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ARTHUR CHAPMAN

KETTERING SMETAK & PIKALA, P.A.

ATTORNEYS AT LAW

Minnesota Workers' Compensation Update

In This Issue

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New Faces in the Arthur Chapman Workers' Compensation Group

Meet John Foss, Logan Sharp, and Inayah Smith-Marsette

John practices law in Minnesota and Wisconsin. For the past seven years, he represented applicants in Social Security disability and Wisconsin worker's compensation claims. John received his Juris Doctor and Masters in Business Administration from the University of St. Thomas. Prior to attending graduate school, he acquired his Bachelor Degree from the University of St. Thomas, where he majored in Finance and Business Law, with a minor in Economics. John is currently a member of both the Minnesota and Wisconsin Bar Associations, Wisconsin Association of Worker's Compensation Attorneys, and Hudson Lion's Club. You can reach John at JRFoss@ArthurChapman.com or (612) 375-5948.

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About Our Attorneys

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

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New Faces in the Arthur Chapman Workers' Compensation Group *(continued)*

Meet John Foss, Logan Sharp, and Inayah Smith-Marsette

Logan joined our team last summer. In addition to workers' compensation, he also has experience in estate planning and criminal defense. Logan received his Bachelor of Arts degree from Minnesota State University, Mankato with a double major in Law Enforcement & Political Science. He received his JD from Mitchell Hamline School of Law. Logan enjoys sports and helps coach hockey camps. He also enjoys spending time outdoors fishing, hunting, and boating on the lake. You can reach Logan at LRSharp@ArthurChapman.com or (612) 375-5929.

Inayah is the most recent attorney to join our team. She graduated from Delaware State University, where she earned her Bachelor of Arts in Criminal Justice and a Minor in Forensic Science. Prior to law school, Inayah worked in Compliance for two large financial institutions. She earned her Juris Doctor from Thomas M. Cooley Law School in December 2021. During her last semester in law school, Inayah clerked for Franklin Reed, Referee of Hennepin County District Court. This experience inspired her to accept a Law Clerk position with Toddrick S. Barnette, Chief Judge of Hennepin County District Court. Inayah is a New Jersey native. Outside the office, Inayah enjoys cooking, traveling, exercising, and outdoor activities. You can reach Inayah at IJSmith@ArthurChapman.com or (612) 375-5949.

Decisions of the Minnesota Supreme Court

Attorney Fees

Lagasse v. Aspen Waste, 982 N.W.2d 189 (Minn.2022). The employee served and filed a claim petition alleging a 64.2% permanent partial disability rating per the treating doctor. In its answer, the employer and insurer denied the employee's entitlement to PPD and affirmatively alleged that the injuries were a result of other conditions. The employer and insurer scheduled an IME. The IME doctor confirmed the treating doctor's findings, and found a higher PPD rating. The employee (Horton) subsequently terminated his representation by Attorney Lagasse. Attorney Lagasse served and filed four statements of attorney fees. At hearing, the compensation judge found that the PPD benefits were genuinely disputed, that Lagasse was entitled to contingent attorney fees, and the employee was entitled fee reimbursement pursuant to Minn. Stat. §176.081, subd. 7. Horton appealed to the WCCA, and the insurer cross-appealed on the issue of attorney fees per subd. 7. The WCCA reversed, reasoning that there was no genuine dispute over payment of PPD and that Lagasse took no action that resulted in Horton being paid PPD. Lagasse appealed.

The Minnesota Supreme Court (Justice McKeig) reversed and remanded the subd. 7 fee issue. The Court went through a detailed statutory analysis regarding what constitutes a dispute within the meaning of Chapter 176 and corresponding Rules. It found that the existence of a genuine disputed claim or portion of claim hinges on two factors: 1) is there an actual conflict between the parties as to any claim or portion of claim, and 2) did the employer or insurer have sufficient time and information to take a position on liability?

The Court rejected respondents' arguments that an attorney must procure a benefit on behalf of an employee to be entitled to a contingent fee. The Court pointed out that this requirement is completely absent from Minn. Stat. § 176.081, and the WCCA cites no statutory support for this determination; the only support for this are other WCCA decisions, which also cite no statutory support and are not binding on the Supreme Court. There may be policy reasons in favor or requiring an attorney to procure benefits for their client in order to be entitled to attorney fees, but Chapter 176 does not contain this requirement. It is not the Court's responsibility to fill in holes created by the Legislature.

The applicable standard when the Court reviews whether the WCCA properly substituted its own finding for a conflicting finding of the compensation judge is whether there is any evidence in the record that a reasonable mind might accept as adequate to support the compensation judge's finding. The WCCA erred in substituting its findings for those of the compensation judge because the compensation judge's finding that a genuine dispute existed entitling the attorney to contingent attorney fees under Minn. Stat. § 176.081, subd. 1(c) was supported by substantial evidence.

The Court found that although the insurer ultimately paid PPD, the answer interposed by the insurer specifically denied PPD. Thus, the dispute was genuine. The Court also indicated that the insurer had months to gather more information regarding PPD after receiving the treating doctor's opinions on PPD in July 2018, and when the claim petition was served and filed in November 2018. Thus, it had sufficient time to take a position on liability, and could have scheduled an IME sooner.

The standard to award reimbursement of attorney's fees under Minn. Stat. § 176.081, subd. 7 (2020), is distinct from the standard to award contingency fees under Minn. Stat. § 176.081, subd. 1(c), and whether to award fees under each subdivision must be analyzed separately. Contingent attorney's fees under subd. 1(c) requires the presence of a "genuine dispute." In contrast, subd. 7 requires an employer or insurer to "unsuccessfully resist payment." This latter criterion was not considered by the lower courts, and the case was remanded to the compensation judge for findings on that issue.

In conclusion, for purposes of allowable fees for legal services under the Workers' Compensation Act, an answer to a workers' compensation claim petition can serve as the basis for a genuine dispute under Minn. Stat. § 176.081, subd. 1(c) (2020), when it creates an authentic controversy between parties and the employer or insurer had sufficient time and information to take a position on liability. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Casual Employment

Witthus v. Noyes, File No. WC22-6456, Served and Filed September 30, 2022. The employee was injured when he slipped and fell from a ledge, landing on his feet, and fractured his left heel. He was doing odd jobs for Noyes, including residential repairs and painting, to prepare Noyes' residential property for sale. The employee was an inpatient at a residential chemical addiction program, which aimed to transition clients back into the community by soliciting businesses and homeowners for work that its clients could perform. Noyes made frequent use of the program for cleanup, painting, and similar projects at his home. Noyes would typically pick up a worker in the morning and drop them off at the end of the day, paying the worker $100 in cash. The employee had performed a number of odd jobs for Noyes prior to the injury. The employee filed a negligence suit in District Court and did not claim he was an employee of Noyes. The District Court Judge dismissed the claim on the grounds that the risk of injury was "open and obvious." The employee did not appeal the dismissal, but filed a workers' compensation claim and alleged Noyes was his employer. Noyes did not have workers' compensation coverage, so the Special Compensation Fund filed an answer on his behalf. The Fund filed a motion for dismissal. Compensation Judge William Marshall granted the motion, finding "the employee's employment is casual and barred under Minn. Stat. § 176.041, subd. 1(11)." The WCCA (Judges Stofferahn, Milun, and Quinn) affirmed. Citing *Billmayer* and *Amundsen*, it determined the employment was casual and was "not in the usual course of the trade, business, profession, or occupation of the employer." The employee was not hired directly by Noyes, but essentially through a labor service – the residential program. The employee was paid in cash at the end of each day, with no expectation or requirement that he should return the next day. Further, a homeowner's desire to increase the sale price of their property does not represent a "trade, business or occupation" pursuant to statute.

Estoppel

Cagle v. St. Benedict's Church, File No. WC22-6476, Served and Filed December 1, 2022. The employee sustained low back and hip injuries while lifting a couch on February 3, 2012. Liability was admitted and benefits were paid. The employee underwent both low back and right hip surgeries with good results. Over a year after the injury, she sought treatment for her left hip. In June 2018, the parties entered into a settlement agreement, closing out all benefits except future medical expenses related to the low back, right hip, and left hip. Shortly thereafter, the employee sought treatment for her left hip. The employer and insurer sought a medical opinion from Dr. Helms, who opined that treatment for both of the employee's hips was not related to the work injury. The employer and insurer denied payment for the proposed treatments. The employee filed a claim petition in March 2019. In an unappealed Order, dated May 4, 2020, Compensation Judge William Marshall adopted the treating doctor's opinion that the left hip treatment was causally related to the work injury. The employee returned to the treating doctor for an injection and possible surgical repair. In September 2020, the employee filed a medical request for the recommended surgery to her left hip. The employer and insurer sought the medical opinion of Dr. Vorlicky, who did not address the issue of causation, but concluded that the employee would have a poor surgical result. The surgical treatment was denied and the employee sought judicial review of the denial. Compensation Judge Marshall heard the matter on May 5, 2021, and on this occasion found that the left hip condition was not related to the 2012 work injury. The employee appealed, and the WCCA vacated the denial of the surgery and remanded the matter. On remand, Compensation Judge Marshall found the employer and insurer were not estopped from litigating the causation issue and also found that the proposed left hip surgery was not reasonable and necessary to cure and relieve the effects of the injury. The WCCA (Judges Sundquist, Milun, and Stofferahn) affirmed in part and reversed in part. Citing *Mach*, the WCCA determined neither a change of condition or new facts existed such that the employee should be forced to re-litigate the causation issue. At the second hearing, there were no new facts to sever the previous causation finding, and there were no new injuries or change of condition, making the issue of whether reasonable and necessary medical treatment for the employee's left hip was causally related to the work injury the same at both hearings. The employer and insurer were estopped from re-litigating the causation issue. However, based on substantial evidence, including the competing medical opinions, it was reasonable to conclude that the proposed left hip surgery was not reasonable and necessary.

Job Offer/Suitable Job

Curtis v. Independent School District No. 721, File No. WC22-6451, Served and Filed August 30, 2022. The employee sustained an admitted injury to her right elbow on September 6, 2017, while working as a teaching paraprofessional in the preschool program. She underwent surgery on January 11, 2018, and was released to work without restrictions in March 2018. In August 2018 the employee slipped and fell and claimed a shoulder injury. She was diagnosed with a rotator cuff strain and was released to work subject to lifting restrictions. The employer offered her a job monitoring the parking lots, hallways, and locker rooms at the high school on September 8, 2018. The employee had no prior experience in this type of work and expressed concerns about having to work outside in the cold and possible physical conflicts between high school students. Nonetheless, the employee accepted the job offer but worked only four days before telling her QRC that she would no longer work in this job due to "personal safety concerns." This precipitated a meeting between the employee, the QRC, and employer representatives to discuss work options. The employee was advised that her only role was to "observe and report" events at the high school, not to intervene. However, the employee insisted she would not work in this role. Compensation Judge Kirsten Marshall found that the employee had unreasonably refused an offer of employment which barred entitlement to temporary total disability (TTD) benefits. The WCCA (Judges Sundquist, Quinn, and Christenson) modified and affirmed the denial of TTD benefits. The WCCA found that the job offer was within the employee's restrictions and that the employee's professed concerns about having to work outside and having to risk exposure to physical altercations were not concerns expressed by her doctors when they issued the restrictions. The WCCA determined that the employee could not be barred from receiving TTD under Minn. Stat. § 176.101, subd. 1(i), because she was not receiving TTD benefits at the time of the refusal, and modified the findings to reflect that TTD was instead barred by *Shogren v. Bethesda Lutheran Medical Center* and its progeny.

Jurisdiction

Brandia v. LKQ Minnesota, Inc., File No. WC22-6455, Served and Filed October 24, 2022. The employee sustained an admitted injury to her right elbow. In 2017 her doctor recommended she try medical cannabis for additional pain relief. A compensation judge subsequently determined that medical cannabis was reasonable and medically necessary to treat the employee's elbow condition. This decision was not appealed and years went by where the employer and insurer reimbursed the employee for cannabis. On October 13, 2021, the Minnesota Supreme Court issued decisions in Musta and Bierbach, which found that the federal Controlled Substances Act preempted the employer and insurer's obligation to reimburse any employee for medical cannabis under the Workers' Compensation Act. The employee submitted additional cannabis expenses to the employer and insurer after *Musta* and *Bierbach* were decided. The employer and the insurer denied reimbursement. The employee then filed a clam petition seeking payment for the cannabis. The employer and insurer filed a motion to dismiss. Compensation Judge Kirsten Marshall granted the motion and found that the claims were barred by *Musta* and *Bierbach*. The WCCA (Judges Milun, Stofferahn, Sundquist, Quinn, and Christenson) affirmed. The WCCA declined to consider the employee's argument that the actual content of the cannabis products she used did not bring the products under the orbit of the Controlled Substances Act. The WCCA found that "neither the compensation judge nor this court has jurisdiction to determine the scope of what is prohibited under the CSA." The WCCA also refused to consider the employee's argument that the *stare decisis* effect of *Musta* and *Bierbach* should be nullified, explaining that this type of legal challenge could not be considered by the WCCA without violating the separation of powers between the executive and judicial branches of government.

Medical Issue

Brandia v. LKQ Minnesota, Inc., File No. WC22-6455all, Served and Filed October 24, 2022. For a summary of this case, please refer to the Jurisdiction category.

Rehabilitation

Ceceres Aguilar v. Kendell Doors & Hardware, Inc., File No. WC22-6448, Served and Filed July 19, 2022. The employee is a native Spanish speaker. The employer and insurer made a referral to a Spanish-speaking qualified rehabilitation consultant (QRC). The employee made a timely request for a change of QRC to someone who did not speak Spanish. The QRC hired an interpreter service to be able to communicate with the employee. The QRC drafted a Rehabilitation Plan itemizing all projected costs and projected completion dates for the services without indicating on the form whether any barrier existed to complete the rehabilitation plan. The interpreter service then billed the employer and insurer directly for its costs related to the case and the employer and insurer denied payment. Compensation Judge William J. Marshall determined that there was nothing in the workers' compensation statute or rules that called for employers and insurers to pay for interpretive services for injured workers to access a QRC or

other rehabilitation services. Therefore, he ordered that that the employer and insurer were not obligated to pay the interpreter's intervention interest. The WCCA (Judges Quinn, Stofferahn, and Christenson) affirmed. The WCCA cites the following statutes in making its determination: Minn. Stat. § 176.102, subd. 9(a)(2) provides that an employer is liable for rehabilitation expenses, including the cost of rehabilitation services and the cost of "supplies" necessary for implementation of the plan; the statute also provides under Minn. Stat. § 176.102, subd. 9(b) that the employer and insurer shall pay for expenses agreed to be paid, that charges for rehabilitation services shall be submitted on proper forms, and that no payment shall be made unless listed on the prescribed forms; and a rehabilitation consultant may not collect payment from other persons, including the employee, for services under Minn. Stat. § 176.102, subd. 9(c), if the employer is relieved of liability. In this case, the interpreter's services were never listed as part of the rehabilitation plan drafted and signed by both the employee and QRC. The rehabilitation plan failed to follow the above referenced statutes listing all the services to be provided and their expected costs. In addition, the rehabilitation plan was never modified and amended as necessary, keeping the employer and insurer aware of the services being provided and the expected costs as it related to the interpreter's services. Here, the QRC did not follow these rules and simply hired the interpreter without informing the employer and insurer. Therefore, the employer and insurer cannot be held responsible for payment to the interpreter.

Vacating Awards

Muchow v. State of Minnesota, File No. WC21-6445, Served and Filed August 8, 2022. The employee sustained an admitted low back injury on November 12, 1990 while helping a patient out of a wheelchair. He underwent a two-level lumbar spine fusion on August 11, 1992. He remained symptomatic after the fusion surgery and was referred for independent medical evaluations by his attorney and by the defense in 1994 and 1995. Both IMEs felt that additional low back surgery was not advisable at that time. In 1995, the parties reached a settlement to resolve a dispute regarding permanent partial disability. Subsequently, the employee obtained employment as a part-time security guard, working around 10-20 hours a week, and subject to light duty work restrictions. In 1997, the parties reached another settlement whereby all non-medical benefits were closed out. The settlement included specific acknowledgements that no more wage loss benefits would be paid and that the employee's back condition could worsen in the future. At the time of the 1997 settlement the employee was experiencing low back pain, sciatic pain, and was aware that he might require additional low back surgery. The employee did not work for three years following the 1997 settlement. His surgeon continued to limit him to light duty work. In 2001, the employee began working as a full-time car salesman, though he continued to experience considerable low back symptoms. In 2006, he began working as an ice rink manager, which was his "dream job." He planned to work in this job until retirement. In November 2010, the employee underwent an L3-4 fusion by Dr. Mehbod. During this procedure the dura was cut which resulted in hematomas and two emergency surgeries, after which time the employee was left neurologically compromised from the waist down. In 2011, the employee was awarded social security disability benefits. He attended a functional capacity evaluation, which found he was only capable of sedentary to light duty for two hours per day, two to three days per week. In 2013, Dr. Mehbod rated the employee with an additional 21 percent permanent disability for the lumbar spine. The employee was also rated with permanent disability for bladder dysfunction and sexual dysfunction by a physician's assistant. The employee then filed a Petition to Vacate the 1995 and 1997 awards on stipulation,

arguing that his medical condition substantially worsened and that this could not have been anticipated at the time of the settlements. The WCCA (Judges Quinn, Milun, and Christenson) granted the Petition. The WCCA rejected the defense's argument that the deterioration in the spine condition was reasonably anticipated, given the employee could have claimed permanent and total disability at the time of the settlements, and given that the employee was warned of the risks of paralysis and death that the fusion surgery entailed. The WCCA found that subsequent to the 1995 and 1997 settlements, the employee developed a "different and very severe neurological condition resulting from the medical error that took place during the L3-4 fusion surgery in 2010." At the time of the settlements he only had limitations on his ability to bend and lift over twenty five pounds, whereas now his restrictions are much more significant and have arguably rendered him permanently and totally disabled. In addition, there was "nothing in the record" to prove the employee "clearly anticipated or was capable of reasonably anticipating" that the 2010 surgery could subject him to the "massive neurological compromise from his waist down" that he subsequently experienced. ✦

Arthur Chapman's Workers' Compensation Update is published by the attorneys in the Workers' Compensation Practice Group to keep our clients informed on the ever-changing complexities of workers' compensation law in Minnesota.

The experience of our workers' compensation attorneys allows them to handle all claims with an unsurpassed level of efficiency and effectiveness. Contact any one of our workers' compensation attorneys today to discuss your workers' compensation claims needs.

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