

MINNESOTA WORKERS' COMPENSATION UPDATE

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TAMING THE BEAST: PROPOSED RULES REGARDING LONG-TERM TREATMENT WITH OPIOID ANALGESIC MEDICATION

by Alicia J. Smith



It is an understatement to say that the management of workers' compensation matters involving chronic pain is often highly complex. This fact is largely due to the widespread prescription of—and often addiction to—opioid medications. The workers' compensation community can attest to the devastating effects that long-term opioid use and abuse can have, not only on injured workers and their families, but on the system as a whole. Too often, we see cases of employees who sustain relatively minor injuries which, with the continued use of powerful prescriptions, turn into intractable problems. Continual use of opioid medication can negatively affect a worker's ability to tolerate pain, leading to higher dosages, diminishing returns, and bigger bills. Therefore, it is no surprise that workers' compensation practitioners in several states, including Minnesota, are formulating more rigorous treatment policies to curb the many negative consequences associated with opioid dependence.

Take, for example, the case of *Bowman v. A & M Moving & Storage Co.*, File No. WC13-5551 (WCCA August 14, 2013). In *Bowman*, the issue for the WCCA was whether the deceased employee's death due to oxycodone toxicity was causally related to his work-related low back injury. In the months before the employee's death, it was discovered that he had a previous history of alcohol abuse. His treating doctor even noted a concern with the employee's use of narcotics. Nevertheless, his doctor continued to prescribe oxycodone, among other prescriptions. After the employee passed away, the medical examiner's office evaluated his oxycodone toxicity, and it found that typical levels of oxycodone were only one-tenth of the level found in his blood at the time of death. In the end, the WCCA affirmed the ruling of the compensation judge that the employee's death due to opioid toxicity was due to the work injury. This decision was summarily affirmed by the Minnesota Supreme Court on January 13, 2014.

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TAMING THE BEAST: PROPOSED RULES REGARDING LONG-TERM TREATMENT WITH OPIOID ANALGESIC MEDICATION *continued*

In Minnesota, the current workers' compensation treatment parameters contain Minn. Rule 5221.6105, Subpart 3, which governs opioid analgesics. It lists the most common opioids: codeine, hydrocodone, levorphanol, methadone, morphine, hydromorphone, and oxycodone. The rule provides a relatively rudimentary outline of how opioids can be initially prescribed, with just a few instructions by which they can be re-prescribed. Basically, treatment with opioid medications can begin on a trial basis with the lowest clinically effective dose of a generic brand, and then be re-prescribed upon clinical evaluation at different points of time following the date of injury. For several years, we have seen pain management bills run rampant, and the need for increased oversight of opioid treatment has become increasingly clear.

The Minnesota Department of Labor and Industry (DOLI) is in the process of adopting revisions to the workers' compensation treatment parameters that govern long-term treatment of chronic pain with opioid medications. The most notable proposed addition is of a new section, Minn. Rule 5221.6110, which is very aptly titled "Long-Term Treatment with Opioid Analgesic Medication." This rule sets forth more stringent requirements for health care providers in administering these prescriptions among injured workers. The definitions in Minn. Rule 5221.6040 would be consequently updated, and the current Minn. Rule 5221.6105, Subpart 3 would be revised to add that "continued prescription of" opioid analgesics must comply with the new long-term opioid treatment rule.

Unlike the current rule, the new rule contains mandatory criteria for initiating a prolonged opioid treatment plan. Criteria include: the worker is unable to maintain function without long-term use of opioid medications; all other reasonable medical treatment options have been exhausted; the patient does not have a history of failing to comply with treatment or failing to take medication as prescribed; the patient does not have a current substance use disorder; and, a drug test confirms that the worker is not using any illegal substances. The new rule also offers guidance for determining whether long-term opioid treatment would be contraindicated, such as when there is a relevant mental disorder or suicide risk, the patient has poor impulse control, and the patient regularly engages in activity that would be unsafe in combination with use of opioid medications. A risk assessment must be completed before a long-term opioid treatment plan can be initiated, so as to determine whether such treatment will, in fact, be contraindicated.

Once the long-term opioid plan is actually initiated, there are additional parameters for the administration of the plan. The new rule requires that long-term treatment with opioid medication must be part of an integrated treatment program, ensuring that recovery from injury is an active process. Fixed schedules of dosing must be followed, and only the prescribing health care provider or a designated proxy may write opioid prescriptions. Along the way, there are several hoops through which a provider must jump in order to continue prescribing these medications. Namely, the health care provider must assess the patient for possible negative side-effects or addiction at each follow-up visit, adherence to the treatment program must be monitored at each visit, and in the event that there is more than one instance of unreported opiate prescriptions from other providers, a schedule to taper dosages must be implemented. These critical features of the new rule will force health care providers to scrutinize their work when it comes to people most at risk for dependence, and will dramatically reduce the ad nauseam re-prescription of opioids that we too often see in our cases today.

As is the case with every rulemaking initiative, DOLI published a Statement of Need and Reasonableness (SONAR) with regard to these proposed rule changes. The SONAR mentions that the rule changes will affect workers' compensation stakeholders across the state, from workers and their health care providers who administer opioid medications, to the employers and insurers who pay for them. While employers and insurers have applauded these proposed changes to the treatment parameters, the SONAR addresses that some providers may be less-than-enthused about the additional layers of assessment that will be required in the administration of opioid medications. Providers may cite the mandate for continuous evaluation of opioid use as a cause for additional expense. However, the SONAR makes clear that the rules do not require any provider to spend money to comply with the rules—compliance will merely require knowledge and attention.

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Overall, the proposed new workers' compensation treatment parameters on long-term opioid treatment will be beneficial not only for employees, but also for employers and insurers, which is a welcome bridge over our often-existent divide. The comment period for this rulemaking initiative ended on April 15, 2015. DOLI is currently submitting information relative to the new rules to the Office of Administrative Hearings (OAH). The OAH will have 14 days to review the information. Assuming it approves, it will then submit the rules to the Secretary of State, and the Revisor will prepare a Notice of Adoption. The rule becomes effective five working days after the Notice of Adoption is published.

A comprehensive list of information related to the proposed rules and the adoption process can be found at: http://www.dli.mn.gov/PDF/docket/5221_6020_8900TrtmPar_2.pdf.

2015 WORKERS COMPENSATION SEMINARS

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

Thursday, June 18, 2015
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Contact Marie Kopetzki at 612 225-6768 or email
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CASE LAW UPDATE

DECISIONS OF THE MINNESOTA SUPREME COURT

ARISING OUT OF

Arrowhead Senior Living Community v. Kainz, File No. A14-1521 (Minn. March 4, 2015). The employee fractured her ankle on a staircase at her workplace. The issue before the compensation judge was whether her injury “arose out of” her employment. Compensation Judge Arnold concluded that it did, and awarded benefits. The WCCA affirmed, applying its “work-connection test,” citing its old decision in *Dykhoff*. The Court had stayed the employer’s appeal while it considered the *Dykhoff* appeal. After reversing *Dykhoff*, the Court remanded *Kainz* to the WCCA for further consideration. On remand, the WCCA again affirmed, this time applying the “increased risk” test set forth in *Dykhoff*. In doing so, the WCCA relied on the compensation judge’s finding that no handrails were on that portion of the stairway where the employee injured her ankle. The Court independently reviewed the evidence and determined that that finding was “manifestly contrary to the evidence.” It noted that the photographic evidence conclusively showed that the handrails extended all the way down the staircase. The WCCA also relied on the employee’s testimony that the staircase was “kind of steep” to determine that there was an increased risk. However, there was no evidence that the stairs were steep, nor did the judge make such a finding. Because the WCCA’s decision was “manifestly contrary to the evidence,” the Court (Justice Stras) reversed. It remanded the case to the compensation judge for further proceedings consistent with the order.

DECISIONS OF THE MINNESOTA COURT OF APPEALS

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

DECISIONS OF THE MINNESOTA WORKERS' COMPENSATION COURT OF APPEALS

ARISING OUT OF

Dennis v. The Salvation Army, File No. WC14-5763, Served and Filed April 8, 2015. The employee worked as a cook at The Salvation Army and sustained an admitted injury to his left knee when he slipped and fell on a path covered with slushy snow. The Salvation Army had two buildings, one where the employee cooked and served food, and another building, across the street from the first building, consisting of rooms for programs, a garage and a kitchen storage area. It had snowed the night before and was still snowing. The employee went on a paid break after serving food at the first building. He crossed the street to the second building to smoke at one of the outside designated smoking areas. The street had not been plowed, and the sidewalk in front of the second building had not been shoveled. The employer was responsible for snow removal on the sidewalk. Instead of walking up the driveway to the second building, the employee walked in a v-shaped path, made by other pedestrians, to get through the snow on the street curb. When he stepped onto the path on the curb, he slipped and fell, injuring his left knee. Compensation Judge Mesna held the injury arose out of and in the course of his employment by applying the "street risk" doctrine. The employer and insurer appealed and the WCCA (Judges Stofferahn, Hall and Cervantes) affirmed, holding that

the employee's presence on the street was due to his employment. *Dykhoff* did not abolish the "street risk doctrine," or require the employee to prove a different or greater risk than the public in crossing a snowy street while on break. Indeed, the Supreme Court in *Dykhoff* commented on the "street risk doctrine." The factors of the street risk doctrine were met by the facts of the case. The employer's act of creating designated smoking areas for employees extended the "usual workplace" for its employees. The WCCA also held the employee's smoking break was not sufficient to remove him from the course of his employment.

Shire v. Rosemount, Inc., File No. WC14-5739, Served and Filed April 22, 2015. The employer held annual employee appreciation events for its employees, scheduled by shift and department. The online employee handbook indicated that attendance at these events 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. 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 anticipated taking some time off when the 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 the physical activities, most did. The employee injured his right ankle while he was participating

in the laser tag competition. 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 the employee was thus awarded workers' compensation benefits. On appeal, the only issue was whether the employee's participation in 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 (WCCA 2005) and *Paskett v. Imation Corp.*, File No. WC12-5494 (WCCA Jan. 3, 2013) stand for the proposition 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.'" Additionally, the employer and insurer argued 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.

Karstad v. Myles Lorentz, Inc., File No. WC14-5775, Served and Filed May 20, 2015. The employee worked for the employer as a truck driver in a seasonal position. He was laid off from work for the season on October 5, 2012, although he understood that if the employer had further contracts, there was a possibility that he might be called back to work for another job assignment that fall. He further anticipated that he would be called back by the employer in the spring, although there was no guarantee. Drivers were required to furnish some tools and supplies to carry in their assigned truck, including a CB radio. Some employees had cleaned out their trucks immediately when laid off in the fall, while others left supplies in their assigned truck over the winter in anticipation of returning to work in the spring. There was no requirement that the personal items be removed while the trucks were parked over the winter. When the employee was laid off, he initially left his personal supplies in his assigned truck. After a few weeks, he concluded that he was not going to be called back to any further work that fall. On October 25, 2012, he went to the employer's truck yard to retrieve his personal items. No one had contacted him to request that he clean out his truck, and he was not being paid while doing so. When he arrived at the truck yard, he obtained the keys to his assigned truck, which was parked by a maintenance bay. The employee's radio used an antenna

that was clipped on the passenger side rear view mirror. While he was taking his antenna off of the truck, he fell and injured his shoulder. Compensation Judge Behounek determined that the employee was present at the employer's facility solely to retrieve his personal items and that his injury did not arise out of and in the course of his employment. The WCCA (Judges Hall, Stofferahn and Cervantes) affirmed. It was undisputed that the employee's services for the employer had been suspended by layoff more than three weeks prior to the injury. The WCCA rejected the employee's argument that the employer's actions in allowing him access to its truck yard should be construed as demonstrating an ongoing employment relationship. Even if the WCCA were to accept the employee's argument of a continuing employment relationship during the layoff, a primary consideration in cases dealing with injuries sustained outside of the employee's regular schedule and duties is whether the employee's actions at the time of the injury were in advancement of the employer's interests. *See Swenson*. In this case, the employee was not paid following the layoff, he was not asked to come in and clear out his belongings from the truck, and the employer did not exercise any control over his conduct in retrieving his belongings from the truck. There was no evidence that his actions furthered the employer's interests, as the presence of the employee's belongings in the truck did not interfere with the employer's business. The activity was not sufficiently incidental to the employment to bring the injury within the course of the employment.

ATTORNEY FEES

Alli v. Great Pacific Enterprises, File No. WC14-5764, Served and Filed May 19, 2015. The employee sustained an admitted low back injury at work on

January 29, 2014. On July 3, 2014, the employee's treating provider recommended decompression-fusion surgery. The requested surgery was authorized by the insurer on July 22, 2014. On July 31, 2014, the employee retained the Law Office of Donald F. Noack to represent her in her workers' compensation claims. On August 4, 2014, the employee's attorney filed both a Request for Certification of Dispute with the Department of Labor and Industry, requesting approval of the recommended surgery, as well as a Claim Petition with the Office of Administrative Hearings. DOLI denied certification on August 8, 2014, indicating that the surgery had already been approved. On August 18, 2014, the employee's attorney filed a Statement of Attorney Fees in the amount of \$16,825.00, but did not serve the employer or counsel for the employer and insurer. On September 15, 2014, Compensation Judge Marshall signed an attorney fee order, granting the employee's attorney's request for fees. The entry of the order was the first notice counsel for the employer and insurer had regarding the request for fees. The employer and insurer's attorney objected and requested an on-the-record hearing on the issue. Judge Marshall instead held an off-the-record telephone conference with the parties and subsequently affirmed his order. The WCCA (Judges Cervantes, Stofferahn and Hall) reversed and remanded. The WCCA reiterated that it has broad discretion in considering attorney fees under Minn. Stat. §176.081, Subd. 1(c). The WCCA noted that the employee's attorney admitted that he was aware that the employer and insurer were represented by counsel subsequent to the filing of the Statement of Attorney Fees, but provided no explanation as to why he did not then serve that counsel with the Statement as required under

Minn. R. 1415.0700, Subp. 2. Further, the WCCA noted that the employee's attorney failed to provide any evidence to show that there was a "genuinely disputed" surgical benefit, or that he provided legal representation that resulted in the procurement of that benefit, at the time the surgery was approved, especially in light of the undisputed fact that the surgery was approved prior to the time that the employee retained her attorney. In addition, the WCCA determined that the issue of fees was not even ripe, as the requested surgery has not yet occurred. The WCCA reversed the award of fees. Finally, the WCCA found that "it appears that the employee's attorney may have made material misrepresentations in this case," noting that "the employee's attorney's conduct in this matter raises questions about his law practice, if not ethical concerns." As no specific findings were made by the compensation judge, the WCCA could not conclude that Judge Marshall relied on the apparent misrepresentations, but did remand the matter for a determination as to whether the employee's attorney participated in the proceedings in good faith.

CAUSAL CONNECTION

Niemi v. MA Mortenson, File No. WC14-5679, Served and Filed December 4, 2014. For a summary of this case, please refer to the Medical Issues category.

EARNING CAPACITY

Middlestead v. Range Regional Health Services, File No. WC14-5723, Served and Filed March 3, 2015. The employee worked as a nurse in intensive care and sustained an admitted injury to her back after a patient stumbled when trying to stand up from the commode without help, and fell

into the employee's back. After a few different attempts to return to work, the employee requested a transfer to an on-call, seasonal per diem registered nurse position and decided she wanted to return to school. She testified she could have worked in the on-call position full time, but cut back her hours to take time to recover. She began working with a QRC, who reported the employee did not want to work more than 24 hours a week because of her schooling. She subsequently accepted a case manager position with the employer with an \$8.00 per hour wage loss. Compensation Judge Baumgarth held the employee's injury was a substantial contributing factor to her disability, that she was entitled to temporary partial disability benefits, and that it was also clear the employee returned to school because her doctors could not resolve her symptoms, schooling would allow her to find a job less demanding than her job as a nurse in intensive care, and the burdens of returning to school to find such a job made a reduced work schedule attractive to the employee. The Compensation Judge awarded TPD benefits. The WCCA (Judges Milun, Hall and Cervantes) agreed with the judge that the employee had ongoing restrictions related to the work injury. However, it also noted that there was evidence that at certain times, the loss in earning capacity may have been due to the employee's pursuit of education, as there were full-time hours available within her restrictions. The WCCA reversed and remanded the TPD finding, holding that the issue the judge should have addressed was when, whether, and to what extent, the employee's reduced earnings and/or hours at work were attributable to her decision to return to school instead of being attributable to her work-related disability.

ESTOPPEL

Mach, Jr. v. Wells Concrete Products Co., File No. WC14-5710, Served and Filed November 4, 2014. The employee sustained an admitted leg injury and alleged a consequential RSD condition on August 6, 2008. A Claim Petition was litigated in 2010, with a findings and order issued in 2011. One of the requests in the Claim Petition was for implantation of a neurostimulator. Compensation Judge Arnold denied the requested neurostimulator, and that decision was upheld. On October 7, 2013, the employee filed a medical request, requesting replacement of the spinal cord stimulator (it is not discussed who ultimately paid for the original stimulator), based upon a July 23, 2012, medical opinion of Dr. Vollmar that the stimulator was reasonable, necessary, and related. The employer and insurer argued the claim was barred by estoppel and/or res judicata, as a finding on the issue of a neurostimulator was entered in 2011. Compensation Judge Arnold agreed and dismissed the employee's medical request. The WCCA (Judges Wilson, Milun and Cervantes) reversed. The WCCA determined that Judge Arnold had made no findings in 2011 regarding whether the employee's work injury was temporary, had healed, or had resolved, and that the 2011 findings and order dealt only with claims for medical expenses prior to January 5, 2011. The instant request was for treatment subsequent to that date, and as no finding of whether the work injury was temporary, had healed, or had resolved had been made, the new claim was not barred by either estoppel or res judicata.

MEDICAL ISSUES

Willy v. Northwest Airlines Corporation, File No. WC14-5709, Served and Filed December 3, 2014. The employee appealed from the compensation judge's denial of medical mileage. She sustained three injuries to her left knee between 1997 and 1999. Between 1999 and 2009, she lived in Minnesota and received medical treatment within 100 miles of her home. She was paid medical mileage for these visits. In 2009, the employee moved to eastern Wisconsin. She used a rental car to drive hundreds of miles to her providers in Minnesota, and claimed approximately \$18,000 in medical mileage from 2010 to 2012. The employee insisted that she trusted her own doctors and she did not want to create jurisdictional confusion by treating in Wisconsin. The compensation judge denied the mileage claim, noting that the employee failed to justify the claim as reasonable and failed to pursue similar medical care closer to her home. The WCCA (Judges Stofferahn, Hall and Milun) affirmed the ruling that the employee failed to prove that her total mileage claim was reasonable. However, citing *Kuhnau v. Manpower, Inc.*, slip op. (WCCA December 16, 2013), which noted that the insurer must provide "whatever transportation assistance is reasonably required to allow the employee to obtain proper treatment," the WCCA remanded the issue for determination of whether at least some of the mileage claim was reasonable. The WCCA also cautioned that use of a rental car does not necessarily preclude a mileage claim. Finally, the employee argued that denial of mileage is an infringement of her constitutional right to travel, but the WCCA indicated that it does not have jurisdiction to rule on issues of constitutionality.

Niemi v. MA Mortenson, File No. WC14-5679, Served and Filed December 4, 2014. In 1996, the employee sustained an admitted crush injury of the left big toe. He had surgery on his toe and was soon diagnosed with reflex sympathetic dystrophy (RSD), today known as complex regional pain syndrome (CRPS). This diagnosis was confirmed in an IME with Dr. Barnett. Later in 1996, the employee's treating physician indicated that sympathetic block injections are the treatment of choice for RSD. The employee refused the injections because he feared needles. Throughout the next year, multiple treating doctors recommended the injections, and the employee was even offered counseling to address his fear of needles. The employee underwent another IME with Dr. Lohman in 1997. He, too, concluded that the employee had RSD and, without the injections, his prognosis was poor. The window of time in which this procedure would be successful eventually passed. In 2010, at his attorney's request, the employee was examined by Dr. Fleeson. Dr. Fleeson opined that the RSD had spread and the employee had RSD from the neck down—essentially, of the entire body. An IME with Dr. Vorlicky was conducted. Dr. Vorlicky concluded that the employee did have RSD of the left lower extremity, but not on any other body part. The issues for the compensation judge were whether the employee unreasonably refused treatment, whether the RSD had migrated, whether the employee was entitled to additional permanent partial disability benefits, and whether the employee was permanently and totally disabled. The employee's attorney attempted to argue that Dr. Vorlicky's opinion was so flawed that it lacked foundation, but Compensation Judge Baumgarth rejected that argument and instead found that the employee lacked

credibility. Thus, the judge held that the RSD had not spread, and the employee was not entitled to any award. The WCCA (Judges Cervantes, Wilson and Milun) affirmed. Additionally, the WCCA explored the legal standard for RSD. Per *Ellsworth v. Days Inn*, slip op. (WCCA June 8, 2007), to establish a diagnosis of RSD, it must "persist concurrently" over a period of time, as opposed to a moment of time. A diagnosis of RSD must also be confirmed by objective findings, not the employee's subjective complaints. Here, the employee simply failed to prove that the RSD had spread.

Comment: An interesting point about this case is that both the compensation judge and the WCCA implicitly found that the employee's refusal of treatment all the way back in 1996 was unreasonable, even though some may argue that injections are an invasive procedure that the employee has a right to reject. Despite that this was a case in which RSD was both diagnosed and admitted, the defense successfully narrowed the nature and extent of the condition.

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Bantz v. H.O.M.E.S., Inc., File No. WC14-5721, Served and Filed December 23, 2014. The employee was involved in a motor vehicle accident while working for the employer and sought medical treatment for her cervical and lumbar spine, right hip, right elbow, and left shoulder. Eventually, her treating doctor recommended that she receive a decompression and fusion surgery. The employer/insurer denied the surgery based on their independent medical examiner's findings that the employee's condition was unrelated to her work-related injury and that the employee did not need any additional medical treatment in relation to her work-related injury. The IME also noted that the surgery would not be related to her work-related injury and if done, should only be done if the employee stopped smoking. The IME also included a supplemental report that referenced numerous studies and medical journal articles about the adverse effects smoking has on spinal fusion surgeries. Compensation Judge Mesna determined that the work injury was a substantial contributing factor to the employee's condition and her need for surgery. He noted that the employee "should stop smoking," but a failure to stop smoking would not preclude the employee from being able to have the surgery. The WCCA (Judges Hall, Wilson and Cervantes) affirmed, holding that there was sufficient evidence for the judge to determine that the proposed decompression and fusion surgery was reasonable and necessary, and also causally related to a work-related injury and that a fusion surgery can be successful even with a patient who smokes.

Rivera v. Cargill Kitchen Solutions, Inc., File No. WC14-5726, Served and Filed March 17, 2015. The employee sustained a work-related hernia injury and required surgery.

Before the surgery could be done, the employee's diabetes had to be medically controlled. Compensation Judge Brenden denied payment for the diabetes treatment, holding that it was not causally related to the work injury. The WCCA (Judge Cervantes, Stofferahn and Hall) reversed, ruling that the diabetes treatment was specifically undertaken in the process of curing the effects of the admitted work injury through surgery. See *Bauer; Hopp*.

NOTICE

Jaffer v. Holiday Stationstores, Inc., File No. WC14-5753, Served and Filed March 17, 2015. The employee sustained a left shoulder rotator cuff tear from a work incident where boxes fell off a shelf. The incident occurred on March 22, 2013. The FROI noted the employer was notified of the injury on July 9, 2013. The employer and insurer denied having actual notice of the work injury. The employee reported he told a night manager about the incident on the night of the injury. The employer and insurer disputed this with evidence of time stamps indicating the night manager the employee claimed he told was not working that night. Compensation Judge Rieke found the time stamp data was difficult to interpret and found the employee's testimony more credible and found he had reported the injury on the date it occurred. In the alternative, Judge Rieke found the employee reported the injury on May 28, 2013, to an assistant manager, and that any delay in reporting was due to mistake of fact as the employee did not realize the significance of his injury until he returned to work on May 28, 2013. The WCCA (Judges Milun, Stofferahn and Hall) affirmed Judge Rieke's decision noting the 180 day requirement is broad, and failure to recognize the seriousness of the

injury is a reason for giving notice later. The issue of prejudice against the employer and insurer was brought up, but no evidence of prejudice was submitted by the employer and insurer.

PERMANENT PARTIAL DISABILITY

Mogard v. Land O' Lakes, File No. WC14-5776, Served and Filed April 28, 2015. The employee sustained an admitted low back injury on August 30, 1978. Subsequently, he underwent numerous additional treatments to his low back, including multiple surgeries. A Stipulation for Settlement was entered into in 1998, closing PPD to the extent of 25% of the spine. The employee's symptoms worsened in 2010, and he was diagnosed with a severe degenerative L4-5 disc with spondylolisthesis and a degenerated L5-S1 disc with retrolisthesis. The employee ultimately underwent fusion surgery between L4 and S1 in 2011. Following the surgery, consequential left foot and ankle pain and radiculopathy was alleged. A PPD rating of 23% of the whole body was assigned. That rating was converted to a pre-1984 PPD rating for a total of 32.39% of the spine pursuant to Minn. R. 5223.0250. The employer and insurer discounted the rating by the 25% previously settled pursuant to the 1998 Stipulation, and paid the remaining 7.39%, for a total PPD benefit of 32.39% of the spine. The employee's medical expert, Dr. Wengler, assigned an additional 15% PPD rating based on the subsequent left foot and ankle issues. The employee further claimed that he was entitled to an additional 15% under Minn. Stat. §176.101, Subd. 3 (46) (1978) which provided "[i]n cases of permanent partial disability caused by simultaneous injury to two or more members, the applicable schedules in this subdivision shall be increased

by 15 percent.” The employee claimed a total 42% PPD rating to his back, a 15% PPD rating for his left leg, and a 15% PPD rating under the “simultaneous injury factor.” Compensation Judge Wolkoff denied the claim for 15% PPD to the left leg and also denied any additional PPD under the simultaneous injury factor. The WCCA (Judges Sundquist, Stofferahn and Cervantes) affirmed. The WCCA held that the judge has wide latitude in determining the permanency ratings of pre-1984 injuries, and that his adoption of the 23% rating as opined by two separate providers was within his discretion. The WCCA also found that the judge’s denial of the claim for any PPD for the left leg was supported by substantial evidence. Finally, the WCCA affirmed the determination that the simultaneous injury factor in Minn. Stat. §176.101, Subd. 3 (46) (1978) did not apply in this matter. Judge Wolkoff determined that the statute was intended to address simultaneous injury to multiple body parts resulting from a single event, that the left leg symptoms were not part of the original 1978 injury, and that the 23% rating to the low back included the left leg condition. The WCCA found that these determinations were reasonable given the evidence.

REHABILITATION

Hoffman v. Timberline Sports N Convenience, File No. WC14-5754, Served and Filed January 6, 2015. The employee sustained a right knee injury in the form of an aggravation of a preexisting degenerative condition and had a temporary consequential injury to her left foot. Compensation Judge

Wolkoff found that the employee had no employment restrictions from the work injury and, on that basis, he denied the employee’s claim for a rehabilitation consultation. The WCCA (Judges Stofferahn, Cervantes and Milun) affirmed, ruling that an employee must at least have restrictions to be entitled to a rehabilitation consultation, and “[a] determination that the employee has completely recovered from the work injury or has no employment restrictions from the injury may defeat a claim for a rehabilitation consultation” (citing *Judnick v. Sholom Home West*, slip op. (WCCA Aug. 4, 1995); *Brew v. College of St. Scholastica*, slip op. (WCCA Aug. 5, 2003); *Brownell v. Hibbing Taconite Mining Co.*, slip op. (WCCA April 8, 2010)).

Sebghati v. Life Time Fitness, Inc., File No. WC14-5740, Served and Filed February 6, 2015. Compensation Judge LeClair-Sommer determined that the employee sustained a work injury that resulted in headaches and a cervico-disequilibrium condition, but she had not sustained a traumatic brain injury, concussion, post-concussion syndrome, visual symptoms, and other ailments. The judge further found that the QRC’s (Stanley Sizen) services were not reasonable or necessary for about a seven month period. The WCCA (Judges Milun, Stofferahn and Hall) held that the choice of expert opinion on the nature and extent of the injury was in the discretion of the compensation judge and Judge LeClair-Sommer’s choice of expert opinion was not unreasonable. The WCCA also affirmed the decision with regard to the rehabilitation services. The QRC seemed to be aggressive with the doctors, as he brought medical literature to support his own diagnoses of

the employee, and the medical records indicated one doctor “resented” being pressured by the QRC. The compensation judge found that the employee had already been returned to work, the QRC services were focused on obtaining medical treatment and coordinating litigation, the quality of services compared to the cost were inadequate, and the direction of the services was not to get the employee to suitable work. After an administrative decision that ended rehabilitation benefits, the QRC continued to provide benefits. The employee was released to work and the QRC claimed he was providing “minimal” medical monitoring, but his billing reflected that he was preparing for the formal hearing.

RES JUDICATA

Mach, Jr. v. Wells Concrete Products Co., File No. WC14-5710, Served and Filed November 4, 2014. For a summary of this case, please refer to the Estoppel category. ♦

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