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MINNESOTA WORKERS' COMPENSATION UPDATE

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WHEN LIFE GIVES YOU LEMONS, USE THE TREATMENT PARAMETERS

by Michael J. Flower and Alicia J. Smith

When it comes to an employee's Medical Request, the best line of defense is often located in the treatment parameters, and there are several rules that can help push a decision in your favor. On the Medical Response form there is a blank for indicating which treatment parameters you are asserting. If possible, you want to find at least one treatment parameter to include on the form because, when it comes to the conference on the Medical Request, use of the treatment parameters is a "use it or lose it" situation. We want to share some treatment parameters that are commonly applicable and may even help you defeat a Medical Request.

- Medically Necessary Treatment. Because all treatment must be medically necessary, the healthcare provider is required by the rules to determine whether treatment is effective and results in progressive improvement. Minn. Rule 5221.6050, subp. 1B indicates that progressive improvement is: 1) the employee's subjective complaints of pain or disability are progressively improving; 2) the objective clinical findings are progressively improving; and 3) the employee's functional status, especially vocational activity, is progressively improving. This rule, while simple, can be highly effective. Occam's Razor applies–the simplest solution tends to be the best one.

- Imaging. MRIs can get pricey, often to the tune of several thousand dollars, and it sometimes seems that physicians want to utilize them at every turn. According to Minn. Rule 5221.6100, subp. 2, lumbar spine

continued on next page . . .

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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When Life Gives You Lemons, Use the Treatment Parameters *continued*

MRIs are generally not to be performed in the first eight weeks after an injury, unless an exception is met. Those exceptions include: when cauda equina syndrome is suspected, for evaluation of progressive neurologic deficit, when previous surgery to the lumbar spine has been performed and there is a need to differentiate scar due to previous surgery from disc herniation, tumor or hemorrhage, or when there is suspected discitis. Thus, if you are dealing with a non-complex, soft tissue injury to the lumbar spine and the employee gets sent straight to the MRI provider, it may be time to throw out a red flag.

- Opioids. The new treatment parameters on the long-term use of opioid medications went live in the summer of 2015, and you should certainly include these new rules in your tool box. The newly-minted Minn. Rule 5221.6110 provides rigorous requirements for health care providers in administering opioids to injured workers. Employees must meet several criteria to be allowed to enter into an opioid treatment plan, and they must follow the plan on fixed schedules. Providers must strictly ensure that employees are adhering to the plan and continually assess whether the use of opioids is improving the employee's condition. If the rule on opioids is not being followed, you have the opportunity to give notice to the health care provider to nudge them to conformity. Can you cut an employee off from opioids cold turkey? Probably not, but the rules provide a helpful framework for leading employees down the path of weaning off their medications.

- Passive Therapy. You can prevent sticker shock when it comes to chiropractic bills. Often we see that chiropractors or massage therapists provide ongoing, passive treatment that provides temporary relief from pain, but no significant, long-term improvement. Whether it is general passive treatment, such as acupuncture or massage therapy, or chiropractic treatment, Minn. Rule 5221.6200, Subp. 3 (relating to the lumbar spine), provides a general twelve week limit on most passive treatment modalities. There are some exceptions, but at the twelve week mark, it is the burden of the employee to prove that he or she meets one of those exceptions. We recommend placing a reminder on your calendar for twelve weeks after chiropractic or other passive treatment has been initiated, so as to ensure that you will not pay for continuing treatment that has no real benefit. Note that there are similar provisions for the neck in Minn. Rule 5221.6205, the thoracic spine in 5221.6210, and the upper extremities in 5221.6300.

- Departures. Once you get to the conference, chances are that the employee will argue that he or she is entitled to a departure from the treatment parameters. Minn. Rule 5221.6050, Subp. 8 lists several exceptions whereby a departure is warranted, including, but not limited to, when there is a documented medical complication, the treatment is necessary to assist in the initial return to work where the employee's work activities place stress on that body part, or when there is an incapacitating exacerbation. More broadly, in *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27 (Minn. 1998), the Minnesota Supreme Court stated, "[i]n recognition of the fact that the treatment parameters cannot anticipate every exceptional circumstance, we acknowledge that a compensation judge may depart from the rules in those rare cases in which departure is necessary to obtain proper treatment." Nevertheless, the rules provide a structure for defending against departures. Per Minn. Rule 5221.6050, Subp. 9, if the healthcare provider does not provide prior notification of the departure, then that departure from the treatment parameters should not be allowed. Additionally, the proposed treatment that departs from the parameters must meet two of the following three criteria: 1) the employee's subjective complaints of pain are progressively improving; 2) the employee's objective clinical findings are progressively improving; and 3) the employee's functional status, especially vocational activity, is objectively improving. Sound familiar? The rule on departures brings us full-circle with the rule on medically necessary treatment, pressing the point that the treatment parameters support a proactive approach to medical treatment.

We have only scratched the surface of what the treatment parameters can offer in defending against Medical Requests. When all else fails and you are not sure whether there is an applicable treatment parameter, ask one of us at Arthur Chapman. We are glad to help! ✦

Case Law Update

Decisions of the Minnesota Supreme Court

Appeals

Dennis v. The Salvation Army, File No. A15-0715 (Minn. February 3, 2016). The employee slipped, fell, and injured his left knee. He alleged his injury arose out of and in the course of his employment with The Salvation Army. The compensation judge awarded benefits to the employee, and the WCCA affirmed. The decision was filed by the WCCA on April 10, 2015. The relators (Salvation Army and Chesterfield Services) had 30 days from that date to have the order reviewed by the Supreme Court. Within the 30 days, the relators filed a petition for a writ of certiorari. An affidavit of service was filed the next day. Relators forgot to file a cost bond which is required by Minn. Stat. §176.471, subds. 3 & 5. On May 6, 2015, the WCCA notified the clerk of the appellate courts that relators had not served a cost bond on the WCCA. On September 15, 2015, the Supreme Court directed the parties to file informal memoranda addressing the cost bond issue. Relators served a cost bond on the WCCA after receiving the Supreme Court order. Justice Lillehaug authored the opinion that dismissed the relators' appeal for failing to timely serve a cost bond on the WCCA. The Court found that failure to serve a cost bond pursuant to Minn. Stat. §176.471, subds. 3 & 5 was fatal to the relators' appeal. "'[T]o effect review upon certiorari,' in combination with the 30-day time limit, mean[s] that the review does not come into being – in other words, does not happen -- unless and until both the writ of certiorari and the cost bond are timely served." The Court held that both the writ of certiorari and cost bond are mandatory requirements, and strictly construed. The Court also declined to extend the delay under Minn. Stat. §176.471, subds. 2 & 7. The Court held subdivision 2 only permitted a limited extension for "other papers," which is classified as papers other than those that are to be filed within 30 days under subdivision 2. The Court also held that subdivision 3 does not permit extensions for the cost bond. The Court found that issues of prejudice and ripeness were not present, and the relators failed to adhere to the strict statutory requirements of filing. The Court further held the employee did not waive the issue of the cost bond.

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

Shire v. Rosemount, Inc., File No. A15-0856 (Minn. February 17, 2016). The employer held annual employee appreciation events for its employees, attendance at which the employee handbook indicated was "voluntary." For employees who did not want to attend these events, the employer gave them the option of either taking approved vacation leave or approved leave without pay. In this case, the employee testified that he did not apply for approval to take vacation leave instead of attending the event because his wife was pregnant and he wanted to save vacation time for when his child was born. This particular employee appreciation event was held at a bowling alley, and while the employees were not required to take part in physical activities, most did. The employee injured his right ankle while he was participating in a laser tag competition. The matter went to hearing where Compensation Judge Behr found that the employee's participation in the event was not "voluntary" within the meaning of Minn. Stat. §176.021, subd. 9 and awarded the employee workers' compensation benefits. On appeal by the employer and insurer, the issue was whether the employee's participation at the employee recognition event was actually "voluntary" under the statute. The employer and insurer contended that the cases of *Ellingson v. Brady Corp.*, 66 W.C.D. 27 (Minn. 2006) and *Paskett v. Imation Corp.*, File No. WC12-5494 (WCCA Jan. 3, 2013) stand for the principle that an employee's attendance at an employer-sponsored recreational event must be deemed voluntary whenever the employer has offered any alternative at all to attendance. The WCCA (Judges Hall, Milun and Cervantes) concluded that in *Ellingson and Paskett*, the employees had the option to simply continue performing their usual jobs, but in this case, that option was not present. The WCCA indicated, "[w]here attendance at the program is the only means available to

the employee to avoid a forfeiture of pay or benefits, there is an implicit element of compulsion that renders that employee's attendance 'involuntary.'" The next argument of the employer and insurer was that, even if the employee's attendance at the event was involuntary, his participation in the laser tag game was voluntary. Again, the WCCA distinguished this case from *Paskett*. In *Paskett*, the employer offered a variety of separate, independent events scheduled at different times and on different days during a week-long charity campaign. In this case, however, the employee attended a single, continuous event that he was required to attend in its entirety, thus all activities therein were deemed "involuntary" under subdivision 9. The employer and insurer appealed to the Minnesota Supreme Court. In a decision authored by Justice Wright, the decision of the WCCA was affirmed. The Court found that the voluntary-recreational program exception to Minn. Stat. §176.021, subd. 9 is not satisfied when the employee's choices are either to attend the program or risk forfeiting pay (by taking an unpaid day off) or benefits (by using a day of vacation). The employer and insurer argued that the phrase "voluntary recreational program" in Minn. Stat. §176.021, subd. 9 plainly refers to a "voluntary program," not voluntary activities within a program. The Court rejected this argument, finding that the relevant inquiry when applying Minn. Stat. §176.021, subd. 9, is whether the program is voluntary, not whether the individual recreational activities within the program are voluntary.

In his dissent, Justice Anderson argued that the meaning of "voluntary" depends on the context in which it is used, and a definition of "voluntary" that prohibits any constraint on pay or benefits is an unreasonably narrow reading in the context of this statute. He focused on the concept of "coercion" and how it was lacking in this case, finding that the recreational program was "voluntary" because the employer did not coerce the employee into attending–he made the choice to attend after being presented with reasonable alternatives of taking approved vacation leave or approved leave without pay. Justice Anderson found that this lack of coercion rendered the facts of this case similar to those in *Ellingson* and *Paskett*, and benefits should have similarly been denied. ✦

2016 Workers Compensation Seminars

Thursday, June 9, 2016
McNamara Alumni Center, University of Minnesota
Minneapolis, Minnesota

Thursday, June 16, 2016
Crowne Plaza, Wauwatosa, Wisconsin

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

Decisions of the Minnesota Court of Appeals

Minn. Stat. §176.82 Actions

Anderson v. North American Gear & Forge, File No. A15-0966, Minn. Ct. App. (unpublished opinion), Filed January 11, 2016. The employee was injured when a piece of hot metal burned him next to his right eye. It was a "tiny burn." Prior to the injury, the employee had been written up several times for attendance and had received a final warning from his employer. He insisted on seeing a doctor and was told he would reach MMI in three days, but could work without restrictions. The second day he called in hurt and saw his primary care doctor who immediately released him to work. He did not work that day. The third day, he left early to see the occupational health specialist because his work irritated his burn. The fourth day, he did not attend work. It is disputed whether the employer approved the day off. The employee was terminated for attendance reasons. The employee filed a retaliatory claim alleging termination was reprisal for filing a workers' compensation claim. The Court of Appeals (Judge Worke) affirmed the District Court's summary judgment dismissal of the employee's claim. A *prima facie* case for retaliatory-discharge claims under the Workers' Compensation Act requires: 1) statutorily protected conduct by the employee; 2) adverse employment action by the employer; and 3) a causal connection between the two. The burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. The Court of Appeals held the employee failed to establish the third prong, that there was a connection between his work injury and his termination. He was cleared to work at each of his three visits with two separate doctors. He also failed to show his termination for absenteeism was pretextual.

Arising Out Of

Henson v. Uptown Drink, LLC, File No. A15-0493, Minn. Ct. App. (unpublished), Filed December 21, 2015. For a summary of this case, please refer to the Exclusive Remedy category.

Exclusive Remedy

Henson v. Uptown Drink, LLC, File No. A15-0493, Minn. Ct. App. (unpublished), Filed December 21, 2015. The employee worked as a food runner. On his date of injury, he clocked out early, at 9:03 p.m., because business was slow, and he ordered a half-priced meal and a beer. He removed his uniform and ate in the game room, per company policy. At some point after he had clocked out, the bartender asked him to fix a beer tap, which he fixed. He also moved a chair back to its spot at a table. At 9:30 p.m. the manager and bartender attempted to remove two unruly men. Without being asked, the employee and a bar patron arrived to help them subdue the attackers. The employee helped the general manager remove one man, and as they approached the door, they fell down a set of stairs onto the sidewalk. The employee hit his head. He was rushed to the hospital where he later died. The employee's estate sued Uptown Drink, LLC for wrongful death. The district court had referred the matter to a compensation judge at the OAH, who held that the employee's injuries arose out of and in the course of his employment. The district court granted summary judgment to the employer and determined that the estate's claims were barred by the exclusive remedy provision of the Minnesota Workers' Compensation Act. The Court of Appeals (Judge Chutich) reversed the district court and held the employer failed to show the employee's injuries arose out of and in the course of his employment, and thus, the Minnesota Workers' Compensation Act did not apply in this case. The employer bore the burden of showing the employee's injury arose out of and in the course of employment so that the exclusive remedy provision would apply. The employer failed to show the employee's injury arose out of work, as he was exposed to the same risk as a bar patron. His injuries also did not occur in the course of his employment because eating a meal and drinking a beer after work were for personal pleasure, fixing the beer tap and straightening a chair were "insignificant employment related tasks," he exceeded the scope of his employment duties by helping with security, and he was not asked to assist the general manager. The emergency doctrine also did not expand the employee's job duties to include "all actions of an off-duty employee," because his regular job duties were unrelated to security. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Aggravation

Lopez v. JBS USA, LLC, File No. WC15-5816, Served and Filed September 28, 2015. The *pro se* employee appealed Compensation Judge Behr's conclusion that the employee's work injury had resolved and that he was not entitled to further benefits. The employee sustained an admitted work-related cut to his left hand. In dispute was the nature and extent of the injury, along with the employee's claims of direct or consequential injuries to his neck, chest, heart, legs, and left shoulder, and claims for various wage loss and medical benefits. The WCCA (Judges Stofferahn, Cervantes and Sundquist) affirmed the compensation judge's conclusion that the employee did not meet his burden of proof, and that the medical opinion on which the employee relied was based upon a lack of review of all of the medical records and the reliance on the employee's history of his problems, which was not supported by the contemporaneous medical records.

Weldon v. Fahey Sales Agency, Inc., File No. WC15-5806, Served and Filed January 11, 2016. There was substantial evidence to support the Compensation Judge's findings that the Employee had sustained merely a temporary aggravation to an underlying back condition, and that the aggravation had fully resolved, as opined by Dr. Dowdle in his independent medical examination. The compensation judge had discretion to determine the weight of the *Wold* factors.

GaNun v. Vinco, Inc., File No. WC15-5851, Served and Filed January 19, 2016. The WCCA affirmed Judge LeClair-Sommer's decision to discontinue TTD benefits and that a preponderance of evidence supported a work injury was no longer a substantial contributing factor to the employee's ongoing low back/sacrum/coccyx symptoms. The employee had fallen from a ladder and landed on his rear. He also had a history of pre-existing arthritic changes to the area of the admitted injury. Judge LeClair-Sommer also found the injury was temporary and superimposed on the underlying degenerative disc disease. She also found surgery with Dr. Stark was not reasonable or necessary. Judge LeClair-Sommer found the opinion of Dr. Raih to be more persuasive than that of Dr. Stark. She also didn't see how Dr. Stark's recommendation of SI surgery would resolve the employee's symptoms.

Appeal

Cruz v. Express Services, Inc., File No. WC15-5783, Served and Filed August 31, 2015. The Spanish-speaking, *pro se* employee (who was represented at trial by an attorney, but not on appeal) alleged *Gillette*-type injuries in the nature of headaches, head, neck, right shoulder, upper back, and eye, as well as an allergic reaction. After the findings and order by Compensation Judge Bouman, the employee drafted a letter to the OAH stating "I would like to appeal the decision [sic] took it [sic] in November 12 - 2014." The letter was accompanied by a 9 page written document explaining his appeal. While the letter was timely served upon all parties, the employee did not serve the employer and insurer with the 9 page explanation of what was being appealed. The employer and insurer subsequently filed a motion to dismiss the appeal on the basis that they did not receive notice, the notice lacked a statement of issues, there was no proof of service, and service was two days late. The WCCA (Judges Sundquist and Cervantes) affirmed in part that the employee did not sustain a *Gillette*-type injury. The WCCA vacated and remanded in part for a determination of whether the employee had an allergic reaction and if subsequent treatment was reasonable and necessary. The WCCA found the employee had timely served his letter, but had not timely served the 9 page document explaining his position. The WCCA noted "when an appellant is acting *pro se*, he is usually accorded some leeway in attempting to comply with the court rules." The WCCA found the employee adequately communicated to the court what he wanted to accomplish in a timely manner and refused to dismiss his appeal. Judge Stofferahn dissented. He would have upheld the judge's entire decision and would not have remanded the case.

Arising Out Of

Hohlt v. University of Minnesota, File No. WC15-5821, Served and Filed February 3, 2016. The employee worked as a painter for the employer and parked her car at a ramp that the employer owns and operates. On the date of

injury, it was snowing and sleeting, and the employee testified that the sidewalks were slippery. While walking to her car after her shift, she slipped on the ice and snow on an incline of a sidewalk that the employer was responsible for maintaining. She fell and fractured the femur neck of her right hip. She underwent two surgeries and was off work for nearly one year. The employer denied primary liability for the employee's injury, arguing that it did not arise out of her employment under the *Dykhoff* case. A claim petition was filed. Compensation Judge Cannon agreed with the employer, holding that the snowy sidewalk presented no "increased risk" to the employee, per *Dykhoff*, precluding her from receiving workers' compensation benefits. The WCCA (Judges Stofferahn, Milun, Cervantes, Hall, and Sundquist) reversed. The WCCA first analyzed the "arising out of" standard. It noted that, in *Dykhoff*, the Minnesota Supreme Court stated, "[t]he phrase 'arising out of' means that there must be some causal connection between the injury and the employment," and this causal connection "is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment, *or* . . . peculiarly exposes the employee to an external hazard whereby he is subjected to a different and a greater risk than if he had been pursuing his ordinary personal affairs." The WCCA held that the employer asserted that an injury arises out of employment only if it is the result of an increased risk, but ignored the question of whether the employee was at an increased risk of injury from a hazard that was *part of* her work environment. Essentially, the WCCA reasoned that, while it is true that workers in Minnesota encounter slippery snow in their everyday lives, the slippery snow nevertheless presented an increased risk to the employee in this particular place and time - she being on the employer's premises immediately after leaving work. The WCCA noted that to accept the employer's argument, it follows that an injury resulting from snowy conditions on the employer's premises can never arise out of employment. The WCCA interpreted *Dykhoff* as establishing two different tests, one applicable to injuries sustained on the employer's premises [an injury is compensable if the employee is exposed to an *increased risk* of injury as the result of her employment status or if the employee encounters an increased risk of injury on the employer's premises because she is an employee and the injury follows from that risk], and a second test applicable to injuries sustained off of the employer's premises [the injury is compensable if the employee was exposed to a *special risk* or *special hazard* which originates on the premises and is one that members of the general public would not ordinarily encounter.] For injuries which occur on the employer's premises, it is irrelevant if members of the general public might encounter the same risk because they were not brought to that risk by the employment. The WCCA concluded that the employee's injury "arose out of" her employment. Additionally, the WCCA analyzed the "in the course of employment" standard. It held that an employee is in the course of employment if "engaging in activities reasonably incidental to employment," which includes "going into work or leaving from work while still on or adjacent to the employer's premises." Here, the employee had recently punched out, she was walking to the parking ramp owned and operated by the employer, and she was on the premises of the employer when she was injured. She was in the "course of employment."

Comment: This case is being appealed to the Supreme Court.

Causal Connection

Ruby v. Casey's General Store, Inc., File No. WC15-5804, Served and Filed September 23, 2015. The employee sustained an injury in 2005 and was subsequently diagnosed with Complex Regional Pain Syndrome ("CRPS") in her left foot and ankle. Within a few months she began to feel similar symptoms in her left shoulder. She sought and was awarded medical care for neuropathic pain in her left arm. This decision was affirmed by the Supreme Court. *See Ruby v. Casey's General Store, Inc.*, No. A11-0964 (Minn. 2011). In September 2013, she began to report symptoms in her right upper extremity and elbow. Within a few months she was describing several CRPS symptoms in her right upper extremity, and she was ultimately diagnosed with CRPS of the right upper extremity. The employer and insurer obtained an IME with Dr. Hubbard, who opined that the employee did not have CRPS and only had tendonitis in her right elbow that was not related to the 2005 date of injury. Further, Dr. Hubbard concluded that the employee was not suffering from CRPS in any extremity. The employee was also evaluated by Dr. Elghor, who opined she did have CRPS in the right upper extremity and that the right elbow problems were due to overuse arising out of her inability to use her left arm and her need for a cane. Compensation Judge Bouman concluded that the employee's right upper extremity condition was neuropathic pain that transferred from her upper left side and was caused by her CRPS condition

that arose out the original left foot/ankle injury. The WCCA (Judges Cervantes, Milun and Sundquist) affirmed rejecting the employer and insurer's argument that the medical evidence was insufficient to support the judge's decision because the evidence was unduly subjective. The WCCA noted that the medical records contained observed, objective symptoms affecting the right upper extremity that were consistent with CRPS. The WCCA found that the evidence submitted was sufficient to establish the chain of causation running from the work injury to the right side neuropathic pain.

Svenningsen v. Innovative Benefit Concepts/Petty & Sons Timber Products, Inc., File No. WC15-5808, Served and Filed October 5, 2015. In 1998, the employee sustained a work injury resulting in a herniated disc at the L4-5 level, underwent a laminectomy, and was paid TTD and PPD. He subsequently worked for multiple other employers and did not seek additional medical treatment for his low back until 2010. The employee was subsequently diagnosed with a repeat herniation at L4-5, along with a disc bulge at L5-S1. In 2013, he underwent a "re-do" laminectomy at L4-5, along with a discectomy and foraminotomies. The treating surgeon indicated that he could not determine whether the need for surgery in 2013 was causally related to the 1998 injury. An IME found no causal connection between the 1998 injury and the problems occurring in 2010. The IME reported that had the recurrent disc problem occurred within the first year following surgery, it would have been related, but since it occurred 11 years later, it was not related. The employee obtained his own expert opinion, and that doctor found a causal connection between the 1998 injury and the 2010 problems and 2013 surgery. The employee attempted to argue that the IME's opinion should have been rejected because he failed to note the employee's claims that his condition waxed and waned over the years. What the IME did note was that the employee did not seek medical treatment for approximately 10 years, and he did quite well following the initial surgery. The lack of medical treatment was not in dispute. Compensation Judge Marshall concluded that the employee's need for surgery in 2013 was not related to his 1998 work injury. The WCCA (Judges Milun, Cervantes and Sundquist) concluded that the compensation judge did not err in relying on the IME's opinions and affirmed the denial of benefits.

Holtslander v. Granite City Roofing, File No. WC15-5810, Served and Filed October 15, 2015. The employee initially sustained a low back injury in 2000, resulting in several surgeries. The employee's doctors noted that he had a "severe antalgic gait" following the injury and surgery. The employee claimed that he sustained several falls due to his leg giving out. As a result of one of these falls, he injured his right knee. An IME concluded that the employee was not experiencing knee instability or neurologic disorders as a result of the low back injury and that the right knee condition was not a consequence of the low back injury. The employee's treating doctor, however, provided a report finding a causal connection between the employee's low back injury and the instability in his legs, indicating that this condition then caused the fall and knee injury. Compensation Judge Cannon determined that the employee sustained a consequential injury to his right knee. The WCCA (Judges Hall, Milun and Stofferahn) concluded that the judge's choice between conflicting medical opinions was supported by substantial evidence, and that there were no foundational issues with the opinions on which the judge relied. The WCCA affirmed the determination of a consequential injury.

Comment: It is interesting to note that one of Judge Cannon's findings was that the fact that the employee had multiple surgeries "in and of itself" supports a conclusion of instability. This conclusion was not supported by any medical opinion. However, the WCCA found that this error did not change the outcome as there was ample evidence independent of this perceived connection to support the judge's determination.

Arne v. Contingent Work Force Solutions, LLC, File No. WC15-5805, Served and Filed November 17, 2015. The employee was working as a food server at the Stillwater prison at the time of her injury. She was assaulted by an inmate. The assault was captured on video tape, but the location and angle of the camera prevented an absolutely clear view of what parts of her body she hit when she fell after being punched by an inmate. The injury was initially admitted, but over time the body parts involved and the nature and extent of the injury became disputed, along with the employee's entitlement to ongoing TTD benefits. Extensive medical records were presented to the judge, along with expert opinions and the videotape of the incident. Compensation Judge Rykken concluded that the employee sustained injuries to her left knee, low back, neck, vision problems, and a psychological condition, and that she was not at MMI. She awarded the requested TTD and medical benefits. The employer and

insurer appealed, with the primary argument being that the employee gave contradictory, inaccurate and misleading statements regarding her injury. In support of this argument, the employer and insurer pointed to the video tape, information in various medical records, and the employee's deposition testimony. The WCCA (Judges Milun, Stofferahn and Hall) affirmed, noting that a determination of credibility is generally entrusted to the compensation judge. The WCCA noted that the judge could reasonably conclude that any differences in the employee's accounts of the injury were to be explained, in part, by the traumatic nature of the experience. Further, because medical records are created by providers, and not the patient, and therefore contain the providers' understanding and interpretation of the history given, the judge could reasonably conclude that minor inconsistencies between the various recitals of the medical history did not necessarily indicate that the employee provided inconsistent information to the different providers. The compensation judge found that the various medical histories were all "reasonably consistent," and the WCCA concluded that the various inconsistencies were not of a sufficient degree or nature to render the compensation judge's credibility determination clearly erroneous. Similarly, the WCCA rejected the employer and insurer's arguments regarding foundational issues with the opinions of the employee's physicians, noting that because the judge accepted the various medical histories as all reasonably consistent with the employee's testimony, there were no obvious foundational defects.

Moore v. Carley Foundry, File No. WC15-5812, Served and Filed November 20, 2015. The employee had a lengthy history of low back problems. In April 2014, he reported to his supervisor that he had low back pain, and that he thought it was due to wearing poorly fitting boots. The employee subsequently gave other versions of his low back pain, including that it developed over a period of time, and later, that it was a result of a specific lifting incident. Primary liability was denied. The employer and insurer's IME agreed that if the employee was lifting at work when his low back pain started, then his condition was work-related. However, the doctor went on to note the changing story regarding the cause of the condition, and concluded that the employee's first story regarding ill-fitting shoes was likely the most accurate, and that this would not have caused the employee's low back condition. Compensation Judge Marshall concluded that the employee failed to meet his burden of proving that he sustained a work-related injury. On appeal, the employee's attorney argued that the employee was a "misinformed man" who lost his claim because he initially thought that his tight work boots caused his condition. Because he was misinformed he did not understand the cause of his low back condition. The employer and insurer, however, noted that no advanced medical or legal training is necessary to tell a doctor the source and cause of one's pain. The WCCA (Judges Sundquist, Hall and Milun) affirmed, noting that the employee did not meet his burden of proving that his work activities were a substantial contributing factor to development of his low back problems. The WCCA further noted that the medical expert reports and deposition of the treating doctor did not adequately expose or discuss how the work activities might have caused the employee's condition. Finally, the WCCA affirmed the compensation judge's choice between conflicting medical opinions. *See Nord v. City of Cook.*

Cid v. Schwan's Global Supply Chain, File No. WC15-5801, Served and Filed December 3, 2015. The compensation judge found that the employee's perianal pain was not causally related to her work injury of the low back. However, the compensation judge also found that a neurological consultation was reasonable and necessary to determine if the perianal pain was causally related to the work injury. The employer and insurer appealed to the WCCA, arguing that because the employee's perianal pain was found not to be causally related to the work injury, then no further "rule-out" measures were reasonable, and the neurological consultation must be denied. The WCCA agreed with the employer and insurer and remanded the case to the compensation judge for clarification with regard to contradictory findings on causation.

Independent Contractor

Johnson, Dennis v. Stephen Alexander Eliason, File No. WC15-5815, Served and Filed January 15, 2016. The employee died in a car accident while driving one of Eliason's vehicles. His

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wife brought a petition for dependency benefits against Eliason, claiming the employee was an employee of Eliason, whereas the Special Compensation Fund claimed the employee was an independent contractor. The most important factor in the analysis was how much control the purported employer had over the "employee's" manner and method of performing the work. Testimony revealed Eliason would choose cars to purchase at auctions, but the employee would drive them off the auction site, make any repairs necessary to them either at Eliason's, at the shop yard, or at the employee's house, and that Eliason did not instruct the employee on what repairs to make. The employee kept his own record of his hours worked and did not have set days/hours for work, no training was given, and the employee used his own tools. No evidence presented suggested that Eliason paid for the employee's class C license to drive the vehicles. Eliason paid for the parts/gas for the vehicles, and sometimes reimbursed the employee for parts, but either party could terminate the relationship at any time. The employee worked as a contractor for other people, though not as a mechanic, and he earned credit for hours worked that allowed him to purchase cars from Eliason. Compensation Judge Kelly concluded that the employee was an independent contractor and denied benefits. The WCCA (Judges Milun, Stofferahn and Cervantes) affirmed, noting that substantial evidence supported the judge's decision.

Job Search

Jenkins v. Minnesota Vikings Football Club, File No. WC15-5825, Served and Filed December 10, 2015. The WCCA affirmed Judge Behr's findings that: 1) The Employee did not conduct a reasonable and diligent job search; and 2) There was no evidence of a medical disability. The Employee argued a job search was futile as he had been cut by three NFL teams. Judge Behr found the Employee should have looked for work outside the NFL. "Three teams rejecting the employee due to medical reasons may be enough evidence to establish that the employee's left knee injury was a substantial contributing factor in the inability to play football. But, it is not enough evidence to establish the inability to work." In *Senser v. Minnesota Vikings Football Club*, 42 W.C.D. 688 (WCCA 1989), this court applied the *Redgate* rule to another professional football player. We held then that "an employee is required to make a reasonable diligent effort to find employment within his physical limitations." And we conclude now that the employee has failed to meet his burden that his work injury medically limited him from work or looking for work.

Maximum Medical Improvement

GaNun v. Vinco, Inc., File No. WC15-5851, Served and Filed January 19, 2016. The WCCA affirmed Judge LeClair-Sommer's decision to discontinue TTD benefits and that a preponderance of evidence supported a work injury was no longer a substantial contributing factor to the employee's ongoing low back/sacrum/coccyx symptoms. The employee had fallen from a ladder and landed on his rear. He also had a history of pre-existing arthritic changes to the area of the admitted injury. Judge LeClair-Sommer also found the injury was temporary and superimposed on the underlying degenerative disc disease. She also found surgery with Dr. Stark was not reasonable or necessary. Judge LeClair-Sommer found the opinion of Dr. Raih to be more persuasive than that of Dr. Stark. She also didn't see how Dr. Stark's recommendation of SI surgery would resolve the employee's symptoms.

Medical Issues

Besic v. Wal-Mart Stores, File No. WC15-5790, Served and Filed September 2, 2015. The employee appealed Judge Brenden's denial of medical treatment. The self-insured employer cross-appealed the award of PTD benefits. The employee sustained an admitted low back injury in August 2009. She received extensive treatment including physical therapy and acupuncture. Ultimately, she started treating with Dr. Sandness, a physical medicine and rehabilitation specialist, and he took her off work and referred her for trigger point injections, additional physical therapy, and additional acupuncture. The employer denied the request for acupuncture. Subsequently, after additional treatment, the employee was given restrictions which the employer could not accommodate and the employee began job placement. Between August 2012 and October 2014, the employee continued to receive acupuncture treatment with no change in pain. Dr. Sandness opined that the employee was in too much pain to work. Dr. Norgard, on the other hand, opined that the employee could work without restrictions, and that the treatment with Dr. Sandness was not reasonable or necessary. The WCCA noted that the compensation judge stated that the employee had an extensive history of similar symptoms for which she received treatment. In addition, she had a history of work-related injuries and workers' compensation claims. However, at her deposition, she denied ever filing a claim prior to the 2009 injury. The Judge denied the employee's requests for reimbursement for

acupuncture treatment, as well as medications and other treatment, but determined that the employee was PTD. On appeal of the denial of treatment, the employee argued that ongoing treatment was appropriate because it relieved her symptoms and because she had a permanent injury. *Peterson v. Kandi Kourts*, 45 W.C.D. 528 (WCCA 1991). However, the WCCA noted that *Peterson* does not state that all treatment for a permanent injury must be considered reasonable and necessary. The WCCA noted that the question of reasonableness and necessity is one of fact which will not be overturned unless it is clearly erroneous and unsupported by the record as a whole. In this case, the judge outlined the incredible amount of conservative care that provided no lasting or significant relief. The WCCA affirmed the findings due to substantial evidence supporting the findings made regarding the denial of treatment. With regard to the cross-appeal, the WCCA affirmed that the employee is PTD. The employer argued that the QRC's testimony that the employee should not have been required to conduct a job search because she had no transferable skills, and his testimony that Dr. Sandness had taken the employee off work, was not supported by evidence. The employer additionally argued that Dr. Sandness' assessments and opinions were based on the employee's subjective reports of pain, and that neither the QRC nor Dr. Sandness were aware of the employee's past work injuries. The judge concluded that the employee's pre-existing conditions and restrictions from her work injury combined rendered her PTD. Further, the judge relied on Dr. Wengler's opinion that the employee could not be productive in any way given her physical findings, Dr. Sandness' opinion that returning to work was not realistic, and the QRC's opinion that she had no transferable skills. As a result, the WCCA concluded that the compensation judge had substantial evidence to find the employee permanently and totally disabled.

Cid v. Schwan's Global Supply Chain, File No. WC15-5801, Served and Filed December 3, 2015. The compensation judge found that the employee's perianal pain was not causally related to her work injury of the low back. However, the compensation judge also found that a neurological consultation was reasonable and necessary to determine if the perianal pain was causally related to the work injury. The employer and insurer appealed to the WCCA, arguing that because the employee's perianal pain was found not to be causally related to the work injury, then no further "rule-out" measures were reasonable, and the neurological consultation must be denied. The WCCA agreed with the employer and insurer, and remanded the case to the compensation judge for clarification with regard to contradictory findings on causation.

Killian v. State of Minnesota/ Department of Transportation, File No. WC15-5819, Served and Filed January 11, 2016. In 2009, the employee sustained an admitted left knee injury at work. After two surgeries, he complained of ongoing pain and, in 2012, began treating at United Pain Center. Over the course of several months, the employee was prescribed medications, including oxycodone, a narcotic medication. However, he continued to have pain. The self-insured employer discontinued payment of medical expenses, including expenses for treatment at United Pain Center and ongoing medications. The employee filed a claim petition in November 2013. An IME (Dr. Konowalchuk) found, in part, that the employee's ongoing use of narcotic medications was not in accordance with Minn. Rule 5221.6105. The compensation judge awarded benefits, including medical benefits. The self-insured employer appealed to the WCCA and argued that the compensation judge failed to consider Minn. Rule 5221.6105 regarding the use of narcotic medications. The WCCA determined that it was not clear whether the self-insured employer maintained that the treatment was not due to the injury, thereby relinquishing the ability to raise the treatment parameters as a defense. [Note that, per Minn. Rule 5221.6020, subp. 2, the treatment parameters do not apply to treatment of an injury after an insurer has denied liability for the injury.] Counsel for the self-insured employer indicated that the injury was admitted, but it was unclear to the WCCA whether causation for the treatment was specifically disputed. The case was remanded to the compensation judge to determine whether treatment parameter defenses were waived by the defense. Another issue in this case revolved around temporary partial disability benefits, which were awarded by the compensation judge, despite the lack of formal, written work restrictions. The self-insured employer appealed this issue, as well, but the WCCA upheld the compensation judge, finding that "written restrictions are not absolutely necessary to show that the employee has a disability," and his testimony regarding lost time sufficed.

GaNun v. Vinco, Inc., File No. WC15-5851, Served and Filed January 19, 2016. The WCCA affirmed Judge LeClair-Sommer's decision to discontinue TTD benefits and that a preponderance of evidence supported a work injury was no longer

a substantial contributing factor to the employee's ongoing low back/sacrum/coccyx symptoms. The employee had fallen from a ladder and landed on his rear. He also had a history of pre-existing arthritic changes to the area of the admitted injury. Judge LeClair-Sommer also found the injury was temporary and superimposed on the underlying degenerative disc disease. She also found surgery with Dr. Stark was not reasonable or necessary. Judge LeClair-Sommer found the opinion of Dr. Raih to be more persuasive than that of Dr. Stark. She also didn't see how Dr. Stark's recommendation of SI surgery would resolve the employee's symptoms.

Permanent Total Disability

Besic v. Wal-Mart Stores, File No. WC15-5790, Served and Filed September 2, 2015. The employee appealed Judge Brenden's denial of medical treatment. The self-insured employer cross-appealed the award of PTD benefits. The employee sustained an admitted low back injury in August 2009. She received extensive treatment including physical therapy and acupuncture. Ultimately, she started treating with Dr. Sandness, a physical medicine and rehabilitation specialist, and he took her off work and referred her for trigger point injections, additional physical therapy, and additional acupuncture. The employer denied the request for acupuncture. Subsequently, after additional treatment, the employee was given restrictions which the employer could not accommodate and the employee began job placement. Between August 2012 and October 2014, the employee continued to receive acupuncture treatment with no change in pain. Dr. Sandness opined that the employee was in too much pain to work. Dr. Norgard, on the other hand, opined that the employee could work without restrictions, and that the treatment with Dr. Sandness was not reasonable or necessary. The WCCA noted that the compensation judge stated that the employee had an extensive history of similar symptoms for which she received treatment. In addition, she had a history of work-related injuries and workers' compensation claims. However, at her deposition, she denied ever filing a claim prior to the 2009 injury. The Judge denied the employee's requests for reimbursement for acupuncture treatment, as well as medications and other treatment, but determined that the employee was PTD. On appeal of the denial of treatment, the employee argued that ongoing treatment was appropriate because it relieved her symptoms and because she had a permanent injury. *Peterson v. Kandi Kourts*, 45 W.C.D. 528 (WCCA 1991). However, the WCCA noted that *Peterson* does not state that all treatment for a permanent injury must be considered reasonable and necessary. The WCCA noted that the question of reasonableness and necessity is one of fact which will not be overturned unless it is clearly erroneous and unsupported by the record as a whole. In this case, the judge outlined the incredible amount of conservative care that provided no lasting or significant relief. The WCCA affirmed the findings due to substantial evidence supporting the findings made regarding the denial of treatment. With regard to the cross-appeal, the WCCA affirmed that the employee is PTD. The employer argued that the QRC's testimony that the employee should not have been required to conduct a job search because she had no transferable skills, and his testimony that Dr. Sandness had taken the employee off work, was not supported by evidence. The employer additionally argued that Dr. Sandness' assessments and opinions were based on the employee's subjective reports of pain, and that neither the QRC nor Dr. Sandness were aware of the employee's past work injuries. The judge concluded that the employee's pre-existing conditions and restrictions from her work injury combined rendered her PTD. Further, the judge relied on Dr. Wengler's opinion that the employee could not be productive in any way given her physical findings, Dr. Sandness' opinion that returning to work was not realistic, and the QRC's opinion that she had no transferable skills. As a result, the WCCA concluded that the compensation judge had substantial evidence to find the employee permanently and totally disabled.

Allan v. R.D. Offutt Co., File No. WC15-5883, Served and Filed November 12, 2015. This decision follows the decision of the Minnesota Supreme Court, issued August 31, 2015, which was discussed in the September 2015 *Workers' Compensation Update*. As a reminder, the Supreme Court determined that in order for PPD to be included for purposes of meeting the statutory thresholds for a PTD claim, the condition for which the PPD is rated must impact the employee's employability. In reaching this conclusion, the Supreme Court reversed the decisions of Compensation Judge Cannon and the WCCA, which both concluded that the employee's PPD, rated for loss of teeth, could be included in order to reach the PTD threshold requirements. On remand from the Supreme Court, the WCCA (Judges Stofferahn, Milun and Cervantes) simply reviewed the history of the matter and its previous decision, along with the Supreme Court's

determination that "a disability that contributes to the employee's permanent-partial-disability rating must affect the employee's ability 'to secure anything more than sporadic employment resulting in an insubstantial income.'" *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 37, 75 W.C.D. 401, 410 (Minn. 2015). The WCCA concluded that the issue of whether the PPD ratings used to meet the statutory threshold affected the employee's employability was not raised by the parties at the hearing, was not addressed by the compensation judge, or considered by the WCCA. Therefore, it remanded the matter to the compensation judge for an evidentiary hearing and indicated that the employee "must present evidence as to the functional loss represented by the ratings of permanent partial disability from the disability schedule which he claims may be used to meet the statutory threshold. The employee must also present evidence as to how any such functional loss affects the employee's ability 'to secure anything more than sporadic employment resulting in an insubstantial income,' considering the employee's age, training, experience, and work available in the community." *See Schulte*, 278 Minn. 79, 83, 153 N.W.2d 130, 133-134, 24 W.C.D. 290, 295.

Procedural Issues

Killian v. State of Minnesota/ Department of Transportation, File No. WC15-5819, Served and Filed January 11, 2016. In 2009, the employee sustained an admitted left knee injury at work. After two surgeries, he complained of ongoing pain and, in 2012, began treating at United Pain Center. Over the course of several months, the employee was prescribed medications, including oxycodone, a narcotic medication. However, he continued to have pain. The self-insured employer discontinued payment of medical expenses, including expenses for treatment at United Pain Center and ongoing medications. The employee filed a claim petition in November 2013. An IME (Dr. Konowalchuk) found, in part, that the employee's ongoing use of narcotic medications was not in accordance with Minn. Rule 5221.6105. The compensation judge awarded benefits, including medical benefits. The self-insured employer appealed to the WCCA and argued that the compensation judge failed to consider Minn. Rule 5221.6105 regarding the use of narcotic medications. The WCCA determined that it was not clear whether the self-insured employer maintained that the treatment was not due to the injury, thereby relinquishing the ability to raise the treatment parameters as a defense. [Note that, per Minn. Rule 5221.6020, subp. 2, the treatment parameters do not apply to treatment of an injury after an insurer has denied liability for the injury.] Counsel for the self-insured employer indicated that the injury was admitted, but it was unclear to the WCCA whether causation for the treatment was specifically disputed. The case was remanded to the compensation judge to determine whether treatment parameter defenses were waived by the defense. Another issue in this case revolved around temporary partial disability benefits, which were awarded by the compensation judge, despite the lack of formal, written work restrictions. The self-insured employer appealed this issue, as well, but the WCCA upheld the compensation judge, finding that "written restrictions are not absolutely necessary to show that the employee has a disability," and his testimony regarding lost time sufficed.

Standard Review

Sepulveda v. Aggressive Industries, Inc., File No. WC15-5832, Served and Filed January 12, 2016. In 2012, the employee fell at work and sustained an admitted injury to her right ankle and right knee. Wage loss and medical benefits were initiated. Once the ankle and knee began to heal several months later, the employee went on to treat for the right hip and low back, claiming that she felt pain in those body parts immediately after the injury occurred. The self-insured employer denied that the employee injured these additional body parts during her fall. An IME (Dr. Muley) found that the employee did not need any restrictions and, on that basis, the self-insured employer filed a Petition to Discontinue benefits. The compensation judge ruled that the self-insured employer established reasonable grounds to discontinue temporary partial disability benefits, the employee did not injure her right hip or low back in the fall, her 2012 injury was temporary and had resolved, and she required no work restrictions. The *pro se* employee appealed to the WCCA. The WCCA affirmed all of the compensation judge's findings, including that the employee was not credible, and indicated, "Assessment of a witness's credibility is uniquely within the province of the compensation judge" (citing *Brennan v. Joseph G. Brennan*, 41 W.C.D. 79, 82 (Minn. 1988)). The WCCA also ruled that there was substantial evidence in the record to support each of the compensation judge's findings.

Huderle v. Sanford Clinic Bemidji, File No. WC15-5837, Served and Filed January 26, 2016. The employee was a nursing assistant who sustained an admitted low back work injury. Temporary total disability benefits were paid until the employee returned to work at full wage, at which point the employer and insurer filed a NOID. An IME (Dr. Mark Carlson) opined that the employee sustained a temporary sprain/strain of her low back that resolved by approximately two months after the injury, she was at maximum medical improvement, she sustained no permanency, and no ongoing care was related to her work injury. Notwithstanding the IME opinion, the employee continued to seek medical treatment with a chiropractor, who opined that ongoing work restrictions, medical treatment, and permanency were causally related to the work injury. The employee filed a claim petition seeking various benefits, and a hearing was held before a compensation judge. The compensation judge weighed the competing medical evidence, and found that the work injury had resolved as of the date of the IME, and that no benefits were warranted after that date. The employee appealed. The WCCA affirmed, indicating that it generally upholds a compensation judge's choice between competing expert opinions, per the standard of review outlined in the *Nord* case, so long as the expert opinion is supported by substantial evidence.

Temporary Partial Disability

Killian v. State of Minnesota/ Department of Transportation, File No. WC15-5819, Served and Filed January 11, 2016. In 2009, the employee sustained an admitted left knee injury at work. After two surgeries, he complained of ongoing pain and, in 2012, began treating at United Pain Center. Over the course of several months, the employee was prescribed medications, including oxycodone, a narcotic medication. However, he continued to have pain. The self-insured employer discontinued payment of medical expenses, including expenses for treatment at United Pain Center and ongoing medications. The employee filed a claim petition in November 2013. An IME (Dr. Konowalchuk) found, in part, that the employee's ongoing use of narcotic medications was not in accordance with Minn. Rule 5221.6105. The compensation judge awarded benefits, including medical benefits. The self-insured employer appealed to the WCCA and argued that the compensation judge failed to consider Minn. Rule 5221.6105 regarding the use of narcotic medications. The WCCA determined that it was not clear whether the self-insured employer maintained that the treatment was not due to the injury, thereby relinquishing the ability to raise the treatment parameters as a defense. [Note that, per Minn. Rule 5221.6020, subp. 2, the treatment parameters do not apply to treatment of an injury after an insurer has denied liability for the injury.] Counsel for the self-insured employer indicated that the injury was admitted, but it was unclear to the WCCA whether causation for the treatment was specifically disputed. The case was remanded to the compensation judge to determine whether treatment parameter defenses were waived by the defense. Another issue in this case revolved around temporary partial disability benefits, which were awarded by the compensation judge, despite the lack of formal, written work restrictions. The self-insured employer appealed this issue, as well, but the WCCA upheld the compensation judge, finding that "written restrictions are not absolutely necessary to show that the employee has a disability," and his testimony regarding lost time sufficed.

Sepulveda v. Aggressive Industries, Inc., File No. WC15-5832, Served and Filed January 12, 2016. In 2012, the employee fell at work and sustained an admitted injury to her right ankle and right knee. Wage loss and medical benefits were initiated. Once the ankle and knee began to heal several months later, the employee went on to treat for the right hip and low back, claiming that she felt pain in those body parts immediately after the injury occurred. The self-insured employer denied that the employee injured these additional body parts during her fall. An IME (Dr. Muley) found that the employee did not need any restrictions and, on that basis, the self-insured employer filed a Petition to Discontinue benefits. The compensation judge ruled that the self-insured employer established reasonable grounds to discontinue temporary partial disability benefits, the employee did not injure her right hip or low back in the fall, her 2012 injury was temporary and had resolved, and she required no work restrictions. The *pro se* employee appealed to the WCCA. The WCCA affirmed all of the compensation judge's findings, including that the employee was not credible, and indicated, "Assessment of a witness's credibility is uniquely within the province of the compensation judge" (citing *Brennan v. Joseph G. Brennan*, 41 W.C.D. 79, 82 (Minn. 1988)). The WCCA also ruled that there was substantial evidence in the record to support each of the compensation judge's findings.

Temporary Total Disability

Contreras v. Jennie-O Turkey Store, Inc., File No. WC15-5822, Served and Filed November 24, 2015. The employee appealed Compensation Judge Behr's denial of TTD and medical benefits. Judge Behr found that the employee sustained injuries to several body parts and awarded some of the claimed benefits. However, he denied a period of claimed TTD, concluding that the employee refused a suitable job offer that she was physically capable of performing, and therefore, was not entitled to TTD based upon Minn. Stat. §176.101, subd. 1(i), which indicates that TTD benefits shall cease if an employee rejects a suitable job offer. The WCCA (Judges Cervantes, Stofferahn and Hall) vacated this portion of the judge's Findings and Order, noting that this provision only applies if a claimant is actually being paid TTD at the time of the cessation event. In this case, the employee was not receiving or being paid TTD at the time of the job offer, and therefore, this statutory provision does not bar future receipt of TTD benefits.

Vacate Awards

Wick v. American General Finance, File No. WC15-5813, Served and Filed December 4, 2015. The Employee met the *Fodness* factors for showing he had an "unanticipated and substantial change" in his condition, because his diagnoses before and after the stipulation had changed, he had been working prior to signing the stipulation, but became unable to work after the stipulation, he was assessed with additional PPD after the stipulation, his doctor did not recommend any significant additional medical treatment prior to the stipulation, but did recommend additional surgeries after the stipulation, and the Employee's doctors stated the Employee's work injury was still a substantial contributing factor to the Employee's post stipulation condition.

Larson v. Michigan Peat Company, File No. WC15-5834, Served and Filed December 17, 2015. The employee sustained an admitted low back injury in 1988. He subsequently underwent two low back surgeries at L4-5. In 1993, the employee entered into a stipulation for settlement that closed out all benefits, with the exception of non-chiropractic medical treatment of the low back. A PPD rating of 16 percent was included. From 2006 to 2012, the employee underwent five additional surgeries of lumbar levels between S1 and L3. He applied for SSDI benefits in 2009, and was found to be disabled as of 2006. In May 2015, he underwent an MRI that revealed a potential mass effect at the left S1 nerve root. Subsequently, the employee sought to vacate the 1993 stipulation, on the basis that he could not have anticipated the spread of his condition to different lumbar levels. The WCCA ruled that, in determining whether to vacate an award based on a change in condition, the *Fodness* factors apply: 1) change in diagnosis; 2) change in the employee's ability to work; 3) additional permanent partial disability; 4) necessity for more costly and extensive medical care than previously anticipated; and 5) causal relationship between the injury covered by the settlement and the employee's current condition. The WCCA found that the employee met all factors, and though he supplied no additional PPD rating, it was determined that he established the other factors sufficiently enough to show that a change in permanency must have occurred.

Peterson, Jackie v. Long Term Health Care Associates, File No. WC15-5828, Served and Filed January 11, 2016. The Employee met the *Fodness* factors, showing there was an unanticipated and substantial change in his condition. Less influence was placed on the need for medical treatment, and the causal relationship factor was not in dispute, but all other factors were met. ✦

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