's competency, she forfeited the issue on appeal, and the WCCA erred in ruling on an issue that was not before it. The WCCA also erred when it held that Dr. Arbisi lacked the necessary factual foundation to provide an expert opinion on whether the employee sustained a concussion or had post-concussive syndrome because he had not viewed the video of the accident and because he noted the employee denied an altered consciousness until October 23, 2014. The WCCA failed to explain why the video was probative for determining whether the doctor had adequate foundation, especially when none of the employee's treating doctors had viewed the video. Dr. Arbisi's foundation was as solid as any other expert in the case, since he reviewed her pre-injury records that no other doctor reviewed, the majority of her post-injury records, performed a significant battery of tests, and personally interviewed the employee. The WCCA also mischaracterized a sentence from Dr. Arbisi's report about the employee's denial of "altered consciousness" and took it out of context. The Supreme Court held that the compensation judge had adequate factual foundation for his opinion and the evidence supported the compensation judge's determination that the employee did not sustain a concussion or post-concussion syndrome. The Court reinstated the compensation judge's Findings and Order.

Evidence

Gianotti v. Independent School District 152, Case No. A16-0629 (Minn. 2017.) For a discussion of this case, please refer to the Appeals category.

Rehabilitation / Retraining

Gilbertson v. Williams Dingmann, LLC, Case No. A16-0895 (Minn. 2017). The employee worked as a licensed mortician for the employer. She worked a regular schedule, but was also on-call outside of her regularly scheduled hours. In 2011, the employee's on-call schedule began to conflict with her obligations to her family. The employer initially was able to adjust her on-call schedule, but this did not last. Once the employee learned the schedule adjustments could no longer be made, on September 26, 2011, she submitted her resignation indicating her last day would be December 31, 2011. Prior to the effective date of the resignation, on October 13, 2011, the employee sustained a compensable low back injury resulting in restrictions. Vocational rehabilitation services were provided and a Rehabilitation Plan was completed and signed by the parties, with the goal being "return to work, different employer." When another funeral director left, the date-of-injury employer made a job offer to the employee in June 2012 that would have resulted in no wage loss. The employer agreed to accommodate the employee's work restrictions. However, no proposal was made to accommodate the employee's family obligations. The employee rejected the job offer. The employer and insurer filed a Notice of Intention to Discontinue the employee's temporary total disability benefits, citing the rejection of the job offer. The discontinuance was granted at an Administrative Conference and affirmed at a subsequent hearing. The Workers' Compensation Court of Appeals, however, reversed the discontinuance of benefits, citing Minn. Stat. §176.101, subd. 1(i), which allows a discontinuance of TTD benefits if an employee refuses an offer of work that is "consistent with a plan of rehabilitation." Since the Rehabilitation Plan stated that the goal was return to work with a different employer, not the date-of-injury employer, the WCCA ruled that there was no basis under the statute for terminating TTD benefits. The WCCA also indicated that the rationale used by the compensation judge which cited a refusal of "suitable gainful employment" did not apply, since that "standard is only applicable where there is no filed Rehabilitation Plan."

The Minnesota Supreme Court (Justice Hudson) affirmed the decision of the WCCA. The Court stated that "[b]y virtue of their signatures on the Rehabilitation Plan, the parties *agreed* that Gilbertson would return to a job with a different employer, not Dingmann. Dingmann had an opportunity to object to the terms of the Rehabilitation Plan, but it did not; it is now bound by the terms of the agreement." (Emphasis in original). Based on this reasoning, the Court indicated that "under the plain language of Minn. Stat. §176.101, subd. 1(i), an offer to return to work with the same employer is not 'consistent with' an employee's Rehabilitation Plan that states that the vocational goal is to return to work with a different employer."

In a concurring opinion, Justice Anderson described the practical consequences of the decision of the Court. Justice Anderson stated that the "employer has just been ordered

to continue financial benefits for a departing employee while she searches for employment from her employer's competitor. And the employer cannot limit its continuing liability by offering the employee equivalent employment." Justice Anderson went on to state that as a result "[e]mployers may be less likely to rely on recommendations of qualified rehabilitation consultants. Employers may seek more review by legal counsel of workers' compensation forms previously thought 'routine.' There may be less interest in accommodating employee requests for return-to-work goals in a QRC plan."

Comment: As Justice Anderson indicated, the ruling of the Supreme Court significantly raises the importance of what may have been previously thought to be a "routine" form. The Rehabilitation Plan has now been determined to be a "binding" agreement among the parties – a contract. We recommend that Rehabilitation Plans be analyzed very closely before they are signed. In particular, with regard to the area of the "vocational goal," we recommend that the plan not be limited to simply one goal. Our recommended best practice is that the "goal" be identified as a return to work to the same employer *and/or* return to work with a different employer. If the employee and QRC do not agree to this, a Rehabilitation Request may need to be filed. In addition, to the extent that there are any "agreements" in the Rehabilitation Plan that may be beneficial to the defense of the case, these should now be given increased importance. Finally, since the plan has now been given the level of significance not previously assumed, and in effect viewed to be a binding contract, if the QRC fails to complete the form properly, arguably the plan can be rejected as being defective and incomplete. ✦

Decisions of the Minnesota Court of Appeals

There were no decisions issued by the Minnesota Court of Appeals during this reporting period.

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Chrushshon v. New American Hospitality, Inc., File No. WC16-5936, Served and Filed August 24, 2016. The employee worked as the director of sales and marketing for the employer's three hotels. Her office was located at one hotel, but she often visited the other two hotels. On August 24, 2014, the employee drove from one hotel to another, parked in front of the main entrance, and began to walk into the hotel when she fell injuring her arm. The walkway at the entrance of the hotel was concrete cobblestone. The cobblestone consisted of irregular squares and rectangles that were separated by grooves that resembled grouting. The employee testified that as she was walking her foot got stuck causing her to trip and fall. The hotel's general manager and the night auditor came to help the employee right away. The general manager testified that the employee told him she stumbled over a brick. The night auditor testified the employee said something about her shoes causing her trouble, but nothing about what caused her fall. The employer and insurer denied liability based on *Dykhoff* and presented an alternative explanation for the cause of her fall – a preexisting knee condition. Compensation Judge Rykken found that the employee's injury arose out of and in the course of her employment, accepting the employee's testimony as credible and supported by the evidence. The WCCA (Judges Stofferahn, Milun, Hall, Cervantes, and Sundquist) affirmed. Citing *Dykhoff* and *Nelson*, the WCCA indicated that in order to arise out of employment, the hazard encountered by an employee does not need to be unique to people in the course of their employment, or be an exposure encountered only by a person in the course of their employment. Therefore, because the compensation judge found that the cobblestone walkway caused the employee's fall, and because the employee was exposed to this risk due to her employment, her injury arose out of her employment. The WCCA noted that the employer and insurer submitted an engineering company report which concluded the walkway was not defective. The WCCA concluded that although this report was evidence to consider, it was not determinative because an employee is not required to prove a defect or negligence by the employer in order for an injury to arise out of her employment under Minn. Stat. §176.021, subd. 1.

Lein v. Eventide, File No. WC16-5961, Served and Filed December 7, 2016. Shortly after her work shift started, the employee went downstairs, through the back stairwell, to a vending machine on the first floor. As she was descending the stairs, her right foot slipped out from underneath her and she fell, injuring her left forearm and back. The employer denied that her injury arose out of her employment pursuant to the *Dykhoff* case. At the hearing, the parties submitted photographs of the stairs, revealing that they were rather typical industrial type stairs with concrete block walls, handrails and the stair rises, which were all painted tan. The stair treads were unpainted concrete with no anti-slip surface on them. Both parties hired experts to investigate the stairs. The employer's expert testified that the stairs were consistent with building code requirements and would not be a "special hazard" or create an "increased risk to users." The employee's expert testified that the paint uniformity of the stairs and the absence of any anti-skid condition on the stairs made the stairs defective. Compensation Judge Marshall held that the stairs did not expose the employee to an increased risk under *Dykhoff*, so her injury did not arise out of her employment. In his opinion the compensation judge noted that he considered the lack of an OSHA investigation, the failure to show a defect in the stairs, and the employer's compliance with the building code in his decision. The WCCA (Judges Stofferahn, Milun, Hall, Cervantes, and Sundquist) reversed, holding that the compensation judge had put the burden on the employee to show that there was a defect in the stairs or a failure by the employer to conform with the building code or OSHA rules. The WCCA noted that this was essentially a negligence standard, with experts testifying, that is prohibited under the Workers' Compensation Act and contrary to *Dykhoff*. In considering injuries occurring from an employee's use of stairs, the Supreme Court stated, "if there is something about the stairway...that 'increases the employee's exposure to injury beyond that' the employee would face in his

or her everyday non-work life, an injury causally connected to that condition could satisfy the 'arising out of' requirement." *See Dykhoff*, quoting *Kirchner v. County of Anoka*. In *Kirchner*, the Supreme Court found that the employee fell when his knee "gave out" while he was walking on a staircase. The Court found the requisite causal connection because the "staircase was located at Kirchner's place of employment, and the injury occurred when the public use of the only handrail required Kirchner to negotiate the steps without the benefit of that protection." There was no evidence in *Kirchner* that only having one handrail in the stairway was a "defect" or a violation of a building code. In this case, it is uncontroverted that the stairs did not have anti-slip treads and the employee testified her foot slipped, causing her to fall. In *Dykhoff*, the employee was unable to provide *any* connection between her injury and her employment, other than her presence on the employer's premises. That is not the case here. The employee provided the requisite causal connection to conclude that the injury arose out of employment. The case was remanded to the compensation judge on the question of damages only.

Legatt v. Viking Coca-Cola Bottling Company, File No. WC16-5994, Served and Filed January 26, 2017. The employee was walking in a warehouse and taking inventory when her shoe caught in a damaged crevice in the concrete floor. She twisted her ankle, for which she treated. She also began treating for low back pain, which her doctor opined was related to the ankle injury due to an altered gait. The employer denied primary liability using a *Dykhoff* argument. It contended that the employee did not establish that the warehouse floor increased her exposure to injury beyond what she would have encountered in her everyday non-work life. Compensation Judge Dallner awarded benefits. The employer appealed. The WCCA (Judges Stofferahn, Cervantes and Sundquist) affirmed. The WCCA cited *Dykhoff*, which states, "[t]he phrase 'arising out of' means that there must be some connection between the injury and the employment," and the causal connection "is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment, *or* peculiarly exposes the employee to an external hazard whereby he is subjected to a different and greater risk than if he had been pursuing his ordinary personal affairs." It was determined that the employee's injury resulted from a hazard that originated on the premises, specifically the damaged floor, so it arose out of the employment.

Attorney Fees

Shire v. Rosemount, Inc., File No. WC16-5927, Served and Filed April 19, 2016. The attorney for the employee filed a motion requesting additional attorney's fees in the amount of $5,000 after appealing an issue to the WCCA. The WCCA (Judges Hall, Milun and Cervantes) denied the employee's attorney's request for an additional $5,000 in attorney's fees, holding that the WCCA's authority for awarding attorney's fees on a successful appeal is under Minn. Stat. §176.511, rather than Minn. Stat. §176.081. The WCCA's initial award of $1,500 in attorney's fees to the employee's attorney was reasonable, so the request for an additional $5,000 in attorney's fees was not warranted. The employee's attorney's requests for fees under Minn. Stat. §176.081, subds. 1 and 7 and the *Roraff* case were also denied. The WCCA also noted the employee's attorney failed to specify the costs or disbursements associated with the appeal in the statement of fees, so his request for costs or disbursements was also denied.

Paniagua v. Employer Solutions Staffing Group, LLC, File No. WC16-6001, Served and Filed February 16, 2017. The employee sustained an admitted injury, and the employer and insurer paid temporary total disability benefits for two periods before filing a notice of intention to discontinue benefits on the basis that the employee failed to cooperate with medical treatment and rehabilitation assistance. An administrative conference was held, and the request to discontinue benefits was denied pursuant to the decision and order which was served and filed on March 7, 2016. The employer and insurer subsequently reinstated TTD benefits, and on March 16, 2016, the employee filed a statement of attorney fees. The employer and insurer objected arguing that the claim for attorney fees was premature because they had 60 days to appeal, which they did. Subsequently, a second NOID was also filed based on an independent medical examination in which the physician opined that the employee's injury was resolved. Another administrative conference was held and again the request to discontinue benefits was denied. The employer and insurer again reinstated temporary total disability benefits, this time withholding attorney fees. The employer and insurer also filed a petition to discontinue benefits, and the employee filed an amended statement of attorney fees. Compensation Judge Bouman granted the employer and insurer's petition to discontinue benefits, finding that the employee's injury resolved by the date of the IME examination, and dismissed the

medical request, rehabilitation request, and the statement of attorney fees. The employee appealed the dismissal of the statement of attorney fees only. The WCCA (Judges Cervantes, Milun and Sundquist) affirmed in part and reversed in part. Under Minn. Stat. §176.081, subd. 1(a), because TTD paid pursuant to an order on discontinuance that is ultimately determined not to be owed to the employee by the compensation judge's hearing decision is not "compensation awarded to the employee," an employee's attorney is not entitled to contingent attorney fees on those benefits. However, the employee is entitled to attorney fees on disputed TTD paid during a period before the date a compensation judge found an employee to have recovered from a work injury as those benefits are "compensation awarded to an employee" under the statute.

Causal Connection

Thao v. Synovis Life Technologies, Inc., File No. WC16-5928, Served and Filed September 2, 2016. The employee worked for the employer since the mid-1980s with artificially raised animal embryos. The job required her to repeatedly cut umbilical cords. Over time, this work caused the employee bilateral upper extremity pain. The parties ultimately entered into a stipulation, agreeing that the employee suffered a repetitive *Gillette* injury culminating on January 1, 2008. The settlement was full, final and complete, leaving open only medical expenses related to the January 1, 2008, work injury. Following the settlement, in May 2011, the employee was diagnosed with DeQuervain's tenosynovitis and trigger finger in her right index finger. Her treating physician, Dr. Koch, initially noted in a chart note that these complaints and diagnoses were two new problems. Dr. Koch subsequently issued a narrative report indicating the DeQuervain's and trigger finger were related to her work activities and to the prior January 1, 2008, date of injury. The employer and insurer obtained a medical opinion during the initial litigation of the case, but did not obtain a medical opinion specifically related to the DeQuervain's and trigger finger diagnoses. Accepting the employer and insurer's position, Compensation Judge Wolkoff found that the medical treatment requested by the employee was not causally related to the employee's admitted work injury. The WCCA (Judges Milun, Stofferahn and Sundquist) reversed. The WCCA found that Dr. Koch's medical opinion was an uncontroverted medical opinion, and therefore, his opinion could not be disregarded unless the employee's medical records and the expert opinion supported opposing positions. The WCCA concluded that despite the conflicting chart notes, the employee's medical records supported the same position as Dr. Koch's narrative. Therefore, because the employer and insurer submitted no medical evidence in support of their position, the compensation judge's decision was not reasonably supported by the evidence as a whole.

Mattick v. Hy-Vee Food Stores, File No. WC16-5946, Served and Filed October 14, 2016. The employee initially sustained a non-work related fracture to her right ankle in 2000 and underwent surgery. She had some follow-up appointments in 2004. For a period of about ten years, the employee asserted she did not feel any significant ankle pain, but acknowledged she wore an ankle brace while playing volleyball. On January 18, 2014, she tripped over a pallet at work and twisted her right ankle. She was diagnosed with an ankle sprain and received conservative treatment. On March 23, 2014, the employee sustained a non-work-related fall, in which she injured her right knee and sustained a mild concussion. She asserted she had a slight increase in ankle pain after this non-work incident, but her symptoms returned to baseline two weeks later. The treating doctor, Dr. Collier, opined the employee's ankle sprain on January 18, 2014, exacerbated her pre-existing arthritis, and on his HealthCare Provider Report, checked the box indicating the employee's work injury had "caused, aggravated or accelerated the employee's condition." The employee also obtained an independent medical examination report from Dr. Bert opining that her right ankle condition was permanently aggravated by the work injury. The employer's independent medical examiner, Dr. Fey, opined there was no objective basis to support any opinion that the employee's ongoing condition was related to anything other than her long-standing degenerative arthrosis in her right ankle as a result of her 2000 right ankle fracture. Compensation Judge Dallner found the employee's right ankle injury was temporary and had resolved, that her work injury was not a substantial contributing factor to her right ankle fusion surgery, and she denied the employee's and interveners' claims. The WCCA (Judges Hall and Milun) reversed holding that the employee's treatment records, medical opinions of her treating doctors, and her testimony demonstrated her pain symptoms were caused by an aggravation of her pre-existing condition from her work injury, and that the employer's independent medical examiner's opinion was not supported by the evidence and could not be relied upon. *See Nord.*

It also held that the employee's right ankle arthrodesis was reasonable and necessary to cure and relief the effects of her work injury.

Judge Sundquist dissented, arguing that the compensation judge's decision should be affirmed on the basis that there was substantial evidence to support that the employee only sustained a temporary work injury. Judge Sundquist also noted that some of the six *McClennan* and *Wold* factors supported a finding that the employee's work injury was temporary in nature, whereas other factors supported a finding that it was permanent in nature. She analyzed each of the factors with regards to whether they supported a finding for a temporary or permanent work injury and noted there was substantive evidence to support the employer's independent medical examiner's opinion that the employee's work injury was temporary in nature. Judge Sundquist also noted there were other treating doctors' opinions that supported the employer's independent medical examiner's opinion. Judge Sundquist noted that analyzing the *Wold* factors is a question of fact for the judge and she declined to accept the majority's decision.

Note: This decision has been appealed to the Supreme Court.

Death

Grage v. ACME Electric Motor, Inc., File No. WC15-5898, Served and Filed September 2, 2016. This case dealt with two issues relative to death benefits. First, the WCCA (Judges Sundquist, Cervantes and Hall) reversed Compensation Judge Baumgarth's finding that the surviving spouse was not qualified for vocational rehabilitation services. Minn. Stat. §176.102, subd. 1a, as discussed in the *Wirtjes* case, indicates that entitlement to rehabilitation is based on "the individual talents, skills, experience, earning capacity, and employability of the surviving spouse." Based on the facts that she was 54 years old and struggling with licensing requirements to secure and maintain employment as a special education teacher, the WCCA found that the employee was qualified for vocational rehabilitation services. Second, in a case of first impression, the WCCA upheld the compensation judge's award of a memorial bench as a "burial expense." The employer and insurer argued that the bench was not a part of the actual burial of the employee's remains, and thus it was not compensable as a burial expense. However, the employee prevailed on the argument that the bench was comparable to a headstone, which is compensable, especially given that it cost less than the statutory limit of $15,000.

Gillette Injuries

Noga v. Minnesota Vikings Football Club, File No. WC16-5989, Served and Filed April 20, 2017. The employee was drafted by the Minnesota Vikings in 1988 and played as a defensive lineman from 1988 to 1992. In that time, he suffered various orthopedic injuries. He also used his head rather than just his shoulders when making tackles, which was then allowed in the NFL, so he experienced headaches and wooziness. He would always report these symptoms to the trainer or team doctor during or after a game. After 1992, he played for several different teams and retired from football in 1999. In 2001, the employee filed a claim petition for workers' compensation benefits against the Vikings associated with 11 specific orthopedic injuries from 10 specific dates of injury. The claim for these ten specific dates of injury was settled and an Award on Stipulation was served and filed on March 23, 2004. The employee's head condition later declined, and he was diagnosed with dementia. In January 2015, he filed another claim petition against the Vikings, alleging a *Gillette* injury to the head. The employer and insurer denied primary liability, asserting notice and statute of limitations defenses, along with a defense that the 2004 Stipulation precluded the employee's claims for permanent total disability benefits and psychological care and treatment. The matter was brought before Compensation Judge Marshall, who found that the stipulation did not close out the current head injury claims asserted by the employee, because it only closed out claims for specific orthopedic injuries that did not involve the head. The compensation judge further found that, while the employee did not prove any specific injuries to his head as alleged in the claim petition, he did sustain a *Gillette* injury culminating on the last day the employee was employed by the Vikings in 1992. The employer and insurer appealed. The entire panel of the WCCA (Judges Hall, Milun, Stofferahn, Cervantes, and Sundquist) determined that the medical evidence specifically

supporting how work activities during the employment with the Vikings resulted in the disability is unclear, as the judge did not include an analysis of his reasoning on this issue. Therefore, the WCCA vacated the finding of a *Gillette* injury and requested that the compensation judge review this issue on remand. Because of the remand, the notice and statute of limitations issues must also be reconsidered. Regarding the effect of the prior stipulation, the WCCA agreed with the compensation judge that the prior stipulation did not preclude the head injury claim because it only closed out claims for orthopedic injuries emanating from specific dates of injury. To support this finding, the WCCA cited the Minnesota Supreme Court's holding in *Ryan*, wherein the *Sweep* line of cases was reviewed and it was determined 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." Therefore, the WCCA concluded that to rule that the head injury claims were precluded by the stipulation would "close out certain benefits for injuries not specifically closed out in it – a result directly contrary to the holding in *Sweep*."

Interest

Fishback v. American Steel & Industrial Supply, File No. WC16-5943, Served and Filed February 3, 2017. Dependency benefits were paid for several years after the employee's death in 1996. The deceased employee's wife apparently failed to provide information needed by the insurer to calculate the benefit rate correctly. The deceased employee's wife also passed away in 2012, and it took additional time for the deceased employee's children to provide documentation to the insurer. Overall, the employer and insurer acknowledged that there were various underpayments from 2003 to 2014. They were able to determine the amount of the underpayments in 2014, but nevertheless, the additional payment was not immediately made. Instead, a mediation was scheduled to resolve the underpayment issue. The mediation was cancelled. After the cancellation of the mediation, the employer and insurer issued the dependents large checks for the underpayments. The dependents then asserted that they were owed interest and penalties because the underpayment checks were issued after the benefits were due and ascertainable. They took the interest and penalties issues to Compensation Judge Tate. The compensation judge was persuaded that underpaid benefits were not "due" until the insurer had all of the information needed to calculate the total amount of the underpayments. On that basis, she denied the claim for interest. The dependents also claimed that penalties were due for "unreasonably or vexatiously delayed payments or neglect or refusal to pay compensation when due," and the compensation judge denied that claim, as well. The dependents appealed on the interest and penalties issues. The WCCA (Judges Cervantes, Stofferahn and Hall) reversed the compensation judge on the interest issue, citing Minn. Stat. §176.221, subd. 7, which states that "[a]ny payment of compensation . . . not made when due shall bear interest from the due date to the date the payment is made." The WCCA found that the plain language of the statute indicates that *any* delayed payment of benefits produces interest and, just because a mediation was scheduled to resolve the underpayment issue, the underpayment checks could have and should have been issued sooner. In addition, the dependents argued that insurer had a statutory obligation to contact each of the dependent children individually for information needed to process their claims after they reached age 18. The WCCA agreed with the dependents, finding that the statute puts the onus on the employer and insurer to contact dependents individually. The WCCA affirmed the compensation judge's decision not to issue penalties, citing the *Sass* case, which indicates that penalties may be awarded "where an insurer unreasonably delays or neglects to pay benefits which are unquestionably due." Here, there was a legal question as to whether benefits were due.

Note: The employer and insurer appealed this case to the Minnesota Supreme Court. By order dated April 17, 2017, the Supreme Court dismissed the appeal, as the brief was late.

Interveners

Fischer v. ISD 625, File No. WC16-5955, Served and Filed November 16, 2016. This matter involved an admitted left thumb injury. The employee incurred medical bills with Landmark Surgery Center and Summit Orthopedics, and some of the bills were paid by First Class Recoveries/Preferred One Insurance Company. All of these entities were placed on notice of their intervention rights, and they all intervened. Under the standing order that was then in effect at the Office of Administrative Hearings, interveners had the option to file a notice to appear by telephone at the hearing. Landmark Surgery Center and First Class Recoveries did so, but Summit Orthopedics did not. Landmark Surgery Center and First Class Recoveries were nevertheless absent from the hearing by phone. The employee's attorney asserted at the hearing that he was making a direct claim on behalf of the employee for the expenses incurred with the

interveners. Compensation Judge Hagen issued an order in which he found that the interveners were entitled to payment. The employer and insurer appealed. The WCCA (Judges Stofferahn, Hall and Cervantes) indicated that its decision is controlled by the *Sumner* case, wherein it was determined that an intervener's failure to appear resulted in the denial of the intervener's claim for reimbursement. After the *Sumner* decision, the Office of Administrative Hearings issued a standing order that established procedures to be followed with regard to the appearances by interveners. This standing order was still in place at the time of the litigation in this case. The question for the WCCA was whether the employee was able to directly claim the medical expenses claimed by the interveners. Citing *Xayamongkhon*, the WCCA determined that, once an entity intervenes, its interest is separate from that of the employee. Therefore, given that the employee's attorney in this case did not establish at the hearing that he represented not only the employee but also the interveners, the award of reimbursement to the interveners was vacated.

Sumner v. Jim Lupient Infiniti, File No. WC16-5968, Served and Filed November 30, 2016. This matter was the subject of previous decisions by the WCCA and the Minnesota Supreme Court. In this latest litigation, Compensation Judge Wolkoff found that the employee recovered from her January 28, 2012, work injury as of May 29, 2012, and therefore she was not entitled to further benefits beyond that point. The compensation judge also held that the employee could not make direct claims for medical expenses for treatment from the interveners and denied payment to two interveners that did not appear at the hearing. The employee appealed from both holdings. The WCCA (Judges Milun, Stofferahn and Hall) affirmed the compensation judge's finding that the employee's injury resolved by May 29, 2012, finding that there was substantial evidence in the record to support that decision. However, the WCCA held that the judge erred by extinguishing the intervention interests due to nonappearance, as it was held in the earlier decision that these two interveners were not required to appear at the previous hearing because no objections were filed to their motions to intervene. The Minnesota Supreme Court specifically noted that where an employer does not object to an intervener's motion, the intervener is excepted from having to personally appear at the hearing. Given that the judge's award of medical treatment through May 29, 2012, was affirmed, and the award of rehabilitation benefits through that date was not appealed, these interveners were entitled to payment of their claims through May 29, 2012.

Note: This decision was summarily affirmed by the Minnesota Supreme Court on May 10, 2017.

Basting v. Metz Framing, Inc., File No. WC16-5971, Served and Filed January 5, 2017. The employee sustained an admitted work injury. His treatment was for various body parts. The employer and insurer initially paid for treatment, but ceased payment based on their independent medical examiner's opinion. The employee filed a medical request. Judge Cannon held that treatment for some body parts was related to the employee's work injuries and those injuries were temporary in nature, but he held that treatment for other body parts was not related to the work injuries. He also awarded payment to interveners whose treatment was related to his work injuries, but denied treatment after he found those injuries had resolved. He also denied payment of treatment not related to the work injuries. One intervener, Neurological Associates of St. Paul, filed a timely motion to intervene, and the employer and insurer objected on a timely basis. Judge Cannon denied Neurological Associates' interest in its entirety after it requested to appear at the hearing by phone, but failed to appear. The employee appealed. The employee argued that the compensation judge found incorrectly that some of his injuries were only temporary in nature and also incorrectly held that some treatment was unrelated to his work injuries. He also argued that the compensation judge incorrectly denied Neurological Associates' intervention interest, because the employee also requested reimbursement for those medical expenses, which was not affected by *Sumner*. The WCCA (Judges Hall, Milun and Stofferahn) affirmed, holding that once an entity intervenes, it becomes a party, and the employee's attorney may only present the intervener's claims if it is unequivocally established at the hearing that the attorney represents both the employee and the intervener. The WCCA also noted that the compensation judge overlooked one date of service for one intervener that was related to one of the employee's temporary injuries before it had resolved, and it modified the award to correct this oversight.

Leal v. Knife River Corporation, File No. WC16-5959, Served and Filed March 3, 2017. The employee sustained an admitted injury to his back and received various benefits before filing a claim petition seeking additional

temporary partial disability benefits, temporary total disability benefits, and payment of various intervention interests, rehabilitation services, and attorney's fees. Big Lake Spine and Sport (BLSS), Integrated Care Clinics (ICC), and Workmed Midwest intervened, and the employer and insurer objected to the motions. BLSS and ICC also filed notices to appear by phone at the hearing, but they did not notify the court of their intent to appear by telephone by the deadline, and on the date of the hearing only the Minnesota Department of Employment and Economic Development appeared by telephone. Compensation Judge Grove granted the employer and insurer's request to dismiss BLSS, ICC, and Workmed Midwest's intervention claims based on their failure to appear at the hearing. The employee argued he was also making a direct claim for payment of these intervention interests. Judge Grove awarded his direct claims for BLSS and Workmed Midwest, but denied reimbursement for the physical therapy at ICC because it was beyond the treatment parameters. The employer and insurer appealed the award granting the employee's direct claims for reimbursement for BLSS and Workmed Midwest and the employee cross-appealed the denial of reimbursement to ICC. The WCCA (Judges Hall, Milun and Stofferahn) held that BLSS, ICC, and Workmed Midwest were not entitled to reimbursement of their intervention interests because they failed to follow the procedure set out in the Office of Administrative Hearings' standing order and the employee's attorney did not also represent the interveners when he made a direct claim for their intervention interests. *See Xayamongkhon*; *Fischer*. It was not necessary for the WCCA to address the employee's cross claim regarding the denial of ICC's intervention claim and the employee's direct claim for reimbursement of ICC's intervention claim under the treatment parameters because of the foregoing reasons.

Jurisdiction

Ansello v. Wisconsin Cent., Ltd., File No. WC16-5949, Served and Filed February 10, 2017. The employee sustained a low back injury in 2006 while he was performing longshoreman work for the employer. Indemnity and medical benefits were paid by the employer and insurer under the federal Longshore and Harbor Workers' Compensation Act (as opposed to the Minnesota Workers' Compensation Act). The employee aggravated his back at work in 2014 and subsequently scheduled low back fusion surgery. He filed a Medical Request under the Minnesota Workers' Compensation Act to seek payment for medical treatment. Compensation Judge Arnold held that the Longshore Act provides a basis for fully compensating the employee for medical treatment, and the medical expenses claimed by the employee under the Minnesota Workers' Compensation Act would "supplant, rather than supplement," benefits available under the Longshore Act. Therefore, the compensation judge denied the employee's claim based on a lack of jurisdiction. The judge also invoked the doctrine of *forum non conveniens*, concluding that a Minnesota workers' compensation court is not a convenient venue to litigate his current medical claims, since benefits were previously submitted under the Longshore Act. The employee appealed. The WCCA (Judges Milun, Hall and Cervantes) reversed and remanded the compensation judge's decision. The WCCA cited case law from the United States Supreme Court and the Minnesota Supreme Court, finding that concurrent state coverage under the workers' compensation system is available for employees who receive benefits under the Longshore Act. It was noted that, to avoid double recovery, federal and state benefits must be credited against one another. Regarding the concept of *forum non conveniens*, the WCCA cited federal case law that establishes a strong presumption in favor of the plaintiff's choice of forum. It was determined that there is nothing inconvenient about the employee seeking benefits through the state system, given that he is a Minnesota resident, the injury occurred in Minnesota, and the employer's facility is located in Minnesota.

Medical Issues

Forrestal v. Miller Dwan Medical Center/Essentia Health, File No. WC15-5897, Served and Filed September 30, 2016. Following a June 2008 work injury, the employee sought a variety of medical treatments. Ultimately, after passive treatment was not successful, she was diagnosed with chronic pain and began treating primarily with a narcotic drug regimen. In May 2012, her workers' compensation claim was settled on a full, final, and complete basis. Indemnity benefits were closed out, but some medical expenses, including narcotic pain medications, were left open subject to defenses. The stipulation closed out completely treatment at pain clinic programs, psychiatric or psychological treatment, chemical dependency treatment, and chiropractic care. At the time the stipulation was signed, the employee was on a narcotic drug regimen, and it was anticipated that she would continue to receive narcotics for her chronic pain. The employee had signed two narcotics agreements with her treating

physicians, which included language that the narcotic prescriptions would cease if the contract was violated. Although the employee and her treating physician disagree about what exactly happened, ultimately, the employee was informed that she violated her narcotic agreement and that her treating physician would no longer prescribe her narcotic medication. After receiving this information, the employee continued to seek narcotic medication, making 11 subsequent visits to different medical providers in order to obtain narcotics. At all 11 appointments, the employee was denied the narcotics and offered alternative treatment, which she refused. She testified narcotics were the only treatment that helped her and that the alternative treatment was closed out in the prior settlement. The employer and insurer denied payment for these 11 appointments. Compensation Judge Arnold awarded payment for all 11 visits, finding they were reasonable and necessary medical treatment representing a reasonable effort by the employee to obtain medical treatment for the residuals of her injury. The WCCA (Judges Sundquist and Cervantes) affirmed in part. Judge Milun issued a separate opinion concurring in part and dissenting in part. The WCCA majority found that because the employee breached the opioid contract, attempted to get more narcotics, and declined other forms of treatment, the record failed to support the compensation judge's findings that all of the visits represented reasonable attempts to secure medical treatment. However, the WCCA majority found that three of the visits were reasonable and necessary. Specifically, at one of the visits in question the employee sought treatment for withdrawal symptoms. Because the treatment parameters specifically offer protocol for cessation of narcotics to prevent withdrawal symptoms, and because the employee actually received medical treatment at that visit, the emergency room visit was compensable. In addition, a second visit to Community Memorial Hospital, where she received an injection to relieve her pain, was awarded. Although this visit occurred in the pain clinic section of the hospital, it was not pain clinic treatment such that it was closed out by the stipulation. Finally, payment was awarded for the employee's visit to Essentia/St. Mary's Superior Clinic, as that visit involved a prescription for an ergonomic desk which was reasonable treatment. Compensation for all other visits where the employee asked for narcotics and denied any alternative treatment was denied. Judge Milun indicated she would have affirmed the compensation judge's opinion in its entirety, as the issue is whether the consultations in which the employee was seeking to reestablish treatment for her work-related injury were reasonable and necessary, not whether the long-term use of opioid medication was reasonable and necessary. Judge Milun agreed with the compensation judge's finding that the employee's attempt to reestablish care was reasonable and necessary and therefore compensable.

Leuthard v. Craig's Tree Service, File No. WC16-5926, Served and Filed October 6, 2016. The employee injured his right shoulder and upper back at work and underwent treatment for his injuries. He attended multiple medical consultations and obtained various treatments, such as surgery, injections, physical therapy, and other treatment, but the treatments did not alleviate his symptoms. For about five to six years, he did not seek any treatment, and then he returned for treatment for ongoing pain symptoms. The employee had initially treated with Dr. Andrews, who referred him to Dr. Elghor. Dr. Elghor wanted to refer him back to Dr. Andrews. The employer and insurer obtained an independent medical examination from Dr. Boyum, opining that the employee's scapular pain did not relate to his work injury. The employer and insurer denied the referral back to Dr. Andrews. The employee filed a medical request for the referral, which was denied, and then he requested a formal hearing. Compensation Judge Wolkoff held the referral was not reasonable and necessary medical treatment under Minn. Stat. §176.135. The WCCA (Judges Sundquist, Stofferahn and Hall) affirmed, first holding that the judge's indication that the employee previously "saw Dr. Collins" was a harmless error, as Dr. Collins did not treat patients with spine complaints and the compensation judge did not find that the employee had treated with Dr. Collins in making his decision. The WCCA also held that the compensation judge's decision was limited solely to the issue of whether to approve a referral to Dr. Andrews, so the employee's argument that the decision barred all future medical and rehabilitation treatment was rejected. Finally, the WCCA noted that the employee has the burden of showing medical treatment is reasonable and necessary, and there was substantial evidence to support the compensation judge's denial of a referral to Dr. Andrews.

Morgan v. Care Force Homes, Inc., File No. WC16-5957, Served and Filed November 14, 2016. The employee had a history of injuries and treatment related to her low back and neck due to a previous work injury and a previous motor vehicle accident. Then, on January 6, 2013, she sustained an admitted lumbar spine and SI joint injury

while working for the employer. She subsequently sought medical treatment and was ultimately diagnosed with complex regional pain syndrome by her treating physician, who recommended treatment including medial branch blocks, Botox injections, and PRP injections in the sacroiliac joint. The employer and insurer challenged the diagnosis and denied the recommended medical treatment, including the Botox injections, based on a treatment parameters defense. Compensation Judge Mesna found that the Botox injections were precluded by the treatment parameters, however, there was a justified departure from the treatment parameters due to the employee's documented medical complication. The WCCA (Judges Hall, Stofferahn and Sundquist) affirmed. Although Minn. R. 5221.6200, subp. 5C specifically states that Botox injections are not indicated for treatment of low back problems, Minn. R. 5221.6050, subp. 8 allows for departures from a type of treatment. Citing *Smith v. Country Manor Healthcare*, the WCCA found that a departure from the treatment parameters was warranted in this case because a "medical complication" is not limited to situations where the work injury caused a new, secondary medical condition, but includes situations where the effects of the work injury together with pre-existing conditions, result in more complicated symptoms, disability, and treatment.

Willy v. Northwest Airlines Corporation, File No. WC16-5956, Served and Filed December 14, 2016. The employee suffered various injuries to her left knee over the course of her employment and received extensive medical treatment. Her treating doctor, Dr. Hess, diagnosed her with complex regional pain syndrome in 2013, and the employer and insurer obtained an independent medical examination with Dr. Zeller, who opined that she did not have complex regional pain syndrome. Compensation Judge LeClair-Sommer held that the employee did not have complex regional pain syndrome based on the independent medical examiner's opinion. The WCCA (Judges Stofferahn, Milun and Cervantes) affirmed based on substantial evidence in the record. As a secondary argument, the employee argued that time limits placed on compensation judges in considering and determining disputes made the employee question whether the judge considered all of the evidence in the case, and in particular whether the judge was limited to only a review of the independent medical examiner's report. The WCCA found no basis for this criticism.

Note: This decision was summarily affirmed by the Minnesota Supreme Court on May 10, 2017.

Castro v. SuperAmerica, File No. WC16-5958, Served and Filed January 9, 2017. The employee sustained an admitted work injury that led to an L5-S1 discectomy and a subsequent revision surgery. After these surgeries, she continued to be prescribed opioid medication. When her medication ran out, she was seen in the emergency room, and the record noted that she had not complied with her pain management plan. Her surgeon was no longer willing to prescribe opioid medications. She later began treating at the MAPS clinic and was re-prescribed an opioid medication. Eventually, she underwent an independent medical examination with Dr. Zeller, who noted that her opioid medication regimen was inappropriate as it failed to motivate the employee to work on strengthening and use of proper mechanics. An opioid taper was recommended and the employer and insurer provided the employee with written notice of the opioid treatment parameters, Minn. Rule 5221.6110, subp. 10. The opioid prescription issue was heard at a hearing, and Compensation Judge Cannon found that the employee met all the requirements for continued prescription of opioid medication as set out in the treatment parameters. On appeal, the employer and insurer argued that the employee was not showing improvement in both pain and function, and thus, the continued prescription of opioids was not reasonable or necessary. The WCCA (Judges Milun, Hall and Cervantes) noted that Minn. Rule 5221.6110, subp. 8(B) requires the improvement be demonstrated in the first six months of long-term opioid treatment. After that, the employee need only maintain the benefits of the treatment to meet that portion of the treatment parameter. The WCCA found that the compensation judge correctly ruled that she met this requirement. The employer and insurer also argued that the compensation judge did not give adequate weight to Dr. Zeller's report, but the WCCA upheld the compensation judge's decision that the treating doctor's opinions as to the reasonableness and necessity of opioids were more persuasive. Finally, the compensation judge noted in his findings that the lifetime use of opioid medication is inadvisable, that a number of doctors had advised the employee to attempt to wean from the use of opioids, and the treating doctor should prepare a treatment plan or file a narrative report to address why weaning would not be appropriate. The employer and insurer argued that these findings contradicted the finding that the continued opioid prescription was reasonable and necessary. The WCCA

was not persuaded, accepting the employee's argument that these findings were dicta. Judge Cervantes concurred in part and dissented in part, specifically disagreeing that the weaning suggestion by the compensation judge was dicta. He agreed with the findings that a weaning plan should be considered.

Sirian v. City of St. Paul Public Works, File No. WC16-5997, Served and Filed February 27, 2017. The employee sustained admitted injuries on July 22, 1993, including burn wounds and an injury to his right hand, after a natural gas explosion at work. After he was released from the hospital, his spouse was instructed on how to treat his burn wounds. She helped him in and out of a body suit he wore for two years after the incident, monitored his body temperature, drove him to his appointments, and gave him paraffin baths and massage. The employee was able to return to work for fifteen years after the accident, but then became unable to tolerate work. The parties stipulated that he was permanently and totally disabled as of July 24, 2008, but went to a hearing on whether the employee's wife should be awarded reimbursement for home nursing services, which was awarded at an amount of $462.00 per month from July 24, 2008, to December 31, 2009, and $525.00 a week from January 1, 2010, to June 22, 2012. In July 2015, the employee filed a claim requesting a 10 percent increase in his spouse's home nursing care services. After an administrative conference at the Department of Labor and Industry, the employee requested a formal hearing. The parties stipulated that the employee's spouse was still providing home nursing services, but the dispute was whether she was entitled to an increase in the value of her home nursing services from and after June 22, 2012, and if so, the amount of that increase. The employee argued his spouse was entitled to an increase of 3.7 percent per year, and the self-insured employer argued it should only be a single cumulative change. Compensation Judge Hagen held the employee's spouse was entitled to a 3.7 percent increase, plus statutory interest, from June 22, 2012, through April 29, 2016, and "thereafter as may be warranted." The employer appealed. The WCCA (Judges Sundquist, Milun and Hall) affirmed the decision that the employee's spouse was entitled to a 3.7 percent increase per year, but vacated the portion of the decision that required an annual 3.7 percent adjustment every year after his order because this was a prospective award outside of the judge's jurisdiction.

Notice

Duehn v. Connell Car Care, Inc., File No. WC16-6000, Served and Filed March 20, 2017. The primary dispute in this matter was over whether the employer and insurer properly denied primary liability for an August 2013 date of injury and a November 2014 date of injury on the basis of a notice defense. The *Anderson* and *Isaacson* line of cases stand for the principle that, to receive benefits, the employee must show that he provided notice of the injury to the employer, or that the employer had actual knowledge of the injury, within the 180 day period prescribed by Minn. Stat. §176.141. In August 2013, the employee allegedly sustained a specific low back injury and sought medical treatment, but he did not report it to anyone at the employer until he completed a first report of injury around a year-and-a-half later in January 2015. The employee's supervisor testified at a hearing before the compensation judge that nobody at the employer was aware of any claimed work injury until this time. Compensation Judge Rykken found that notice for the August 2013 date of injury was not adequately provided within 180 days. On appeal, the WCCA (Judges Sundquist, Stofferahn and Hall) affirmed. The employee also alleged a specific November 2014 date of injury, when he felt a pop in his back. On that day, the employee specifically told his supervisor that he was doing too much work with tires that day. The supervisor was also aware of the employee's doctor's appointment two days later. The compensation judge found that adequate notice for the November 2014 date of injury was given because the statutory requirement of actual knowledge of the injury was met. The WCCA affirmed. The employer and insurer argued that the compensation judge erred in implicitly finding that the employee's November 2014 injury arose out of and in the course of employment because the employee failed to list this injury on the first report of injury and failed to mention it in a recorded statement. The WCCA upheld the compensation judge's finding as to causation, as the compensation judge could reasonably conclude from the medical evidence that a specific injury did occur.

Penalties

Fishback v. American Steel & Industrial Supply, File No. WC16-5943, Served and Filed February 3, 2017. For a description of this case, please refer to the Interest category.

Permanent Total Disability

Moyer v. Lifeworks Services, Inc., File No. WC16-5929, Served and Filed October 25, 2016. The employee appealed from Compensation Judge Grove's decision that she failed to prove that she had met the permanent partial disability threshold prerequisite for claiming permanent total disability benefits. Attempting to reach the threshold per the *Allan* case, wherein the Minnesota Supreme Court held that PPD from non-work-related conditions may be included in the PPD required to meet the threshold only if said PPD affect the employee's ability to work, the employee noted a long history of treatment for non-work-related conditions as contributing to her inability to work. The employee relied on a report from her chiropractor, who provided a 10 percent PPD rating for a non-work lumbar spine condition and a 10 percent PPD rating for a non-work cervical spine condition. The compensation judge did not find the chiropractor's opinion persuasive. The judge further noted that no work restrictions had ever been imposed on the employee for her non-work neck and back conditions prior to those imposed by the chiropractor in his report. The WCCA (Judges Hall, Milun and Cervantes) upheld the compensation judge's determination that there was not sufficient evidence to show that the non-work-related conditions affected the employee's ability to work. Further, the WCCA held that the judge's determination on the PPD threshold issue was not mooted by her determination on an alternative temporary partial disability claim.

Dekeyrel v. Metropolitan Mechanical Contractors, File No. WC16-5930, Served and Filed November 16, 2016. The employee worked as a union sheet metal worker and general foreman in a physically demanding job and sustained an admitted injury to his low back on September 8, 2011. He underwent extensive medical treatment, including an L4-5 fusion and L5-S1 artificial disc replacement surgery. His symptoms continued and his treating doctors took him off of work indefinitely, but never specifically opined that he was permanently and totally disabled. Eventually, his doctors recommended a second surgery to remove the failed synthetic disc and extend his fusion through L5-S1. He underwent the recommended surgery, but was not released to work as of the hearing and had not worked since the injury. The employee argued he was PTD, largely based on his QRC, Bill Potocnik's, testimony. Compensation Judge Hagen found a finding of PTD was premature because there was not a medical opinion finding him to be PTD and it was unknown whether he would improve after his second surgery. The compensation judge also ruled that the QRC's vocational opinion was premature because he had not contacted the employee's treating doctor to discuss possible work restrictions or his ability to return to work and the employee had not yet undergone a functional capacity evaluation to determine his restrictions. Finally, the compensation judge noted that there was some discussion between the QRC and the employer that if the employee underwent retraining, he could perform CAD tasks for the employer, so there was the possibility of a return to work. The WCCA (Judges Milun, Stofferahn and Cervantes) reversed, holding that the employee had a significant disability to his back, he continued to be disabled from sustained gainful employment, that the sole opinion offered at the hearing was the QRC's that the employee was permanently and totally disabled, and that his work injury was a substantial contributing factor for his claimed PTD benefits. No evidence was presented that the second surgery will significantly aid the employee in returning to work, or that a return to work in any capacity was contemplated in the foreseeable future. The employer and insurer did not submit any medical expert opinion relevant to the dispute. While *possible* future training might aid the employee in returning to work with the employer, mere speculation that an employee *might* find employment if he receives some unspecified training provides an inadequate basis for a charge to conclude that an employee is not PTD. Similarly, that some future FCE might possibly result in less restrictive work limitations is pure speculation at this point.

Psychological Injury

Romens v. Ballet of the Dolls, Inc., File No. WC16-5952, Served and Filed January 9, 2017. The employee worked as the managing director for the employer beginning in November 2008. The job required the employee to raise sufficient revenue for the theater during the recession. Due to financial issues management staff was cut, requiring the employee to perform additional job duties and perform multiple roles. The testimony was that the employee often worked from 9:00 a.m. until 2:00 or 3:00 a.m. Due to the stress of the job and the long hours, the employee suffered from chronic fatigue and lack of sleep. He reported six to eight months of feeling poorly. Then, in March 2011, the night before a major fundraiser, the employee had a seizure while cleaning the bathroom at work. He had additional seizures

on July 6, 2012, December 10, 2012, and March 15, 2013. Between December 10, 2012, and March 15, 2013, he continued working for the employer, but left the managing director position and began working reduced hours. Compensation Judge LeClair-Sommer found that the employee sustained a work-related injury on March 10, 2011, but did not sustain separate injuries on July 6, 2012, December 10, 2012, and March 15, 2013. The WCCA (Judges Sundquist, Milun and Cervantes) affirmed indicating that determining whether a stress-induced physical injury occurred involves evaluation of a two-step test. First, there must be sufficient factual evidence to support a finding of legal causation. Second, there must be sufficient medical evidence to support a conclusion that the mental stress was medically related to the seizure. The employer and insurer challenged the first step, arguing the employee's stress was no greater than the stress of similarly situated management employees at the employer. The WCCA disagreed, finding that the employee submitted evidence that showed his stress was beyond the ordinary day to day stress to which all employees were exposed. Due to the evidence of the employer's financial situation, lack of appropriate staffing levels, and the necessity for the employee to perform multiple roles and tasks on an ongoing basis, the WCCA found there was substantial evidence of an unusual and extraordinary level of stress for the employee at his job.

Note: This case was appealed by the employer and insurer to the Minnesota Supreme Court. By order dated April 14, 2017, the Supreme Court dismissed the appeal, as no brief had been filed on a timely basis.

Rehabilitation / Retraining

Grage v. ACME Electric Motor, Inc., File No. WC15-5898, Served and Filed September 2, 2016. For a description of this case, involving the issue of vocational rehabilitation for a surviving spouse, please refer to the Death category.

Bode v. 3M Company, File No. WC16-5910, Served and Filed December 9, 2016. In this case, the WCCA (Judges Cervantes, Hall and Sundquist) provided an overview of Minn. Stat. §176.102, subd. 4, which indicates that an employee has the right to choose a QRC once during the period beginning before the rehabilitation consultation and ending 60 days after the filing of the rehabilitation plan. If a request for a change in QRC after that point is disputed, a compensation judge may grant or deny the request based on "the best interest of the parties." Here, the employee presented evidence to Compensation Judge Kohl that, over a nine-month period, her QRC failed to ensure that her work duties were within her restrictions, shared sensitive information with the employer and insurer without first communicating with the employee, and made an effort to have restrictions removed at the request of the employer. The employee testified at the hearing that she did not trust the QRC and wanted a change of the in QRC. The compensation judge denied the request for a change in QRC, and the employee appealed. The WCCA reversed the decision of the compensation judge, holding that it was not unreasonable for the employee to lose faith in the QRC, especially given that the QRC engaged in prohibited conduct under the rules.

Fisher v. Jim Lupient Auto Mall, File No. WC16-5976, Served and Filed March 1, 2017. The employee was employed as an automobile repair technician from 1983 to 2013. On August 5, 2011, he sustained an admitted injury to his low back. Following the injury he was provided medium duty permanent restrictions and began working with a qualified rehabilitation consultant and with a job placement specialist. The employee underwent a job search for six months, at which time the QRC recommended exploration of retraining options. A Retraining Plan was developed, indicating the goal of obtaining a bachelor's degree in Operations Management at St. Thomas University. At the request of the employer, the employee also underwent an independent vocational evaluation with rehabilitation consultant Berdahl. Mr. Berdahl contacted four universities/colleges and completed a labor market survey before concluding that the employee never properly conducted a serious job search and that the retraining plan was not appropriate. Mr. Berdahl recommended a less costly two-year associates degree with possible transfer to a four-year degree or another less costly business degree program at a college such as Metropolitan State University. Compensation Judge Kohl found that the evidence failed to support the reasonableness of the proposed retraining plan to attend St. Thomas University as compared to continued job placement activities or less costly retraining options, the likelihood that the proposed plan would result in reasonably attainable employment, and the likelihood that the proposed plan would produce an economic status as close as possible to that which the employee would have earned without his disability. The WCCA (Judges Hall, Milun and Sundquist) reversed. In reviewing the record,

the WCCA found that the evidence showed that despite Mr. Berdahl's conclusion that the employee did not conduct a diligent job search, the evidence was that the employee spent 29 months conducting an extensive job search. The WCCA also found that the record supported the reasonableness of the retraining proposed by the employee as compared to the less costly retraining options, as the employer failed to demonstrate that suggested alternatives would be equally viable and effective in restoring the employee to suitable, gainful employment. The WCCA found that gainful employment was likely reasonably attainable upon completion of the operations management degree at St. Thomas with wages producing an economic status as close as possible to that the employee would have earned without the disability.

Settlement

Noga v. Minnesota Vikings Football Club, File No. WC16-5989, Served and Filed April 20, 2017. For a description of this case, please refer to the *Gillette* Injuries category.

Vacating Award

Hurley v. Dungarvin Minn., LLC, File No. WC16-5953, Served and Filed November 23, 2016. The employee sustained an admitted injury to her lumbar spine and was diagnosed with low back pain and left leg radiculopathy. She underwent treatment, which included an L3-5 anterior/posterior fusion surgery, physical therapy, and a spinal cord stimulator implantation surgery. The parties entered into a full, final, and complete settlement, except for future medical treatment. In the stipulation for settlement, the employee did not claim permanent total disability benefits, but she did claim that she might be able to return to work at reduced time with permanent restrictions, which would entitle her to future temporary partial disability benefits. In the stipulation the employer and insurer also indicated that if the employee did not return to work within her restrictions, or if she was not released to return to work, she would be entitled to PTD benefits, but asserted that the employee would eventually be released to work with restrictions and might find work at or near her pre-injury wages. The stipulation included a present day value of the employee's potential claim for PTD benefits. The employee continued to report back pain and treat for her symptoms after the stipulation, and her treatment included injections and a thoracic discography at T8-9. She also underwent hardware removal, and her treating doctor opined she was permanently disabled because of her chronic pain syndrome. The employee also treated for left sacroiliitis and left hip pain. She eventually filed a petition to vacate the award on stipulation based on a substantial change in medical condition. The WCCA (Judges Milun, Stofferahn and Cervantes) held that, "the basic concern in determining whether sufficient cause exists to set aside an award is to assure compensation proportionate to the degree and duration of disability." *See Krebsbach.* The WCCA granted the employee's petition to vacate because of the change in diagnosis for her thoracic spine, additional thoracic spine fusion, which might be rated for permanent partial disability benefits, her need for more extensive medical care than was previously anticipated, and the admitted causal relationship between her thoracic condition and her work injury. The WCCA concluded that under these circumstances, it is not certain that the employee had received compensation proportionate to the degree and duration of her disability under the prior stipulation for settlement. ✦

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