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Minnesota Workers' Compensation Update

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New Faces in the ACKSP Workers' Compensation Group

Jennifer S. Homer
Molly N. Tyroler

Jennifer Homer joined Arthur, Chapman, Kettering, Smetak & Pikala, P.A. as an associate and concentrates her practice in Workers' Compensation. Prior to joining the firm, she practiced in the areas of personal injury, Veterans law, criminal defense, social security, family law, and workers' compensation.

In addition to workers' compensation cases, Jennifer also serves the needs of veterans, assisting veterans seeking service-connected disability benefits.

Jennifer obtained her undergraduate degree in Business Administration at Hamline University, St. Paul, Minnesota and her Juris Doctorate from Hamline University School of Law, St. Paul, Minnesota.

In her free time, Jennifer enjoys practicing yoga, running, walking her Great Dane and attending professional sporting events.

Molly Tyroler practices exclusively in the area of Workers' Compensation. She represents employers, insurers, self-insured employers, and third-party administrators in the defense of workers' compensation claims in both Minnesota and Wisconsin.

Molly obtained her undergraduate degree in Business Administration from the University of Wisconsin-Green Bay and her Juris Doctorate from William Mitchell College of Law. During her time at William Mitchell, Molly also attended courses in Rome, Italy, studying Alternative Dispute Resolution, focusing on settling disputes through negotiation, mediation, and arbitration.

Avid Packer fans, Molly and her husband, Isaac, live in Woodbury and enjoy trying new restaurants, traveling and mentoring through William Mitchell.

About Our Attorneys

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

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Case Law Update

Decisions of the Minnesota Supreme Court

Jurisdiction

Giersdorf v. A&M Construction, Inc., 820 N.W.2d 16 (Minn. 2012). The Hartford provided insurance coverage to the employer in 2007 and 2008. Following an audit of the employer's financial records, Hartford increased the annual premium for the employer for the ensuing year and billed the employer for the entire premium, rather than collecting it in installments. The employer failed to pay the premium, and Hartford gave notice of its intent to cancel the policy. Hartford then cancelled the policy. Subsequent to the cancellation, the employee suffered a work-related injury. It was a construction-related injury, and the employee filed a claim against the employer and against the general contractor pursuant to Minn. Stat. §176.215. The employer submitted the claim to Hartford, but Hartford alleged that it had cancelled the policy due to the employer's nonpayment of premiums. The employer then filed a Petition for Declaration of Insurance Coverage in the workers' compensation court. Hartford moved to dismiss the Petition based on lack of subject matter jurisdiction in the workers' compensation court. It argued that the employer's petition raises a "breach of contract claim," as opposed to a "coverage dispute," and that the workers' compensation courts only have jurisdiction over the latter. The compensation judge denied Hartford's Motion to Dismiss, finding that it was a coverage issue, not a breach of contract issue. The WCCA affirmed. The Supreme Court (Justice Strass) affirmed. The WCCA has previously determined that it has jurisdiction to decide questions related to workers' compensation insurance coverage when such questions are ancillary to the adjudication of an employee's claim for compensation. *See Martin v. Morrison Trucking, Inc.*, 803 N.W.2d 365 (Minn. 2011). Further, under Minn. Stat. §176.215, the courts have the authority to determine the respective liabilities of the parties. Hartford argued that the employer's petition represents a classic breach of contract dispute, and that language was utilized in the petition. The courts, however, are not bound by the labels used in the pleading. It is necessary to determine the "real nature of the action" to determine whether subject matter jurisdiction exists. The real nature of the action in this case is an insurance coverage dispute, not a breach of contract action. The compensation judge can determine whether the employer's insurance coverage was in effect at the time of the work injury. Hartford is free to bring an action in District Court against the employer for the premium payment.

Medical Issue

Washek v. New Dimensions Home Health, Case No. A12-0395, (Minn. April 10, 2013). The employee sustained a spinal cord injury in 2002 and was rendered a paraplegic. The employer and insurer paid various workers' compensation benefits, including $58,000 to make the employee's home more accessible for her special needs. As a consequence of her disability, the employee suffered from multiple dermatologic issues, including skin ulcers and carpal tunnel syndrome. An accessibility specialist examined the employee's home and recommended a remote-controlled, ceiling-mounted lift system which would extend from her bedroom to the toilet and shower stall, eliminating the need to propel the shower chair over thresholds and avoiding the necessity of having to slide onto a toilet seat, which had caused skin ulcers. The employee filed a Medical Request seeking payment for installation of the lift system. The cost of the lift system was $15,000, including installation of the system, and all parties agreed that it was reasonable and necessary to cure and relieve the effects of the work injury, and further, was medical expense compensable under Minn. Stat. §176.135. The installer of the lift system informed the employee that installation would require the employee to make several modifications to her home to accommodate the lift system. The modifications included moving electrical wires, raising door headers, and installing various support brackets capable of sustaining the lift system. The cost of these modifications was approximately $14,000. The employer and insurer contended that the modifications constituted an alteration or remodeling of the home, and that liability for those modifications was governed by Minn. Stat. §176.137, subd. 1. At the time of the injury, liability for remodeling was limited to $60,000. Since the employer and insurer had already paid $58,000 to remodel the employee's home, they contended that their liability for the additional modification was no more than $2,000. The compensation judge had determined that the cost of the structural changes was a medical expense pursuant to Minn. Stat. §176.135, which includes no limits on expenditures. The WCCA reversed. It concluded that the structural changes required to install the lift system constituted remodeling of the residence, and therefore, were governed by the limitations in Minn. Stat. §176.137. The Supreme Court (Justice Paul Anderson) affirmed. The Court determined that the type of alterations required to permit installation of the lift system, under any definition, constituted "alteration or remodeling" of the residence. The employee argued that the "remodeling" was necessary in order to "furnish" the

reasonable and necessary treatment, i.e., the lift system. The Court rejected that argument. The cost of installation of the lift system is not in dispute -- it is the cost of the structural modifications to permit the lift system to be installed. The Court concluded that the cost of the structural modifications to the residence constituted remodeling, and therefore, were limited by Minn. Stat. §176.137.

Justice Page dissented. Minn. Stat. §176.135 requires the employer to "furnish" the apparatus to the employee, and the ceiling-mounted lift system has not been furnished until it is fully installed and operational. He agreed with the compensation judge's conclusion that the lift system was reasonable and necessary medical treatment, and that the costs of the system and everything needed to make it fully operational were medical expenses pursuant to Minn. Stat. §176.135.

Notice

Anderson, Karl v. Frontier Communications, 819 N.W.2d 143 (Minn. 2012). The employee worked for the employer from 1987 to 2007 in a physically demanding job. He admitted that by April 2007, he knew that his work activities were aggravating his low back. In May 2007, the employee had a surgical consultation, and he testified that he knew that his work activities were a cause of his low back problems. He advised his supervisor in June 2007 that he needed to take time off for surgery, but he did not tell anyone at work that his condition was related to his work. His last day was July 4, 2007. He then underwent several low back surgeries between July 2007 and February 2008, but he was never able to return to work. He received short-term and long-term disability benefits and ultimately qualified for Social Security disability benefits. In May 2009, the employee's attorney received a report from the physician concluding that the work activities had significantly aggravated the employee's back condition. The attorney then gave written notice to the employer that the employee was claiming his back injury was work-related. Pursuant to *Issacson v. Minnetonka, Inc.*, 411 N.W.2d 865 (Minn. 1987), "[t]he time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury of disease." The compensation judge determined that the employee had sustained a *Gillette*-type injury to his low back on the last date of employment. The judge further found that the employee knew by that time that his work activities aggravated or caused the low back problem, but that he did not give the employer timely notice of the injury. The judge also determined that the employer did not have "inquiry notice" of the injury as of the last date of employment. The judge denied the employee's claims. The WCCA reversed, noting that evidence from the employee's family doctor in March 2007 attributed the back problems to degenerative changes. It concluded that a reasonable person would not have known he had a compensable injury until the doctors provided reports establishing such to the employee's attorney.

The Supreme Court (Justice G. Barry Anderson) reversed in a 4-3 decision. The date on which an employee has sufficient knowledge to trigger the duty to give notice of injury is a question of fact. The Court concluded that there was substantial evidence supporting the compensation judge's finding that the employee knew no later than July 2007 that he had a compensable work injury. A medical report establishing a *Gillette* injury is not required before notice must be given. Under the standard from *Issacson*, "the information available to" the employee, whether or not documented in the contemporaneous medical records, was that the wear and tear on his discs was the result of his work activities. The notice in May 2009 was not timely. The Court further held that the employer did not have actual or inquiry knowledge of the employee's injury. "It is not simply enough that the employer is aware that an employee has shoulder pain" – to constitute actual knowledge, "an employer must have some information connecting work activity with an injury." *See Issacson.* The Court rejected the employee's argument that the employer, knowing the demands of the job, had sufficient information in May 2007, when the employee told his supervisor that he needed to take time off for back surgery, to inquire whether the job was a substantial contributing factor in the injury. That date was before the date of the established injury on July 4, 2007.

Justices Paul Anderson, Page and Meyer dissented. Justice Anderson wrote a long dissent in which he felt that the employee must be judged as his own person, rather than as a "reasonable person." He found that the employee was a "stoic" and "long-suffering" person, devoid of an entitlement to benefits, although not citing to any particular evidence for that conclusion. He also felt that it was important that no doctor specifically indicated that the work activities were a significant factor in the low back problems until April 2009. He urged the Court to apply a balancing test that specifically includes the lack of early medical evidence as an important, if not critical, factor to consider when determining whether notice of a *Gillette*-type injury is timely. Justice Anderson went on to quote from Sinclair Lewis and Garrison Keillor, as well as draw from his own personal experiences as a Minnesota farm boy, in determining that the employee's outlook on life led to his unwillingness or inability to attribute his low back injury to his work for the employer. The employee should not be precluded from pursuing his claim. ✦

Decisions of the Minnesota Court of Appeals

176.82 Actions

Schmitz v. United States Steel Corporation, Case No. A12-0709, (Minn. Ct. App. May 13, 2013). The employee allegedly sustained an injury at work on October 23, 2006. He alleged that he reported the injury on the day it occurred to his direct supervisor, Mr. Bakk. No accident report was filed. The following morning, the employee called Mr. Bakk to tell him that his back hurt, but due to noise at the employer, Mr. Bakk advised that he would call the employee back later. Later that day, Mr. Bakk and his supervisor, Mr. Sutherland, called the employee at home. The employee indicated that Mr. Sutherland informed him that the employer would take a "very dim view" of the employee if he were to file an accident report. The employee asked Mr. Sutherland whether they would fire him, and the employee indicated that Mr. Sutherland responded, "without having to perjure [myself], yes." The employee testified that this conversation led him to believe that he would be fired if he filed an accident report. On that same date, the employee saw his doctor, reporting that he had been having low back pain since moving a heavy object at work, but noting that he adamantly refused to put this under workers' compensation because of other issues that had been going on at the employer. The employee never filed an accident report concerning his alleged work injury. He was able to return to work without restrictions, although it was noted that the employer provided him with accommodations. The employee subsequently injured his back at home in December 2006 and was unable to return to work. In April 2007, he filed a workers' compensation claim, asserting that his inability to work resulted from the October 2006 work injury. The employer denied liability asserting, among other reasons, a failure to provide notice of the injury. The employee underwent back surgery and was authorized to return to light-duty work in October 2007. The employer did not provide him with a position.

The employee brought a number of claims pursuant to Minn. Stat. §176.82. The case had a complicated procedural posture, with the end result being that the district court, following a bench trial, entered a judgment for the employee on his threat-to-discharge claim, awarding $15,000 in emotional-distress damages and reasonable attorney fees and costs. The court rejected the employee's retaliatory-discharge and refusal-to-offer-continued-employment claims. The employer appealed the judgment on the threat-to-discharge claim. The Minnesota Court of Appeals (Judges Hudson, Stoneburner and Kirk) affirmed in part and reversed in part. The court held that the statute proscribes three forms of conduct: discharging an employee for seeking workers' compensation benefits; threatening to discharge an employee for seeking benefits; and intentionally obstructing an employee seeking benefits. Although there is no prior case law on the issue, the court determined that the statute is unambiguous and provides a cause of action for threatening to discharge an employee for seeking workers' compensation benefits, which is a separate action from retaliatory discharge and intentional obstruction of benefits. In order to seek such a claim, the employee must show that: (1) a person with knowledge that the plaintiff suffered a workplace injury; (2) attempted to dissuade the plaintiff from seeking workers' compensation benefits through one or more communications; (3) the communication created a reasonable apprehension of discharge; and (4) as a result, the plaintiff delayed or ceased seeking workers' compensation benefits. The court further determined that the employer's actions do not need to be "cruel or venal," as is required in an intentional-obstruction-of-benefit claim. *See Bergeson.* The court further determined that the employer was vicariously liable for the actions of the supervisor. The supervisor's tortious act of threatening to discharge an employee for seeking workers' compensation benefits was within the scope of his employment and is imputed to the employer. The court determined that all four elements of the test for a threat-to-discharge claim were met in this case. It affirmed the judgment for the plaintiff on that cause of action.

The employee appealed the denial of his request for a jury trial. The court determined that the employee's claim alleging retaliatory discharge in violation of the statute, seeking monetary damages, is an action at law guaranteeing the right to a jury trial. Conversely, an action based on the alleged refusal to offer continued employment is equitable in nature, and therefore, is not the type of action entitling the party to a jury trial. The matter was remanded to the district court for a jury trial on the issue of the retaliatory discharge claim. ✦

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Decisions of the Minnesota Workers' Compensation Court of Appeals

Adjustments/Minn. Stat. §176.645

Olson, Kevin v. Dart Distributing, Inc., File No. WC12-5516, Served and Filed April 4, 2013. The employee sustained an injury in April 1996 and was subsequently stipulated to be permanently and totally disabled. The employee later asserted that because the minimum Statewide Average Weekly Wage is increased each year, his permanent total disability rate should increase each year at the same rate as the minimum SAWW. The employer and insurer argued that the employee's initial PTD rate is established at the date of injury as 65 percent of the minimum SAWW but is increased thereafter only by operation of Minn. Stat. §176.645. Compensation Judge Ertl, relying on *Vezina v. Best Western Inn Maplewood*, 627 N.W.2d 324, 61 W.C.D. 255 (Minn. 2001), determined that Minn. Stat. §176.101, subd. 4 provided for compensation at 66-2/3 percent of the daily wage at the time of the injury, subject to a maximum and a minimum. The WCCA (Judges Hall, Stofferahn and Wilson) affirmed, finding that any adjustments to the employee's compensation rate should be made pursuant to Minn. Stat. §176.645 and not under the employee's proposed reading of Minn. Stat. §176.101, subd. 4.

Arising Out Of

Eide v. Award Construction Company, Inc., File No. WC12-5435, Served & Filed October 16, 2012. The employee worked as a carpenter, traveling between Target stores and doing construction projects. On March 27, 2009, he and a co-worker completed a project in Yuba City, CA. The following morning they traveled to Eureka, CA, for another project. They had dinner and watched a hockey game, and the employee went to his hotel room. On March 29, 2009, the employee was found dead in his hotel room as the result of a heart attack. The cause of death was listed as acute coronary thrombosis of the right coronary artery. The employee's spouse commenced a dependency claim. A forensic pathologist opined that the employee's work activity was not a substantial contributing cause of the employee's death, and that the employee had a number of risk factors for heart disease, including cigarette smoking, elevated cholesterol, obesity, and family history. The petitioner admitted that there was no medical evidence indicating that the work activity was a substantial contributing factor to his heart attack. However, the petitioner argued that the employee was a traveling employee and was under continuous workers' compensation coverage while traveling. Compensation Judge Hagen determined that the employee's death did not arise out of the employment. The WCCA (Judges Milun, Johnson and Hall) affirmed. The petitioner has the burden of proof that an injury arose out of and in the course of employment. These two requirements are elements of a single test of work-connection. *See Bohlin v. St. Louis County/Nopeming Nursing Home*, 61 W.C.D. 69 (WCCA 2000). The general rule is that traveling employees are under continuous workers' compensation coverage while engaged in reasonable activities from the time they leave home until they return. *See Voight v. Rettinger Transportation, Inc.*, 306 N.W.2d 133 (Minn. 1981). In this case, the employee was a traveling employee, and the heart attack occurred "in the course of" his employment since he was considered on the employer's premises as a traveling employee from the time he left home until he returned. The petitioner seeks to expand coverage for traveling employees for all injuries or conditions which occur while they are traveling, regardless of the cause of the injury or condition. We decline to do so. A traveling employee is covered for risks inherent in reasonable activities outside of regular employment activities, but for an injury to arise out of employment, there must be a causal connection between the employment and the injury. This requires a showing of an increased risk or hazard with its origin or source in the employment and beyond the exposure of the general public. In this case, there was no increased risk which caused or contributed to the heart attack. There is no evidence that the heart attack was causally related to the work activity or any other reasonable activities while he was not working during the trip. It was from natural causes as a result of risks personal to the employee.

Cummings v. Kelly Services, File No. WC12-5447, Served and Filed October 17, 2012. The employee worked for a temporary employment agency which had placed her in a clerical position at a business in downtown St. Paul. On the date of injury, the employee was leaving work and exited the employer's building. She had parked in a public parking ramp nearby. She walked on to a public plaza, owned and maintained by the City of St. Paul as a city park. She then began going down the steps to the public sidewalk. On the third step, she fell, fracturing her right ankle. She testified that she did not know why she fell. Compensation Judge Behr determined that the employee was on the employer's premises when she fell, but that she had failed to establish that she was at a risk of injury greater than the general public. He concluded that the injury did not arise out of the employment. The WCCA (Judges Stofferahn, Wilson and Milun) affirmed. An employer has an obligation to provide safe ingress and egress to and from its premises for its employees. The ingress and egress to and from the premises must create a special hazard to employees not encountered by the general public in order for there to be compensability. *See Satack v. State Department of Public*

Safety, 275 N.W. 2d 556 (Minn. 1978). We do not disagree with the employee's contention that traversing the steps at the plaza represented an increased risk of injury over simply being able to walk on a flat surface. The question, however, is whether the employee was at a greater risk in using the steps than would have been true for a member of the general public. The compensation judge had determined that the employee failed to demonstrate that her route across the plaza from the building to the public sidewalk exposed her to an external hazard or an increased risk of injury in comparison to the risk posed to members of the general public. While the employee argues that her use of the plaza was the only way for her to leave work, even if that were so, there is no showing as to how her use of that public space subjected her to a greater risk than the general public. This case was summarily affirmed by the Minnesota Supreme Court June 12, 2013.

Milbrat v. The MarketPlace, Inc., File No. WC12-5448, Served and Filed October 22, 2012. The employee sustained a thoracic and lumbar spine injury in 2008. She sought physical therapy treatment for her low back and mid back pain and was prescribed medication. In May 2009, the employee was referred to a specific physician for ongoing pain management. Her doctor treated the employee's thoracic and lumbar symptoms, as well as a non-work related injury to her knee. The employee filled her prescriptions at the Target store in Monticello because she did her other shopping there. In January 2011, the employee drove from her home to the physician's office, where she received an injection for her knee from a physician assistant and also had the physician examine her back and renew her prescriptions. When leaving the clinic, the employee was involved in an automobile accident and sustained injuries. The employee claimed that her need for treatment after her motor vehicle accident was a compensable consequence of her September 2008 injury as she was on her way to Target to fill her prescriptions. The employee framed the issue as whether the treatment expenses incurred following the January 2011 accident were causally related to the work injury of September 14, 2008, or a direct result of a consequential injury sustained as a result of the motor vehicle accident in January 2011. The employee contended that the 2011 automobile accident had caused injuries to her cervical spine, as well as aggravations of her thoracic and lumbar conditions. The employer and insurer disputed the employee's claim as to the circumstances of her motor vehicle accident and maintained that, in any event, the employee's post-accident need for treatment was not a compensable consequence of the 2008 work injury. Compensation Judge Behr concluded that the employee was traveling from her doctor's office to fill her prescriptions when the accident occurred and that the prescriptions in question were reasonable, necessary, and causally related to the 2008 work injury. The WCCA (Judges Wilson, Hall and Johnson) affirmed and held that the medications prescribed by the employee's physician were intended, at least in part, to treat the employee's 2008 admitted lumbar injury. The employer and insurer contended there was no evidence that the trip to the Monticello Target was necessitated by the work injury. The WCCA affirmed the compensation judge's finding and determined that the record as a whole adequately supported the compensation judge's conclusion that the employee's motor vehicle accident occurred as the employee was traveling from her doctor's office to her usual pharmacy to obtain medications prescribed to treat the effects of the 2008 work injury. The employee sustained injuries while traveling to obtain medication, which was a compensable consequence of her 2008 work injury. The employer has an obligation to provide medical treatment and the employee has an obligation to receive such treatment and thereby avoid further medical complications.

Dykhoff v. Xcel Energy, File No. WC12-5436, Served and Filed November 30, 2012. At issue in this case was whether a left knee injury sustained by the employee on June 20, 2011, could be viewed as "arising out of" her employment with the employer. The employee had arrived early to the company's Minneapolis headquarters to take part in a computer training session. She did not ordinarily work out of the headquarters and, therefore, dressed differently from the way she dressed in her usual job. On this day, she wore two-inch wooden heels. She arrived early and when walking down a hallway to the meeting room, fell and injured her left knee. Compensation Judge Brenden concluded that the employee did not sustain an injury that "arose out of" her employment. Specifically, she found that there was no "increased risk" presented to the employee that gave rise to the injury. The WCCA (Judges Hall, Milun and Stofferahn) reversed. Although the WCCA concluded that the "increased risk" test is the "primary test" applied in Minnesota to analyze the arising out of element, it concluded that the "increased risk" test may only be the starting point of the analysis for the arising out of element. It stated that even if an employee cannot establish compensability under the increased risk test, compensation may be analyzed under a different test or theory. The WCCA referred to the analysis put forth in *Bohlin v. St. Louis County/Nopeming Nursing Home*, 61 W.C.D. 69 (WCCA 2000). In that case, the WCCA used a "balancing test" which takes into consideration both the "arising out of" and the "in the course of" elements to determine whether, on the facts of each case, there is a sufficient "work connection." The WCCA indicated that a compensation judge "must give appropriate consideration to the 'work connection' of each injury and the judge must consider the balance between the arising out of and the in the course of elements." In this case, the WCCA indicated that although the "arising out of" element may have been weak, the "in the course of" element was strong. The WCCA stated that, "it is insufficient, as a matter of law, to award or deny benefits based solely on application of the increased risk test, as the compensation judge did here." When applying the work connection test to the facts of the present case, the WCCA concluded that the "in the course of" element was very strong. The WCCA also concluded that the floor on which the employee fell was

a "contributing factor" in her injury, although the judge had found that the floor was not slippery and was clean, flat and dry. Since the compensation judge applied only the increased risk test to deny benefits and did not apply the "work connection" balancing test, the decision of the compensation judge was reversed. This case is on appeal to the Supreme Court.

Gilbert v. ISD 615, File No. WC12-5481, Served and Filed January 23, 2013. The employee worked as a custodian. He worked until 4:30 p.m. most days. Contractors sometimes asked custodians to work later to allow the contractor to finish a project. A supervisor had to approve a custodian working past scheduled hours because it would result in overtime. On the date of injury, the employee did not leave the building at 4:30. There was no reason established as to why he did not leave. He did not seek permission to work past 4:30. There was no evidence any contractors worked past that time. Security footage of the building showed the employee intermittently between 3:31 and 7:56 p.m. He was seen walking in the hallway a few times. He stood motionless for almost ten minutes on one occasion. He sat for thirty minutes at a desk on another occasion. He was last seen entering a classroom where he had just moved a desk. At approximately 3:30 a.m., the employee was discovered in the classroom he was last seen entering. He was lying face down and had died some time earlier. His prior medical history was significant for diabetes, hypertension, elevated cholesterol, and obesity. He also had a pituitary gland disorder and required hormone replacement therapy. The autopsy revealed no anatomic cause of death as a primary finding. Hypertension was noted as a contributing condition. The employer and insurer's medical expert testified the employee's unusual actions were consistent with a metabolic disturbance resulting from the pituitary gland condition, which could have led to cardiac arrhythmia, causing the death. The employee's wife's expert concluded the death should be described as unclassified. Compensation Judge Brenden determined the employee's death did not arise out of and in the course of employment. The WCCA (Judges Stofferahn, Hall and Milun) affirmed. To be compensable, a personal injury or death must arise out of and in the course of employment. Minn. Stat. §176.021, subd. 1. An employee is not in the course of employment if the employee's activities at the time of injury are not reasonably incidental to employment. Here, the employee's death occurred at least three and a half hours after he was supposed to be done working. There is no reason for him to have still been on the employer's premises. Video did not reflect he performed any work activity during that period of time. A presumption of compensability in the case of an unexplained death would not be appropriate in this situation. There was substantial evidence to support the determination that the employee was not in the course of his employment at the time of his death. Therefore, the WCCA did not address the proposition that such a general presumption should exist.

Kanable v. Service Master of Rochester, File No. WC12-5466, Served and Filed January 31, 2013. The employee worked at an administrative job at her employer's office. The office was located on a frontage road along Highway 52 in Rochester. A semi tractor-trailer carrying a load of asphalt went out of control and left Highway 52 approximately 1/8 of a mile north of the employer's office. The tractor-trailer went across a grassy area, crossed over both the frontage road and another road, and crashed through the employer's office. The path between the highway and building sloped slightly toward the office. There were no guard rails, culverts, landscape features, or barriers along the tractor-trailer's out-of-control route. The truck had been traveling at 55 to 60 miles per hour at the time it left the highway, and it was still traveling between 50 and 60 miles per hour at the time it struck the office building. The employee was struck and trapped under debris from the partial collapse of the office building. Compensation Judge Schultz held the injuries arose out of the employee's employment. The WCCA (Judges Milun, Hall and Stofferahn) affirmed. Whether an injury arises out of employment is a question of fact for the compensation judge. However, there was no factual dispute over the manner in which this incident occurred. The increased risk test was applied, and all parties agreed this was the appropriate standard. The source of an injury may be extrinsic to the employment. The cause of the injury may be unexpected or unusual, so long as it is sufficiently shown that "one in the employment is more likely to be injured from such a source than those who are not." *See Auman v. Breckenridge Telephone Co.*, 246 N.W. 889 (Minn. 1933). The risk of the occurrence itself is not a consideration in the increased risk causation analysis. Rather, it is whether the risk, however small, was made substantially greater because of some incident of the employment. Compensation in increased risk cases is typically denied in the absence of specific evidence to support the finding that an otherwise "neutral" risk was increased by some incident of employment. Where there was evidence that the finder of fact could reasonably find that some incident of the employee's job had increased the risk of such injury, the injury arises out of the employment. This employee's office was located in proximity to the highway, there was an absence of natural or artificial barriers between the highway and the office, and the truck was required to travel a relatively short distance to strike the building. Further, the location of the employer's facility was at the bottom of the embankment and at a shallow angle. The risk of being struck by an out-of-control tractor-trailer traveling at highway speeds diminishes the further one gets from the highway, or the more perpendicular one is located to the direction of the traffic. The risk was not shared equally by all in the neighborhood of the employer's premises, and therefore, there was substantial evidence to support an award of benefits.

Kainz v. Arrowhead Senior Living Community, File No. WC12-5511, Served and Filed April 1, 2013. The employee twisted her ankle while descending

a flight of stairs while working as a nurse for a senior living community. She described the stairs as "kind of steep." The employer and insurer denied primary liability alleging that the injury did not arise out of and in the course of her employment. Compensation Judge Arnold, applying the "increased risk" test, held that the ankle injury arose out of and in the course of employment. The WCCA (Judges Milun, Wilson and Hall) affirmed, but on different grounds. The WCCA held that "the 'increased risk' test is not the only test used in Minnesota to analyze the arising out of element." The WCCA relied heavily on *Dykhoff v. Xcel Energy*, File No. WC12-5436, Served and Filed Nov. 30, 2012, where the WCCA previously held that "the 'arising out of' and 'in the course of' requirements are elements of a single test of a work-connection." The WCCA concluded that since the employee's injury was unexplained and the "in the course of" element was sufficiently strong, the compensation judge appropriately held that the ankle injury arose out of and in the course of employment. *See also Bohlin.*

Attorney Fees

Frederick v. Scott Dean Winter, File No. WC12-5381, Served and Filed June 29, 2012. The employee sustained an injury on August 13, 2007. Primary liability was admitted and benefits were paid. Subsequently, the matter went into dispute over a medical issue. That issue was settled and the employee's attorney received $1,200.00 in *Roraff* fees. Additional litigation then ensued for a claim for temporary partial disability benefits. Prior to the Hearing in that matter, the employee sought to consolidate a Medical Request for psychological treatment. The employer and insurer objected to the consolidation. A Compensation Judge subsequently awarded TPD benefits, with the instruction that attorney's fees be withheld and paid to the employee's attorney from the stream of TPD benefits. The employee then filed a claim for psychological treatment. That matter went to Hearing, and it was determined that the work injury was a substantial contributing factor in the psychological condition, and the treatment was awarded. The employee's attorney then filed a claim for *Roraff* fees relating to the psychological dispute. Compensation Judge Ertl denied the claim as being premature, noting that the employee was receiving ongoing contingent fees from the TPD benefits. The WCCA (Judges Milun, Stofferahn and Hall) reversed. In *Smith v. City of Sauk Centre*, 578 N.W. 2d 755 (Minn. 1998), the Supreme Court determined that in proceedings where a medical benefits dispute is resolved simultaneously with a dispute over monetary benefits, *Roraff* fees are not allowable unless the disallowance would result in inadequate compensation to the attorney. In this case, the medical dispute was not resolved simultaneously with the wage loss claim. They were separate claims that were not consolidated as the result of the objections of the employer and insurer. Minn. Stat. §176.081, Subd. 1 (a)(1), states that the contingent attorney fee for recovery of monetary benefits is presumed to be adequate to cover recovery of medical and rehabilitation benefits or services concurrently in dispute. In this case, there were no wage loss benefits *concurrently* in dispute at the time of the hearing on the psychological medical treatment. The WCCA noted that the ordinary meaning of "concurrently in dispute," requires concurrent proceedings, not separate proceedings litigated and decided before the adjudication of the medical dispute. The employee's attorney is entitled to *Roraff* fees in addition to the concurrent payment of contingency fees. The matter was remanded to the judge to determine the appropriate amount of *Roraff* fees.

Yennie v. Benchmark Electronics, Inc., File No. WC11-5353, Served and Filed August 16, 2012. Following an alleged injury, the employer and insurer accepted liability and paid benefits and expenses. Following an IME, the employer and insurer retroactively denied primary liability. The employee filed a Claim Petition seeking various benefits, reimbursement of medical mileage, and advising of a potential intervener, Blue Cross and Blue Shield of Texas, which may have paid certain medical expenses on behalf of the employee. Compensation Judge Schultz determined that there was a work injury, awarded various workers' compensation benefits, and noted that it was premature to order reimbursement to the medical intervener, as no documentation of services was included with its Motion to Intervene. The judge noted that the medical intervention claim was provisionally granted, provided that Blue Cross submitted the required documentation. Several months later, the employee's attorney filed a request for *Roraff* attorney's fees. Judge Schultz noted that no supporting documentation had been submitted by Blue Cross, but nevertheless, awarded *Roraff* attorney's fees. The WCCA (Judges Milun, Johnson and Wilson) reversed. The compensation judge was unable to identify the medical benefits recovered in this case, and the WCCA is unable to do so either. Where there is no evidence as to the medical benefits recovered for the employee, there is no basis for the judge to conclude that a contingent fee is inadequate to compensate the employee for representing the employee at the hearing, and therefore, *Roraff* and *Irwin* cases are inapplicable. The employee has failed to establish entitlement to *Roraff* fees in this case, since the record does not indicate that medical benefits were recovered for the employee.

Wolters v. Curry Sanitation, Inc., File No. WC12-5425, Served and Filed September 11, 2012. The employee sustained an injury in July 1987. In 2011, he prevailed on a medical request seeking fusion surgery, and his attorney filed a statement of attorney fees for fees listing a total of 47.3 hours spent on the surgery claim and an hourly fee of $375.00 ($17,737.50). The statement did not include an itemization of the attorney's time expended. At the hearing, the employee's attorney amended his claim for fees to $28,371.70 based on the 25/20 formula applied against the costs of the surgery and attempted to

introduce an itemization of the time spent on the claim as an exhibit. The employer and insurer objected to the introduction of the itemization as an exhibit because they did not have a chance to examine it before the hearing. Compensation Judge Behounek offered to continue the hearing to allow the employer and insurer time to review the documents and address all arguments in one proceeding. The parties then went off the record, and when they returned on the record, the compensation judge sustained the objection and did not admit the itemization as an exhibit. The compensation judge also denied the employee's claim for attorney's fees based on the 25/20 formula. The WCCA (Judges Milun, Wilson and Stofferahn) affirmed. The WCCA rejected the employee's argument that the compensation judge erred in excluding the list of hours spent handling the employee's surgery claim. The WCCA reasoned that the compensation judge was not bound by common law or statutory rules of evidence and "has wide discretion in evidentiary rulings." The WCCA also affirmed the denial of the claim for attorney fees since any fee awarded that exceeds the statutory formula required application of the Irwin factors or the factors in Minn. Stat. §176.081, Subd. 5(d), and without consideration of the itemized hours, those factors could not be applied.

Lann v. Stan Koch & Sons Trucking, Inc., File No. WC12-5524, Served and Filed March 6, 2013. The employer and insurer resolved a dispute on a Medical Request seeking an MRI. The employee's attorney filed a statement of attorney fees requesting fees of $543.75 based on the time spent handling the dispute. The employee's attorney also requested reimbursement to the employee of $163.13, pursuant to Minn. Stat. §176.081, subd. 7. The employer and insurer did not dispute the $543.75 attorney fee, but argued that the appropriate fee under Minn. Stat. §176.081, subd. 7 was $88.13, because the $250 reduction allowed under that statute applied to every award of fees. The statute provides in part that "in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.00." Compensation Judge Dallner agreed with the employer and insurer and held that the employee was entitled to subd. 7 fees totaling $88.13. The WCCA (Judges Stofferahn, Wilson and Milun) reversed. The issue on appeal was whether the $250 deduction in the statute is applied every time there is an award of attorney fees in a single injury or only at the time of the first award. The WCCA analyzed the statutory history and legislative intent of Minn. Stat. §176.081, subd. 7, citing Minn. Stat. §176.081, subd. 1(b), which contains language "requiring a focus on the injury and not on the claim in considering the award under Subdivision 7." The WCCA determined that "applying the deduction again would be contrary to the cumulative nature of fees for a single injury." Judge Wilson issued a dissenting opinion, reasoning that workers' compensation cases involve multiple claims for separate benefits and corresponding claims for fees, and there was nothing in the statute to support applying the $250 only once.

Average Weekly Wage

Van Kirk v. Kraft American, File No. WC12-5484, Served and Filed December 27, 2012. The employee sustained an admitted injury which resulted in death, and the employer and insurer commenced payment of dependency benefits based upon an average weekly wage of $693.54. The petitioner (employee's dependent) filed a claim for underpayment of dependency benefits alleging a higher average weekly wage. The employer and insurer denied liability for additional benefits based upon the wage and also filed a Petition to Discontinue, alleging an overpayment based upon an erroneous adjustment of benefits. At the hearing, the petitioner withdrew the claim for underpayment of dependency benefits. The matter went to hearing on the amount of the average weekly wage. The employer and insurer introduced the 26-week wage statement as evidence of the employee's average weekly wage. The wage documents themselves had been destroyed. The petitioner alleged that the employee's average weekly wage should be based upon the Social Security records rather than the 26-week wage statement, as she thought that was a more accurate reflection of the employee's earning capacity and more representative of his actual earnings. Compensation Judge Vallant determined that the 26-week wage statement constituted reliable hearsay evidence and relied upon that evidence when finding the employee's average weekly wage to be $693.54. The WCCA (Judges Johnson, Stofferahn and Milun) affirmed. In so doing, it cited Minn. Stat. §176.411, subd. 1, which provides that "the compensation judge is bound neither by the common law or statutory rules of evidence, nor by technical or formal rules of pleading or procedure. Hearsay evidence which is reliable is admissible." It also noted that the compensation judge has broad discretion regarding admissibility of evidence. The WCCA went on to say that the compensation judge noted in his memorandum that the 26-week wage statement introduced at the hearing was the type of wage statement commonly prepared by employers and insurers at the time to show the injured employee's weekly wage. Accordingly, he found the wage statement to be reliable hearsay evidence. The WCCA concluded that the admission of this document was not prejudicial or erroneous and the compensation judge could properly consider it.

Burden of Proof

Bankston v. Second Harvest Heartland, File No. WC12-5395, Served and Filed July 26, 2012. For a summary of this case, please refer to the Maximum Medical Improvement category.

Causal Connection

McCarney v. Malt-O-Meal Company, File No. WC12-5497, Served and Filed March 5, 2013. Compensation Judge Wolkhoff found that the employee's symptoms, which developed on June 20, 2011, were the result of his underlying and ongoing back problem. In the process, the judge relied heavily on the opinion of the independent medical examiner, Dr. Jeffrey Dick. The WCCA (Judges Wilson,

Milun and Stofferahn) reversed and remanded. The WCCA cited *Vanda v. Minn. Mining and Mfg. Co.*, 300 Minn. 515, 218 N.W.2d 458, 27 W.C.D. 379 (1979). That case stands for the proposition that, if an employee's work activities substantially aggravate or accelerate a pre-existing condition, the resulting disability is compensable. The WCCA felt that the opinion of Dr. Dick could "easily be interpreted as contrary to this established precedent." Therefore, if the compensation judge relied on an erroneous view by Dr. Dick as to what constitutes a compensable injury, the judge erred. The WCCA remanded the matter to the compensation judge for reconsideration and further findings on the issue of whether the employee sustained an injury on June 20, 2011.

Employment Relationship

Price v. Fox, File No. WC12-5392, Served and Filed October 15, 2012. The uninsured employer appealed from Compensation Judge Olson's determination that the employee's injury arose out of an employment relationship. Fox was a homeowner who was looking for someone to help out with his lawn work. Prior to this time, Fox had his son do the work, did it himself, or hired a professional. He was referred to Price by his barber, as an individual who was interested in the work. At the time, Price was semi-retired and receiving a pension. The two agreed on an amount of work that needed to be done, time frames for doing the work, and rates of pay. Price commenced doing the yard work for Fox, and over time his duties expanded. Price would drive Fox's father around to appointments for pay and was paid by Fox's father. Price drove his own truck, used his own trailer, and had some of his own tools. When the amount of work became too much for one person, he was permitted to hire help to get the work done. Price decided how much to pay the help he hired and paid them out of the money he charged Fox. He was also reimbursed any expenses he incurred as a result of the work he was doing for Fox. Ultimately, Price fractured his ankle after stepping on a pipe hidden in the lawn. Price sought benefits from uninsured Fox. Fox denied, contending that Price was an independent contractor. Judge Olson found that Price was an employee of Fox and ordered payment of benefits. Fox appealed and the WCCA remanded for determinations regarding whether the independent contractor rules applied to the case. Judge Olson again found that an employment relationship existed and that all five criteria of Minn. R. 5224.0110, subp. 3 were met. Fox again appealed and the WCCA vacated the decision and remanded for further findings. At a second hearing, Judge Olson found that Price did not meet all of the criteria set forth by Minn. R. 5224.0110, subp. 2, and that Price would be considered an employee under non-specified occupations under Minn. R. 5224.0330 and 5224.0340. Fox appealed. The question presented was whether Price was an employee of Fox or an independent contractor. The WCCA (Judges Johnson and Stofferahn) went through an in-depth, step-by-step analysis of the criteria set forth by Minn. R. 5224.0110, subp. 2. The WCCA found that all of the independent contractor criteria of 5224.0110, subp. 2 were met. Further, the WCCA found that even if all of the criteria had not been met, under the general rules, Price would not have been Fox's employee due to Price's ability to control the means and manner of the performance of the work. *Hunter v. Crawford Door Sales*, 501 N.W.2d 623, 48 W.C.D. 637 (Minn. 1993). It focused on the fact that Fox was a homeowner who did not oversee Price's work while it was being completed, that Fox was not in the business of lawn maintenance, and that the only control over the work that Fox had was the time frame in which he expected the work to be done. All other aspects were controlled by Price. The findings of the compensation judge were reversed.

Dissent: Judge Milun dissented on the basis that the majority considered the question presented to be one purely of law, whereas she considered it to be a mixed question of law and fact. She believed that the majority set aside factual determinations made by the compensation judge in order to decide that Price met all of the criteria for independent contractor status. She also went into the majority's discussion regarding the criteria under 5224.0110, subp. 2E, requiring the furnishing of tools. The majority was satisfied that since Price supplied his own truck, trailer, and other tools, he substantially met the requirement. Milun argued the definition of "substantially met" and cautioned that the majority's opinion essentially yields a result that if a laborer provides only one tool, then they have substantially met the subp. 2E criteria. Milun was in favor of affirming the compensation judge's decision.

Evidence

Majerus v. Rochester City Lines Company, File No. WC12-5458, Served and Filed January 2, 2013. The employee claimed he sustained an injury on June 30, 2011. Primary liability was denied. For a number of enumerated reasons, the employer concluded the employee falsified his injury claim. The employee was terminated toward the end of July 2011. A step one agreement was reached between the employee and employer in August 2011. The employee needed to meet certain conditions to get his job back. The criteria included a release from his doctor, correcting the medical record, undergoing recommended treatment, and obtaining a finding of a work-related injury. Over the employer's objection of the agreement being too prejudicial, this step one agreement was admitted into evidence. Compensation Judge Rykken determined the employee sustained a work-related injury. The WCCA (Judges Hall, Milun and Stofferahn) affirmed. Admitting the step one agreement into evidence was not a basis for remand or reversal. There was no reference that the step one agreement was given any weight because there was no reference to the evidence in the findings of fact or memorandum. Evidence that could arguably be viewed as prejudicial is not to be presumed so when the finder of fact is a compensation judge, unless the record clearly suggests that the evidence did in fact have a prejudicial effect. Discussions with the parties at the hearing and the stated rationale for the conclusions do not indicate there was any improper influence by exposure to the step one agreement.

Insurance Coverage

Drier v. Grounded Air, Inc., File No. WC12-5424, Served and Filed December 3, 2012, and *Mironenko v. Grounded Air, Inc.*, File No. WC12-5431, Served and Filed December 3, 2012. The employees were jointly employed by Grounded Air and PSI. The employees each sustained a work-related injury and petitioned for benefits from Grounded Air and the Special Compensation Fund (SCF). At hearing regarding Drier's injury, Compensation Judge Behr determined that Grounded Air was uninsured in October 2007. At hearing regarding Mironenko's injury, Compensation Judge Ertl determined that Grounded Air was uninsured in April 2007. Judges Behr and Ertl both determined David Herzog was the sole owner of Grounded Air and was personally liable for the corporate debt and ordered him to reimburse the SCF. Grounded Air and Herzog appealed the compensation judges' findings and orders. The WCCA (Judge Johnson writing for an en banc court) affirmed. Minn. Stat. §176.071 provides compensation is paid jointly by two or more employers at the time of the injury and the contribution of the compensation is in the proportion of their wage liabilities to the employee. If any such employer is excluded, then the remaining liable employer(s) bears the entire wages. Grounded Air and Herzog asserted that Minn. Stat. §176.071 allows joint employers to arrange for a different distribution of payment of the compensation. Grounded Air specifically argued that it made payments to cover workers' compensation coverage and that with its payments, PSI agreed to procure coverage for all Grounded Air employees. Therefore, Grounded Air legally contracted away its workers' compensation liability and is not a "liable employer". The WCCA held §176.071 does not abrogate an employer's liability for compensation benefits statutorily imposed under Minn. Stat. §176.021, subd. 1. The WCCA noted that PSI failed to obtain any workers' compensation coverage and that it was necessary for the SCF to be involved. Citing *Sorenson v. Metro Stucco Sys.*, 49 W.C.D. 216 (WCCA 1993), the WCCA held that while the employee may look to one or both employers for compensation because he is under a general and a special employment relationship, the special employer (Grounded Air) is primarily liable, as it controls the employee in the workplace. Grounded Air and Mr. Herzog contended that imposing liability on an employer that was uninsured through no fault of its own is unjust. Citing *Olsen v. Kling*, 363 N.W.2d 310 (Minn. 1985), the WCCA concluded that statute and case law mandate that an employer obtain coverage, and the fact that the employer was uninsured through no fault of its own is not a defense.

Interveners

Hansen, Jill v. Dayton Hudson, File No. WC12-5467, Served and Filed January 22, 2013. The self-insured employer appeals from a compensation judge's determination that an intervener was entitled to full reimbursement, including statutory interest, for medical expenses the intervener paid from 2003 to the date of service and filing of an Award on Stipulation. The parties in this case had settled a variety of claims through several stipulations for settlement. The stipulation for settlement at issue in this litigation was served and filed on March 8, 2007. A prior stipulation was entered into and awarded on November 27, 2002. The 2002 stipulation closed out all of the employee's claims except for future medical expenses. It also specifically requested that certain potential intervention rights be extinguished, including Medica, for failure to timely intervene. After the 2002 stipulation was filed, Medica filed a Motion to Intervene on January 6, 2003. The intervention motion only listed dates of services prior to the 2002 Award on Stipulation that had extinguished Medica's interests. A Medical Request was subsequently filed in 2003 by the employee for payment of medical bills. Medica was identified as a potential intervener. Ultimately, the parties entered into another stipulation for settlement in 2007. At no time after January 6, 2003 did Medica file a Motion to Intervene, nor did it update its interest with regard to the intervention motion it filed prior to the 2003 medical request. The employer/insurer did not contact Medica to discuss settlement, as it was the parties' intent to extinguish Medica's interest for failure to intervene in a timely manner after the 2003 Medical Request. Following the 2007 settlement, more medical treatment was rendered in 2008 and a medical request was filed in 2009. Medica filed an intervention motion in 2009. The case proceeded to hearing and Compensation Judge Dallner denied Medica's intervention claim as to the dates of service listed from 2002 to March 8, 2007. Medica appealed and the WCCA determined that Medica was an intervener with regard to proceedings leading to the March 8, 2007, Stipulation for Settlement. The case was remanded for further findings on whether Medica was left out of settlement discussions. On remand, Judge Dallner found that Medica had not been advised that settlement was being discussed, had not been negotiated with, and no offer of settlement had been made to it. As such, Medica was entitled to full reimbursement, including statutory interest, for medical expenses paid on behalf of the employee prior to the service and filing of the March 8, 2007, Stipulation for Settlement. The self-insured employer appealed. The WCCA found that the parties knew that Medica had made payments and that it may have an intervention interest with regard to the 2007 Stipulation for Settlement and yet did not include Medica in settlement negotiations or make them an offer of settlement. As such, the WCCA held that Medica was entitled to full reimbursement. *See Brooks; Hendrickson; Gebrekidan.*

Comment: This case has a long procedural history that can be found at *Hansen v. Dayton's n/k/a Macy's*, 71 W.C.D. 443 (WCCA 2011), *summarily aff'd* (Minn. Aug. 26, 2011). The parties had planned to extinguish Medica because they were operating as if Medica had not timely intervened. The WCCA did not find that persuasive due to the fact that Medica had filed an intervention motion in 2003, even though there was no litigation occurring at that time. That intervention motion is what led to the determination of Medica being an intervener. This case is a cautionary tale in that, if an employer/insurer know that an entity has paid

benefits or has been involved in the case at some level, it is best to negotiate with them. If the intervener is not contacted or negotiated with, the intervener will be entitled to full reimbursement and interest. Here, it is apparent that all parties knew Medica had paid something. They did not negotiate with Medica or offer settlement, and therefore, Medica was reimbursed in full.

Job Search

Tollefson v. Rice County, File No. WC12-5365, Served and Filed July 6, 2012. For a summary of this case, please refer to the Temporary Total Disability category.

Jurisdiction

Halls v. MN Swarm Lacrosse/Arlo Sports, File No. WC12-5478, Served and Filed April 30, 2013. The employee is a citizen of Canada. He sustained an admitted injury while employed as a professional lacrosse player for the employer. He worked a full-time job at the time of the injury, in addition to playing professional lacrosse. After the injury, he could not return to work for either of his date of injury employers. He obtained subsequent employment for a period of time and was then laid off for the season. He sought payment of periodic temporary total and temporary partial disability benefits. During the time period the employee sought wage loss benefits, he also received unemployment and/or sickness benefits (the nature of a portion of the benefits was in dispute and never resolved) from the Canadian government because of his layoff for the season. The Canadian governmental division that issued the payments was put on notice of its right to intervene in the workers' compensation case but did not intervene. The employee testified that he informed one of the employees of the unemployment department (Mrs. Ross) that he was pursuing a workers' compensation claim in Minnesota and that Canada could get its money back from that claim. The employee testified that Mrs. Ross told him that "the States work different than Canada and so they didn't want to know anything about what was going on in the States." There was no dispute that the employee received approximately $15,450 in Canadian dollars. Close to $14,000 was received during the period he claimed temporary total or temporary partial disability benefits. Compensation Judge Cannon determined the wage loss benefits awarded to the employee during the time period he received Canadian unemployment and/or sickness benefits should be offset by the amount received from the Canadian government. The WCCA (Judges Hall, Wilson and Stofferahn) reversed. The employee received unemployment benefits in Canada and workers' compensation benefits in Minnesota. There is no double recovery of workers' compensation benefits from multiple jurisdictions. Unemployment benefits do not fall within the same type of benefits considered by cases such as *Pierce v. Robert D. Pierce, Ltd.* and *Stolpa v. Swanson Heavy Moving Co.*, as those cases dealt with workers' compensation benefits in multiple jurisdictions. Although public policy disfavors unjust double recovery, public policy also dictates that a windfall to the employer and insurer should be avoided. Because the employee received no workers' compensation benefits from any other jurisdiction, the compensation judge awarded an equitable remedy that was beyond his jurisdiction. Minn. Stat. §175A.01 governs the jurisdiction of compensation judges and the WCCA. Jurisdiction is limited to questions of law and fact arising under the workers' compensation laws of Minnesota. Any claim not involving Minnesota workers' compensation laws must be dismissed for lack of subject matter jurisdiction. *See Hale v. Viking Trucking Co.*, 654 N.W.2d 119 (Minn. 2002). This case involved at least an implicit consideration of the Canadian unemployment benefits the employee received and the likelihood that the Canadian government would pursue recovery from the employee. This determination extended beyond the compensation judge's jurisdiction.

Maximum Medical Improvement

Bankston v. Second Harvest Heartland, File No. WC12-5395, Served and Filed July 26, 2012. The employee sustained a work-related low back injury on January 6, 2010. She was able to continue working until October 2010, when she was no longer able to perform her job duties. The employer provided light duty work for a short period and then paid temporary total disability benefits. The employee underwent an IME with Dr. Charles Burton on March 14, 2011, and Dr. Burton opined the work injury was a temporary aggravation which resolved by January 12, 2010, and was not a contributing factor in the employee's current low back condition. On May 10, 2011, Dr. Sinicropi evaluated the employee and recommended she consider a three-level fusion surgery and other possible forms of treatment. Dr. Sinicropi filled out a workability form, which also indicated the employee was at MMI. On May 13, 2011, the employer and insurer filed a notice of MMI based on that form. In a September 9, 2011 report, Dr. Sinicropi opined that the employee had reached MMI for conservative care, but that she should consider having a multi-level lumbar fusion surgery. On August 15, 2011, the employer and insurer filed a NOID seeking to discontinue TTD benefits on the basis that the employee had reached MMI and the statutory 90-day post-MMI period had expired as of August 10, 2011. At that time the employee had not yet decided if she would undergo surgery. At the administrative conference in September 2011, the discontinuance request was granted. After an October 11, 2011, appointment with Dr. Sinicropi, the employee decided to undergo the surgery. The employee filed an objection to discontinuance. Compensation Judge Hagen found the employee had not reached MMI and granted the employee's objection to discontinuance of the employee's TTD benefits. The WCCA (Judges Milun, Wilson and Hall) affirmed. The WCCA held that whether an employee has reached MMI is an issue of ultimate fact to be determined by the compensation judge after considering all relevant evidence. The burden of proving MMI is normally on the employer and insurer. A hearing on an objection to discontinuance is a *de novo* hearing, and as such, the initial

burden of proof remains on the employer and insurer at the time of the hearing. The burden of proof does not shift to the employee at hearing just because the employer and insurer prevailed at the administrative conference. The WCCA held that there is no requirement that there be a "final determination" on surgery before a compensation judge may consider a proposed surgery as a factor in determining whether an employee is at MMI. However, an employee has to show some willingness to consider surgery in order for that proposed surgery to be considered as a factor in determining MMI. While an employee cannot unreasonably delay or refuse recommended treatment in order to prolong attainment of MMI, prospective surgery is a legitimate factor in determining MMI. Given the extent of the surgery and the doctor's recommendation that the employee wait to decide about the fusion surgery, the judge could reasonably conclude that the employee's delay in this case was reasonable. Further, the employee had now considered the surgery recommended and had testified she intended to undergo the surgery. The judge did not err by considering the proposed surgery as a factor in determining that the employee was not at MMI.

Medical Issues

Wald v. Walgreens Corporation, File No. WC12-5526, Served and Filed April 25, 2013. The employee filed a Medical Request requesting approval for a Med-X program. The employer and insurer denied the treatment stating that it was not reasonable and necessary and was beyond the treatment parameters. At the hearing, the employee presented medical evidence, including an opinion from her treating doctor, stating the treatment was reasonable and necessary. The employer and insurer introduced an IME report stating that the treatment was not reasonable and necessary. In addition, they argued that the treatment was beyond the treatment parameters, and that a departure from the treatment parameters was inappropriate. Compensation Judge Schultz ruled in favor of the employee stating that the employee's condition qualified as a "rare case" exception to the treatment parameters and should be reviewed under the substantial evidence standard—essentially whether the treatment was reasonable and necessary. The judge adopted the employee's medical expert over the employer and insurer's. The WCCA (Judges Hall, Milun and Stofferahn) affirmed. In so doing, it cited *Jacka v. Coca Cola Bottling Co.*, 580 N.W.2d 27, (Minn. 1998), noting that compensation judges can depart from the treatment parameters, and even set aside the departures permitted, in rare cases in which the departure is necessary to obtain proper treatment. The *Jacka* case allows a more flexible analysis of the treatment parameters. In other words, the WCCA will allow treatment that is beyond the treatment parameters, even if it does not fall within the parameters, if the treatment is found to be reasonable and necessary.

Penalties

DeMarais v. United Parcel Services, Inc., File No. WC12-5465, Served and Filed January 3, 2013. Following a settlement between the parties, an Award on Stipulation filed by the Office of Administrative Hearings on June 30, 2011, ordered that payment be made within 14 days of the filing of the Award. The proof of service was attached to the Award and stated an employee of OAH mailed a copy of the Award to all parties on June 30, 2011. The employer and insurer did not make the payments ordered by the date payment was due. On July 18, 2011, the employee's attorney inquired about the payments via email to the insurer. On July 19, 2011, the attorney for the employer and insurer received a copy of the Award from the employee's attorney. The insurer then prepared and mailed settlement checks, which were received by the employee and his attorney on July 21, 2011. The employee filed a Claim Petition seeking penalties for late payment of benefits. Compensation Judge Cannon found that the employer, the insurer, and the employer and insurer's attorney did not receive the Award on Stipulation until July 19, 2011. The compensation judge found the employer and insurer did not unreasonably or vexatiously delay payment and did not neglect or refuse to pay compensation. Therefore, the compensation judge determined the employer and insurer were not liable for a penalty under Minn. Stat. §176.225. The WCCA (Judges Johnson, Wilson and Stofferahn) affirmed. The employee argued the compensation judge's finding that the employer, insurer, and their attorney did not receive the Award on Stipulation until July 19, 2011, was contrary to the evidence. The employee pointed to the testimony of a support staff supervisor at OAH, who testified that on June 30, 2011, it was the last day that the State of Minnesota operated prior to a government shutdown on July 1, 2011. Despite the fact that OAH staff were very busy, the supervisor testified that it was not likely that an important document like an Award would not have been mailed. The employee testified that he and his attorney each received the Award on July 5, 2011. The employer, the insurer's claims supervisor, and the employer and insurer's attorney, testified that they did not receive the Award until July 19, 2011. The employee also contended that the employer, the insurer's claims supervisor, and the employer and insurer's attorney were aware of the impending State government shutdown and neglected to take reasonable steps to ascertain whether an Award had been filed. Accordingly, the employee asserted the employer and insurer neglected and unreasonably denied making payment under the Award, which justified imposition of penalties under Minn. Stat. §176.225. While there was proof of service that showed all parties were served with a copy of the Award on June 30, 2011, the WCCA relied on Minn. Stat. §176.285 that provides, in part:

> Where service is by mail, service is affected at the same time mailed if properly addressed and stamped. If it is so mailed, it is presumed the paper or notice reached the party to be served. However, a party may show by competent evidence that that party did not receive it or that it had been delayed in transit for an unusual or unreasonable period of time. In case of non-receipt or delay, an allowance shall be made for the parties' failure to assert a right within the prescribed time.

The WCCA concluded it was the intent of Minn. Stat. §176.285, to allow a party additional time to comply with an order when an Award is not received by the party. The WCCA found the compensation judge's finding was supported by substantial evidence. The WCCA also contended that the employee cited no authority for his contention that the employer, the insurer, or its counsel had an affirmative obligation to inquire about the status of the Award. Whether in some cases the facts might warrant the imposition of a duty upon a party to inquire about the status of an Award, it did not decide in this case. It found no basis to impose a duty of inquiry on the employer, the insurer, or its counsel.

Permanent Partial Disability

Ware-Cox v. First Student, Inc., File No. WC12-5418, Served and Filed August 9, 2012. Following an alleged injury to the lumbar spine, the employee's treating physician rated 10% whole body disability based on stenosis. The IME, Dr. Gedan, determined that there were no objective clinical findings on examination. Compensation Judge Ellefson awarded 10% permanent partial disability. The WCCA (Judges Wilson, Johnson and Stofferahn) reversed. A rating pursuant to Minn. Rule 5223.0390, Subp. 4E requires, in part, radicular pain or paresthesia, with or without lumbar pain syndrome, and with objective radicular findings on examination, and diagnostic testing evidence of spinal stenosis that impinges on a lumbar nerve root and the medical imaging findings correlate with the findings on neurologic examination. Although the treating physician rated 10% permanent partial disability, he did not offer any explanation as to how the employee's condition satisfied the requirements of the rule. While the MRI produced evidence of spinal stenosis, all of the treating physician's neurologic examinations were normal.

Procedural Issues

Boggs-Rucktaeshel v. Northwest Airlines Corp., File No. WC12-5410, Served and Filed October 24, 2012. A compensation judge denied the employer and insurer's Motion to Dismiss and extended the stricken status of the employee's Claim Petition for 90 days. The employer and insurer wrote to the employee's attorney requesting possible settlement discussions along with clarification of the employee's claims and discovery issues. The employee's attorney did not respond, so the employer and insurer filed a second Motion to Dismiss (over a year after the first motion), for failure to prosecute. The employee did not file a response or any objection to the motion. The compensation judge granted the motion and issued an Order dismissing the employee's Claim Petition. The employee's attorney filed a Motion to Vacate the Order, which was later withdrawn, opting instead to pursue an appeal, in which he admitted that the failure to respond to the motion was the result of his "mistake." The WCCA (Judges Hall, Milun and Wilson) vacated the compensation judge's Order and remanded it for a hearing on the dismissal. The WCCA reasoned that there may have been good reasons for dismissing the Claim Petition, but "no meaningful review of the Order may be accomplished until a record is created and factual findings are made."

Psychological Injuries

Schuette v. City of Hutchinson, File No. WC12-5486, Served and Filed April 18, 2013. The employee worked as a police officer for the City of Hutchinson and responded to an incident involving a 12-year-old girl who fell from a pick-up truck and hit her head on the pavement. After trying to resuscitate the girl, the employee learned that he knew the girl and her family. The employee drove the ambulance to the hospital, and the girl was airlifted to another hospital, where she was pronounced dead. The employee testified that, while at the hospital, he felt sick and experienced "dry heaves." He further testified that after the incident he experienced a variety of symptoms including difficulty sleeping, nightmares, anxiety, panic, mood swings, and headaches. The employee did not seek treatment until three years after the incident, and was diagnosed with chronic anxiety, post-traumatic stress disorder, and depression. In November 2008, he fell out of a loft bed and injured his shoulder and back. He claimed that these injuries were the result of his PTSD, which caused him to get out of bed and run while sleeping. Compensation Judge Kelly held that the PTSD condition represented a mental disability that is not compensable under the Minnesota Workers' Compensation Act. The WCCA (Judges Milun, Stofferahn and Hall) affirmed. The WCCA relied on *Lockwood v. ISD No. 877*, 312 N.W.2d 924 (Minn. 1981), which held that a mental injury caused by job-related stress without physical trauma is not compensable under Minnesota's Workers' Compensation Act. The WCCA determined that, pursuant to *Lockwood*, substantial evidence supported the compensation judge's determination that the employee did not sustain a compensable injury.

Rehabilitation/Retraining

In the Matter of the QRC Firm Registration of PAR, Inc., File No. WC11-5362, Served and Filed September 24, 2012. The vocational rehabilitation firm PAR, Inc. appealed from a Rehabilitation Review Panel's findings that it had violated administrative rules and its assessment of penalties. John Richardson was a QRC and owner of PAR. In 2008, a civil complaint was brought against him by DOLI. As a result, the parties reached a stipulated agreement, part of which required Richardson to relinquish his QRC license for a period of two years. He was not to engage in any work that required registration as a QRC. He was not prohibited from other professional conduct not requiring registration as a QRC. DOLI filed a 19-count complaint against Richardson and PAR alleging violations of the 2008 stipulation. Also included in the 19-count complaint were six counts dealing with a non-compete agreement between PAR and another QRC. DOLI's complaints largely had to deal with Richardson's interactions with two employees, KA and CJ. The non-compete complaints were in relation to fee-splitting issues. DOLI essentially alleged that Richardson was operating as a QRC in his dealings with KA and CJ, and that PAR, as his employer, was responsible for his actions. DOLI also alleged that PAR's non-compete agreement amounted to fee-splitting in that it required that any QRC who left PAR and took clients with

them, to pay PAR fifty percent of any fees earned as liquidated damages. The matter was decided by the Rehabilitation Review Panel, and it found that ten of the counts against Richardson had been established and five of the counts regarding the non-compete agreement had been established. The WCCA (Judges Stofferahn and Johnson) reversed. It found that the panel did not give proper weight to the 2008 stipulation between Richardson and DOLI. That stipulation did not prohibit Richardson from performing duties that did not require a QRC license. The WCCA pointed out that at no point did Richardson state he was a QRC in his dealings with either employee. He was also quick to correct anyone who indicated that he was acting in such a capacity. Richardson was found to be engaged in case management or consulting activities, but not QRC regulated duties. There was no legal basis for penalties against PAR for Richardson's actions. With regard to fee splitting, the WCCA found that the non-compete agreement was not fee splitting as the word is defined and that its common usage is not ambiguous as requiring deference to agency interpretation.

Dissent: Judge Milun wrote a dissenting opinion disagreeing with the fee splitting portion of the opinion. Milun focused on the literal interpretation of the term fee splitting. She believed that the non-compete agreement created a situation where two QRCs voluntarily split fees if certain conditions were met. She believed the majority's opinion essentially created an "exception" for fee splitting if it was contained in a non-compete agreement.

Res Judicata

Vick v. Northern Engraving Corp., File No. WC12-5439, Served and Filed December 28, 2012. In a Findings and Order served and filed April 7, 2008, the compensation judge found the employee's permanent restrictions were unrelated to his work injuries. Subsequently, in July 2009, the employee was evaluated and was provided with different restrictions. In December 2010, the parties litigated the employee's claim for additional medical treatment expenses not previously addressed by the compensation judge. The judge concluded the medical expenses at issue at that time were reasonable, necessary, and causally related to the employee's work injuries. In 2011, the employee's treating physician opined the employee was medically disabled and could not engage in any work activity. However, he subsequently released the employee for work with ongoing restrictions. A hearing was held on March 29, 2012, on the employee's rehabilitation and medical requests. Compensation Judge Wolkoff found, in part, that the employee was entitled to vocational rehabilitation services. The WCCA (Judges Milun, Wilson and Stofferahn) affirmed, finding the compensation judge's award of rehabilitation benefits was not barred by collateral estoppel. While the WCCA agreed that collateral estoppel bars the relitigation of issues that have been previously fully litigated and decided in a Findings and Order, collateral estoppel did not apply in this situation. The claim at the later hearing involved eligibility for benefits based on factual circumstances after the prior decision. Therefore, the prior decision is *res judicata* only with respect to the period considered in the former hearing, including determinations relative to medical restrictions. The employee's claims were new claims for medical and rehabilitation benefits based on new medical evidence for a period in time, including evidence of ongoing clear and specific restrictions from the employee's physician. The findings regarding work restrictions from the prior hearing do not preclude a finding that the employee has work-related restrictions four years later.

Retirement

Tollefson v. Rice County, File No. WC12-5365, Served and Filed July 6, 2012. For a summary of this case, please refer to the Temporary Total Disability category.

Settlement

Olsen, Gerald v. Mackay/Minnesota Envelope, File No. WC12-5476, Served and Filed December 12, 2012. For a summary of this case, please refer to the Vacating Awards category.

Special Compensation Fund

Drier v. Grounded Air, Inc., File No. WC12-5424, Served and Filed December 3, 2012, and *Mironenko v. Grounded Air*, Inc., File No. WC12-5431, Served and Filed December 3, 2012. For a summary of these cases, please refer to the Insurance Coverage category.

Temporary Total Disability

Tollefson v. Rice County, File No. WC12-5365, Served and Filed July 6, 2012. The employee sustained an admitted neck injury in September 2007. Compensation Judge Hagen granted the employee's claim for temporary total disability benefits, finding that the employee did not voluntarily retire from the labor market and that he had conducted a reasonable and diligent job search. The WCCA (Judges Hall, Johnson and Milun) affirmed. The WCCA agreed that the employee was presumed to have retired pursuant to Minn. Stat. §176.101, subd. 8, since he was receiving PERA retirement benefits, but determined that he rebutted the retirement presumption with evidence of an "express intent not to retire." This evidence included the fact that the employee received rehabilitation benefits while receiving PERA benefits, attempted to return to work with the employer in a new position, conducted a job search, found part-time employment, and testified that he needed to work to pay for insurance. The WCCA also agreed that substantial evidence supported that the employee conducted a reasonable and diligent job search, since he attempted to return to work with the employer in a light duty position, conducted a job search on his own, found part-time work, and was receiving rehabilitation assistance.

Garner v. Mobile Washer, File No. WC12-5441, Served and Filed December 4, 2012. The employee sustained an injury on June 3, 2010. The employer and insurer admitted liability for the injury and began payment of medical expenses and temporary total disability. The employee had a number of surgeries as a result of his work injury. The most recent surgery was on October 31, 2011, and was a repair of a previous fusion with a bone graft. The employee was imprisoned at Lino Lakes

Correctional Center on July 1, 2011, as the result of a felony conviction. He was still incarcerated at Lino Lakes at the time of the hearing, April 3, 2012, and he testified that he anticipated being released sometime in July 2012. His surgery in October 2011 was at Regions Hospital. He was transported to the hospital by the Minnesota Department of Corrections and after his surgery, placed in a transitional care unit at the Oak Park Heights Correctional Facility. He returned to Lino Lakes in November 2011. His medical treatment since then had been provided by the Corrections Department at the Lino Lakes facility and consisted of visits with physicians, physical therapy, and participation in a chronic pain program. Of note, there was no discussion in the medical records as to whether the employee was capable of any type of employment activity. Further, the employee's qualified rehabilitation consultant testified at hearing that he had not been allowed to meet with the employee since his surgery, had not been allowed to attend any post-op medical appointments or communicate with the doctors the employee had seen, had not had access to the medical records from Lino Lakes, and had not been able to proceed further with developing the employee's potential for returning to work because of the lack of information. The QRC also testified that he had not seen any medical records from the doctors in Corrections releasing the employee to return to work. The employer and insurer filed a petition to discontinue benefits in February 2012. The employer and insurer claimed that TTD benefits should be discontinued because the employee's incarceration was a removal from the labor market which rendered him ineligible for benefits. Compensation Judge Johnson denied the petition, concluding that although the employee had been removed from the labor market, the removal was "primarily due to his medical condition caused by the work injury, and only secondarily by his incarceration." The WCCA (Judges Stofferahn, Wilson and Milun) reversed. In reaching its conclusion, the WCCA noted that where recommended medical treatment and rehabilitation were prevented by the employee's incarceration, the incarceration represented a withdrawal from the labor market supporting the discontinuance of TTD benefits.

Halls v. MN Swarm Lacrosse/Arlo Sports, File No. WC12-5478, Served and Filed April 30, 2013. For a summary of this case, please refer to the Jurisdiction category.

Vacating Awards

Olsen, Gerald v. Mackay/Minnesota Envelope, File No. WC12-5476, Served and Filed December 12, 2012. The employee sustained a work-related injury in 1980 and subsequently settled his case with the employer and insurer pursuant to a Stipulation for Settlement in 1987. The Stipulation for Settlement was a full, final and complete settlement of all past, present, and future claims for workers' compensation benefits, "except for future medical treatment." This Stipulation for Settlement also closed out future claims for *Roraff* attorney fees. The employee subsequently sought medical treatment for his alleged injury, and this was denied by the employer and insurer. Because the previous Stipulation for Settlement closed out *Roraff* attorney fees, the employee was unable to secure the services of an attorney regarding the medical dispute. The employee then filed a Petition to Vacate the Stipulation for Settlement with the Workers' Compensation Court of Appeals (WCCA). The insurer objected to the Petition to Vacate. The WCCA (Judges Wilson, Stofferahn and Hall) granted the Petition to Vacate. The WCCA reasoned that there were strong policy considerations assuring that an injured worker has legal representation when disputing medical benefits. It noted that although the Stipulation allowed the employee to seek future medical expenses, the agreement was of little to no benefit if it precluded the employee from obtaining the means of enforcing his rights. The WCCA also found that the language closing out *Roraff* attorney fees was voidable because it was the intent of the parties that the employee continue to receive medical benefits related to the work injury. The WCCA concluded that the language closing out the *Roraff* attorney fees should be vacated, but there were no grounds to vacate the remainder of the Award. Accordingly, the remainder of the settlement remained in effect.

Wellness Programs/Minn. Stat. 176.021, Subd. 9

Paskett v. Imation Corporation, File No. WC12-5494, Served and Filed January 3, 2013. The employee was injured while playing in a work-sponsored flag football tournament. The tournament was part of a week-long United Way Campaign put on by the employer. The employer encouraged participation and allowed employees to participate in the activities with pay, work their regular hours, or take unpaid time off. There were many events including flag football, poker, and bowling. The events took place during work hours primarily. The flag football game required a $20.00 fee to play. All activities were voluntary and all employees were told their alternatives. The employee paid the fee and played in the flag football game. He injured his Achilles tendon in the game, which required surgery. The employee filed a Claim Petition alleging it was a work-related injury. Compensation Judge Marshall found that the injury was not compensable. The relevant statute in this case was §176.021, subd. 9, which outlines employer responsibility for wellness programs. The compensation judge found that the game was governed by the statute, that the employee's participation was voluntary, and therefore, the injury did not arise out of and in the course of his employment. The employee argued that due to the fact he could take unpaid time off, that *Ellingson v. Brady Corp.*, 66 W.C.D. 27 (WCCA 2005), supported the position that the injury was work-related. The WCCA (Judges Wilson, Milun and Johnson) found that the employee's reliance on *Ellingson* was misplaced and that *Ellingson* could not be read to require that all the alternatives listed in that case be available in every case. The WCCA found that the employee was not coerced to play in the game and that he had two alternatives to playing. Finally, the WCCA found that though participation in the event, which ultimately gave to the United Way, enhanced the company's reputation, participation in the football game did not directly do that and did not transform the game into a work activity. Participation was voluntary and the injury was not work-related. ✦

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