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ARTHUR CHAPMAN

KETTERING SMETAK & PIKALA, P.A.

ATTORNEYS AT LAW

Minnesota Workers' Compensation Update

In This Issue

New Face in the Arthur Chapman Workers' Compensation Group
Decisions of the Minnesota Supreme Court
Decisions of the Minnesota Workers' Compensation Court of Appeals

Workers' Compensation Practice Group

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New Face in the Arthur Chapman Workers' Compensation Group

Meet Summer Law Clerk Elizabeth Pahkala

Elizabeth grew up in Blaine, MN but she is currently living in Northeast Minneapolis. She received her BA in English Literature from the University of St Thomas and currently a 1L at the University of St Thomas School of Law.

Getting to Know Law Clerk Elizabeth

1. Why did you decide to go to law school?
I decided to go to law school after witnessing underrepresentation in Minnesota's rural communities. Equal access to our justice system is something that is important to me, so I decided to pursue a legal education to help combat this lack of access.

2. What are you most excited to learn this summer?
I am most excited to learn about Workers' Compensation as a practice area generally. I was able to attend a few work comp events with my law school mentor, but seeing the practice from the other side will give me better insight and help shape my perspective.

3. What is an interesting fact about you?
I enjoy curling with my family in my free time.

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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Decisions of the Minnesota Supreme Court

Arising Out Of

Profit v. HRT Holdings d/b/a Doubletree Suites, Case No. A22-0656 (MN Supreme Court March 29, 2023.) The employee was violently attacked while at work on June 27, 2018, sustaining significant injuries. The assailant was identified as WR. The employee had known WR for a few years prior to the date of the attack. They had worked together for a different employer. WR had been to the employee's home, they were "friends" on Facebook, and the employee kept WR's phone number in his cell phone contacts. Other than Facebook, they had had no contact since they stopped working for the same employer. The employee was unaware that WR had a history of criminal assaults and mental illness. Relevant to this case, WR falsely believed that the employee had murdered his uncle. On the day of the assault, the employee was at work as a houseman. WR first tried to find the employee at his home, and when he learned that the employee was at work, went to check into the hotel, attempting to use the employee's discount. The staff described him as acting weird, but had no reason to believe that he was dangerous. He was assigned a room on the sixth floor. During this time, the employee was working in a room on the second floor, when he saw WR standing at the open door of the room. The employee was talking to WR and turned his back. He felt something cold and hard hit him in the back of the head. WR continued the attack while the employee attempted to escape. The employee ran past the front desk and shouted for the staff to call 911. He sought shelter in a conference room and shut the door, but WR pushed through the door and continued his attack. WR was then wrestled to the floor by a coworker and a hotel guest. The police arrived and arrested WR, who continually repeated that the employee had killed his uncle and that he was there to avenge the murder. There was no indication of any other reason for the assault. WR was subsequently civilly committed as a dangerous person. Following treatment, he pled guilty to felony assault. The employee filed a workers' compensation claim, and the employer denied liability on the basis that the employee was injured by the act of a third person who intended to injure the employee because of personal reasons and not directed against him as an employee or because of the employment. The employee also sent a letter requesting that the employer preserve various discovery material, including all video pertaining to the incident. At Hearing, the employee argued that the employer failed to provide surveillance video of WR at check-in, and that this omission constituted spoliation of evidence. Compensation Judge Kulseth denied the claim and the employee appealed. The WCCA affirmed. It concluded, among other things, that the intentional act exclusion, Minn. Stat. § 176.011, subd. 16, indicates that a work injury "does not include any injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." *See Hanson*. The employee then filed a timely petition for a writ of certiorari for review. The Supreme Court (Justice Anderson) affirmed. The employee argues the assault exception found in Minn. Stat § 176.011, subd. 16, does not bar his claim for work-related injuries. The Supreme Court concluded that the workers' compensation judge and WCCA properly applied the assault exception and *Hanson* framework. The assailant's reasons, though "delusional," for injuring the employee were not because of his status as an employee or his employment. Accordingly, the assault comes within the first category of the *Hanson* framework and is not a compensable workers' compensation injury.

Attorney Fees

Lagasse v. Aspen Waste, Case No. A21-2745 (Minn. Supreme Court February 8, 2023). The sole issue was whether the employee's attorney is entitled to attorney fees per Minn. Stat. §176.511, subd. 5 (2022), which deals with attorney fees when a case is reviewed by the Supreme Court. The Supreme Court (Justice McKeig) held that per this statute, attorney fees are only awarded on cases in which *compensation* is modified, affirmed, or an order disallowing *compensation* is reversed. The issue in the underlying case to the Supreme Court (decided on November 30, 2022) dealt with attorney fees, not *compensation*. Therefore, attorney fees pursuant to Minn. Stat. §176.511, subd. 5, were not awarded. The Court, however, awarded the employee's attorney taxable costs pursuant to Minn. Stat. §176.511, subd. 4, as the attorney was the "prevailing party."

Costs

Lagasse v. Aspen Waste, Case No. A21-2745 (Minn. Supreme Court February 8, 2023). For a summary of this case, please refer to the Attorney Fees category.

Earning Capacity

Schmidt v. Wal-Mart Stores, Inc., 988 N.W.2d 124 (Minn. 2023). For a summary of this case, please refer to the *Gillette* Injuries category.

Gillette Injuries

Schmidt v. Wal-Mart Stores, Inc., 988 N.W.2d 124 (Minn. 2023). The employee had a pre-existing knee injury for which she had surgery in December 1993. Wal-Mart hired her full-time in 2005. Her job duties consisted of repetitive standing, walking, kneeling, squatting, lifting up to 50 pounds, and climbing ladders. In 2011, she sought treatment for left knee pain because she thought her repetitive kneeling at work attributed to her knee pain. She sought treatment again in May 2015 because she still experienced left knee pain, swelling, and weakness. X-ray results revealed that she had degenerative arthritis in her knee. On October 27, 2015, she underwent a total knee replacement and returned to work with restrictions. In July 2018, she was treated by Dr. Heller because she continued to have knee pain. He recommended a knee revision surgery, which she underwent on January 16, 2019. She returned to work as a cashier (to accommodate her restrictions). On March 1, 2019, she consulted an attorney who told her that she had a compensable *Gillette* injury claim. Her attorney provided Wal-Mart with notice of a *Gillette* injury on the same day. In August 2019, the employee quit her Wal-Mart job and began working as a bus aide, stating that she could no longer perform her duties at Wal-Mart. In July 2020, she filed a Claim Petition alleging a *Gillette* injury on October 27, 2015, and/or January 16, 2019, and claimed workers' compensation benefits. Dr. Wicklund performed an independent medical evaluation and opined that the employee's work activities were not a substantial, contributing, aggravating, causal, or accelerating factor to her arthritis. In March 2021, Dr. Heller issued a report concluding that the employee's condition accelerated due to her work activities. The compensation judge awarded the employee temporary total disability, temporary partial disability, and 9.2% permanent partial disability. The WCCA affirmed. The Minnesota Supreme Court (Justice McKeig) affirmed.

Wal-Mart contended that the date of injury should have been 2011, as opposed to October 27, 2015, as determined by the compensation judge. The Court held that the date of injury is a question of fact. The employee underwent a left total knee replacement on October 27, 2015. Prior to that time, despite having symptoms, she had worked without restrictions and had lost no time from work. She did not sustain a loss to her earning capacity until she underwent the knee replacement, after which she returned to work with restrictions. The finding that the injury culminated on October 27, 2015, is not manifestly contrary to the evidence.

Wal-Mart contended that notice of the alleged injury should have occurred in 2011, when the employee knew her work activities contributed to her knee pain. The date on which an employee has sufficient knowledge to trigger the duty to give notice of injury is a question of fact. In *Anderson*, we held that an employee must give notice of injury no more than 180 days after "it becomes reasonably apparent to the employee that the injury has resulted in, or is likely to cause, a compensable disability." Here, the injury culminated on October 27, 2015, but the employee did not give notice until March 1, 2019. The employee's treating surgeon stated after the 2015 knee replacement that her injury was not work-related. It is reasonable that the employee would not believe her job caused her knee injury when that injury culminated in October 2015. She also had reported her knee pain to her manager, who never made an injury report, which also resulted in her not believing that she had a work injury. It was not until meeting with her attorney on March 1, 2019 that she made the connection that her injury could be compensable, and notice was given at that time.

Wal-Mart argued that the employee returned to work at Wal-Mart for a number of months following her surgery, before voluntarily quitting to take a lower paying job, and that the earnings at Wal-Mart should be determined as the employee's earning capacity for purposes of temporary partial disability benefits. The evidence indicated that the employee's injury led to work restrictions, she could no longer do the physical work at Wal-Mart, she had to take lesser-paid work, and she did not withdraw from the labor market. Her actual post-injury income is presumed to be an accurate representation of her earning capacity, and Wal-Mart did not rebut that presumption.

Chief Justice Gildea dissented, stating that the record shows that the employee saw a doctor twice in 2011 for pain in her left knee. She described the pain as "sharp" and "excruciating" and attributed the knee pain to her work. Her doctor diagnosed her with

"left prepatellar bursitis." The medical records document the work-related pain, noting that while at work, she is "constantly on her knees" and "as a result, she is constantly aggravating the area." Finally, her testimony was clear that she understood that work was causing her left knee pain. Although she had "excruciating" knee pain in 2011 that was caused by her work, she did not give notice to her employer in 2011. Her date of injury was in 2011. Because the employee failed to give the statutorily-required notice within the time period set in the statute, the statute bars her claim.

Notice

Schmidt v. Wal-Mart Stores, Inc., 988 N.W.2d 124 (Minn. 2023). For a summary of this case, please refer to the *Gillette* Injuries category.

Occupational Disease

Juntunen v. Carlton County, 982 N.W.2d 729 (Minn. 2022). For a summary of this case, please refer to the Psychological Injury category.

Chrz v. Mower County, 986 N.W.2d 481 (Minn. 2023). For a summary of this case, please refer to the Psychological Injury category.

Psychological Injury

Juntunen v. Carlton County, 982 N.W.2d 729 (Minn. 2022). The employee was employed as a deputy sheriff for Carlton County. In September 2019, he was diagnosed with post-traumatic stress disorder (PTSD) by a licensed psychologist. The day after he received the diagnosis, he informed his supervisors at the County and was placed on leave. Carlton County denied primary liability for PTSD and obtained an independent medical examination by Dr. Arbisi, who opined that he had a diagnosis of major depressive disorder, not PTSD. The matter went to hearing, and the compensation judge ruled that the employee was not entitled to workers' compensation benefits, finding that the IME was more persuasive than the employee's experts. The WCCA reversed, holding that under Minn. Stat. §176.011, subd. 15 (e)(2022) certain occupations (including deputy sheriffs) are entitled to a presumption that PTSD is an occupational disease if they present a diagnosis of PTSD, regardless of whether their employer offers a competing diagnosis. The parties appealed to the Minnesota Supreme Court.

Specifically at issue is when the PTSD presumption per Minn. Stat. §176.011, subd. 15 (e)(2022) applies—whether it applies when an employee presents a diagnosis of PTSD or only *after* a legal determination that the employee's diagnosis of PTSD is found more credible than a competing expert opinion offered by the employer, or in other words there is a legal determination that the employee has PTSD. Per the statute, to invoke the PTSD presumption, an employee must: (1) be employed in one of the enumerated occupations; (2) be "diagnosed" with PTSD "by a licensed psychiatrist or psychologist"; and (3) not have been diagnosed with PTSD previously. When analyzing the statute, the Minnesota Supreme Court (Justice Hudson) reasoned that the PTSD presumption in subdivision 15(e) requires that the employee be *diagnosed* with PTSD. That is all. The statute does not require such a diagnosis to be more credible or persuasive than any competing diagnosis offered by an employer. Accordingly, the Court found that the compensation judge erred by failing to apply the presumption once the employee offered a diagnosis of PTSD from a licensed psychologist. It further found that the WCCA correctly set aside the compensation judge's finding that the PTSD presumption did not apply in this case; the compensation judge's finding was based on an erroneous application of law, and there is no evidence in the record that a reasonable mind might accept as adequate to support the compensation judge's finding that the presumption was not triggered. The Minnesota Supreme Court affirmed the WCCA's decision.

Also at issue was whether the WCCA properly found that the employer failed to rebut the PTSD presumption when the statutory presumptions applies. The Minnesota Supreme Court would only overturn the WCCA's findings if, viewing the facts in the light most favorable to the findings, it appears that the findings are manifestly contrary to the evidence or that it is clear reasonable minds would adopt a contrary conclusion. *See Hengemuhle*. The Minnesota Supreme Court affirmed the WCCA.

In summary, per Minn. Stat. §176.011, subd. 15 (e)(2022), an employee who works in one of the designated occupations and who had not been previously *diagnosed* with post-traumatic stress disorder (PTSD) is presumptively entitled to workers' compensation benefits upon presenting a diagnosis of PTSD by a licensed psychiatrist or psychologist, which the employer can rebut by presenting "substantial factors."

Chrz v. Mower County, 986 N.W.2d 481 (Minn. 2023). The employee was a Mower County Deputy Sheriff for 12.5 years. He was placed on administrative leave in February 2019 for using excessive force when arresting a teenager. While on administrative leave, he began to have suicidal ideation. He consulted an attorney, and at the direction of his attorney, he was evaluated by a licensed psychologist, Dr. Slavik, in September

2019. Dr. Slavik used the current Diagnostic and Statistical Manual of Mental Disorders (DSM-5). She diagnosed the employee with PTSD and attributed it to exposure to traumatic events while performing his duties as a sheriff. The employee retired on March 31, 2020. He filed a Claim Petition on May 18, 2020, alleging entitlement to workers' compensation benefits beginning April 1, 2020, and ongoing. Dr. Arbisi performed an independent medical examination in October 2020 and opined that the employee no longer met the requirements of a PTSD diagnosis under the current DSM-5. Instead, he diagnosed adjustment disorder, unspecified. Dr. Slavik reevaluated the employee in March 2021 and opined that the employee's symptoms had improved, he no longer met the DSM-5 criteria for a PTSD diagnosis, and that he had reached maximum medical improvement. She diagnosed him with other specified trauma and stress-related disorder. The compensation judge awarded the employee temporary total disability, rehabilitation, permanent partial disability, mileage expenses, and medical care benefits from April 1, 2020, and ongoing. On appeal, the WCCA reversed and held that the employee was not entitled to benefits after March 30, 2021, as he no longer met the requirements for a PTSD diagnosis by statute. The employee appealed to the Minnesota Supreme Court.

The Minnesota Supreme Court (Justice Hudson) affirmed. The issue was whether an employer is continually liable to an employee for ongoing disablement when an employee no longer meets the criteria for a disability resulting from an occupational disease. The Workers' Compensation Act requires an employer to pay workers' compensation benefits if the employee can demonstrate "disablement ... resulting from an occupational disease." For a PTSD claim to be compensable, the employee must satisfy two prongs: (1) a licensed psychiatrist or psychologist must diagnose him with PTSD; and (2) the psychiatrist or psychologist must use the most current version of the DSM. The legislature specifically identified PTSD as the only mental impairment that is eligible for workers' compensation benefits. The fact that the legislature specifically identified PTSD means it intended to exclude any other mental impairment. Citing the *Woelfel* case, the Court found that an employee's eligibility for benefits ends when he is no longer disabled, or when he continues to be disabled, but his disablement is no longer due to a compensable work injury -- this case fits into the latter category. The Court found that the employee was no longer entitled to workers' compensation benefits after March 30, 2021—the date on which he no longer had a PTSD diagnosis by a licensed professional using the DSM-5. It further provided that an employer does not "remain under a continuing liability to pay compensation to an employee who is found to be no longer disabled *or* to be no longer disabled because of his work injury." ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Aggravation

Thompson, Howard v. On Time Delivery Services, Inc., File No. WC22-6487, Served and Filed April 12, 2023. The employee was previously injured in two motor vehicle accidents in 1987 and 1990 and received a 15 percent disability rating for a herniated disc at C4 prior to his employment with On Time Delivery Service, Inc. He treated with chiropractic care for ongoing neck pain beginning in 2017. On April 16, 2018, he was involved in a motor vehicle accident while driving to deliver product for the employer. Following the accident, he continued to receive chiropractic treatment for his worsening neck and back pain. On May 18, 2018, he was seen by a neurologist for neck, back, and bilateral hip pain. The employee continued with chiropractic treatment and physical therapy through the summer of 2018, but he had not returned to work since the date of the accident. Dr. McKinney issued the employee a narrative report on June 15, 2021, opining that he sustained chronic neck, back, and hip strains more likely than not related to the April 16, 2018 accident and the continuing chiropractic care was reasonable. The employee was evaluated at the request of the insurer by Dr. Szalapski on August 6, 2019 and November 9, 2021, who opined that if the employee had injured his neck, back, and right hip in the April 16, 2018 accident, then those injuries resolved and resulted in no disability as they were limited to soft tissue injuries. In addition, any treatment rendered more than three months after the date of the accident was not causally related to the accident. Compensation Judge Grove found that: 1) the employee did not sustain personal injuries to his right hip, right shoulder, or left hand on April 16, 2018; 2) the employee sustained injuries to his neck and back on April 16, 2018, which resolved, and he reached maximum medical improvement by August 20, 2018; 3) the employee was temporarily and totally disabled from April 17 through August 20, 2018, as a substantial result of his temporary neck and back injuries and was entitled to benefits based upon a weekly wage of $1,801.41; 4) the employee did not conduct a reasonable and diligent job search from August 21, 2018, through the date of the hearing; and 5) the medical treatment administered up to August 20, 2018, was reasonably required to cure and relieve the effects of the neck and back injuries sustained on April 16, 2018. The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed. The WCCA indicated the following: 1) the judge's findings were supported by substantial evidence, including the opinion of Dr. Szalapski; 2) there was no evidence in the record that the employee conducted a job search; and 3) citing *Lukat*, the court noted that "in cases involving direct payment or reimbursement of actual expenses… such payments are not compensation to the employee and are excluded from the wage calculation." The compensation judge's findings were supported by substantial evidence.

Arising Out Of

Espinoza v. Direct Home Health Care, Inc., File No. WC22-6468, Served and Filed December 20, 2022. The employee was employed as a personal care attendant (PCA) working only for his mother, with whom he resided. The employee's PCA duties were directed by a registered nurse/social worker, who also helped develop his mother's care plan. It included services and duties like dressing, grooming, bathing, eating, positioning, toileting, behavior, transfers, and mobility. "Mobility" was defined by the plan as "moving from one place to another by walking, wheelchair, cane, or [H]oyer lift." In addition, the care plan listed other duties that the employee could provide if time permitted, including light housekeeping, laundry, health-related functions, errands, socialization, and escort. "Escort" was defined by the plan as an activity done with the client for "medical appointments, community, running errands." It was regularly confirmed by the registered nurse/social worker that the employee was providing these services in compliance with the care plan. The employee's time sheets indicated a regular start time of 11:00 a.m. and an end time of 5:45 p.m. with all the daily care plan tasks he performed every day of the week. On the date of the injury, August 2, 2016, at approximately 4:00 p.m., the employee's mother suggested they walk across the street to a National Night Out event. The employee was walking across the street alongside his mother, as she used her walker, when a vehicle backed out of a parking space, striking the employee. Compensation Judge Hartman determined that the employee was not engaged in work activities at the time of the incident because the employee's decision to take his mother to the National Night Out event was a social event and not related to his employment as it was a deviation from his approved duties. Therefore, the employee did not sustain an injury arising out of and in the course of his employment. The WCCA (Judges Quinn, Christenson, and Sundquist) reversed. The WCCA first evaluated whether the injury arose out of the employee's employment, concluding

that he was engaged in approved PCA duties, including escorting his mother or otherwise helping her with mobility tasks as called for in the care plan. Therefore, he was subject to the increased risk associated with that activity, including those occurring outside the home on the street. Second, the WCCA analyzed whether the injury was also in the course of his employment. As to time, the injury occurred shortly after 4:00 p.m., which was within the timeframe of his employment. In regard to the location of the injury, the care plan contemplated that the employee would escort his mother in the community, an area that certainly included the street immediately in front of her home. Therefore, the injury occurred at the employee's place of work. Furthermore, after drawing these conclusions, the WCCA determined that a reasonable mind could not find the employee was acting outside his work duties when he walked alongside his mother as they crossed the street, immediately in front of her home. Thus, the employee was working within his work hours, at the place of his work, and he neither deviated from his work duties nor committed a prohibited act.

Average Weekly Wage

Thompson, Howard v. On Time Delivery Services, Inc., File No. WC22-6487, Served and Filed April 12, 2023. For a summary of this case, please refer to the Aggravation category.

Contribution / Reimbursement

Sershen v. Metropolitan Council, File No. WC22-6488, Served and Filed May 11, 2023. For a summary of this case, please refer to the Occupational Disease category.

Interveners

Johnson, Daniel v. Concrete Treatments, Inc., File No. WC22-6484, Served and Filed March 14, 2023. The employee alleged entitlement to benefits resulting from two injuries to his low back. The first injury occurred on March 4, 2005, while delivering an entertainment center for Furniture & Things, Inc. Benefits were paid and the employee reached maximum medical improvement on September 16, 2006. He continued to work for Furniture & Things until 2011. In 2016, the employee was hired to work for Concrete Treatments, Inc. as a lead worker on a concrete crew. He sustained another low back injury on October 1, 2018, when he was removing a door hinge. However, he did not seek medical treatment until one month later, and he continued to work full time without restrictions. Years later, in April 2021, he underwent an MRI scan that showed a herniation at L5-S1. A decompression and discectomy surgery was done on May 4, 2021. The employee filed a Claim Petition on May 13, 2021, seeking wage loss benefits, rehabilitation assistance, and payment of medical treatment expenses. Both employers filed Answers denying liability. One of the employers, Furniture & Things, also filed a motion to extinguish the potential intervention claims of Twin Cities Orthopedics (TCO) and Power Within Chiropractic (PWC). Compensation Judge Wolkoff issued an Order on September 23, 2021, which extinguished the potential intervention claims. This Order was not appealed. The case was tried on April 29, 2022, and at the Hearing employee's counsel asserted direct claims for the medical treatment provided by the previously extinguished interveners, TCO and PWC. Compensation Judge Wolkoff found both employers liable and awarded payment to TCO and PWC. The majority of the WCCA (Judges Christenson and Stofferahn) reversed the Compensation Judge's award of medical expenses to TCO and PWC. The majority found that counsel for the employee had not unequivocally established, on the record at Hearing, that he was representing the employee and TCO and PWC as separate parties to the case. The majority found that employee's counsel could, in theory, assert a direct claim for medical treatment related to the work injury under *Adams v. DSR Sales, Inc.*, but only if unequivocal representation was established. Chief Judge Milun delivered a dissenting opinion wherein she found that an employee's attorney could assert a direct claim, even without unequivocally establishing separate representation of the interveners, in cases where the interveners at issue had not sought to intervene. Judge Milun further explained that in this scenario, the Compensation Judge would also have to conduct an inquiry to determine if allowing a direct claim to proceed would result in "undue prejudice" to the employer(s), citing to *Adams*.

Intoxication

Guzman Morales v. Installed Building Products, File No. WC22-6485, Served and Filed March 27, 2023. The employee worked as a fiberglass insulation installer for Installed Building Products (IBP). He had worked for IBP for 15 years. On February 2, 2021, he was driving a work truck when he lost control of the vehicle, reportedly due to fiberglass dust in his eyes, and crashed into an electric pole. He was airlifted for emergency medical care. At the hospital, his blood work tested positive for cocaine metabolites. Thereafter, the employer alleged that the accident was caused by the employee's cocaine intoxication and denied his claim for benefits. The employer retained a toxicology expert, Dr. Topliff, who reviewed the evidence in the case and opined that the accident was due, at least

in part, to "cocaine washout" causing fatigue which led to the accident. The employee retained an expert of their own, Dr. Van Berkom, who reviewed the evidence and opined that the presence of cocaine metabolites in the blood did not prove the employee was intoxicated at the time of the accident, just that cocaine had been used "some days prior." At the Hearing, the employee testified that he had used cocaine three days prior to the accident and that he was not experiencing any effects at the time of the accident. A co-worker testified that the employee's behavior was "normal" in the two days leading up to the accident. Compensation Judge Chang found the employee's testimony about the cause of the accident credible and adopted Dr. Van Berkom's opinions on intoxication. The WCCA (Judges Stofferahn, Milun, and Sundquist) affirmed. The WCCA explained that intoxication is a bar to liability if the employer proves that the intoxication was the proximate cause of the injury, pursuant to Minn. Stat. § 176.021, subd. 1. In this case, the WCCA held that the Compensation Judge was within his discretion in adopting Dr. Van Berkom's opinions over those of Dr. Topliff. The WCCA rejected the employer's argument that Dr. Van Berkom did not have the foundation to offer opinions on causation and intoxication given he was employed as a veterinarian. The WCCA reasoned that Dr. Van Berkom, though employed as a veterinarian, also had a master's degree in forensic toxicology that provided him with adequate foundation. The WCCA also rejected the employer's argument that the employee's use of cocaine, a violation of the employer's drug policy, is employee misconduct which disqualifies him from receiving temporary total disability benefits. Use of illegal drugs is not a per se disqualification from receipt of workers' compensation benefits. For a misconduct defense, the employer must demonstrate "a direct relationship between the prohibited conduct and the employee's injury." In this matter, the required nexus between the prohibited conduct, failing a drug test, and the employer's motor vehicle accident is lacking. *See Boeder*.

Medical Issue

Sullinger v. KIW Construction, File No. WC22-6489, Served and Filed April 21, 2023. The employee sustained a low back injury on August 4, 2008, when he slipped on mud at a job site. The employer and insurer admitted primary liability for the injury. The employee underwent x-rays, MRI scans, an EMG, different injection therapies, and extensive physical therapy, all of which were ineffective. He underwent surgery in 2009, and his post-operation treatment mainly consisted of opioid therapy. In September 2010, he was recommended not to treat with opioids, but instead, attend a chronic pain rehabilitation program and receive a spinal cord stimulator. The employee continued to experience moderate to severe pain, but first wanted to try physical therapy with ultrasound. Under Dr. Walters' orders, the employee's opioid prescription continued through November 2014, as Dr. Walters noted that the employee exhibited no signs of addiction. In March 2011, the employee's opioid dosage was increased from 5 per day to 6 per day. In June 2011, the parties entered into a full, final, and complete settlement, leaving certain medical benefits open, not including chemical dependency care. In May 2015, the employee began to treat with CNP Stark. His opioid dosage was currently 8 per day. However, CNP Stark noted that the employee was not misusing the medication. In June 2015, CNP Stark prescribed the employee Hysingla ER due to its "drug abuse decreasing factor." The employee treated with CNP Stark through February 2022 and continued his prescription of Hysingla ER. The insurer retained Healthesystems to perform pharmacotherapy evaluations, which concluded that the employee's prescribed medication regimen was unsafe. Healthesystems' evaluations were anonymous. The insurer then requested the employee undergo an independent medical examination performed by Dr. Lutz. Dr. Lutz opined that the employee's pain had not reduced nor had his function improved since the opiate therapy began; the Hysingla ER prescription was incredibly expensive and

did not provide any benefit compared to lesser expensive medications; and that the employee's dosage of MMEs were associated with increased risk of motor vehicle accidents, opioid use disorder, and inadvertent overdose. Dr. Lutz also recommended other treatment modalities. Compensation Judge Lund accepted the opinions of Dr. Lutz according to Minn. R. 5221.6110, and admitted the Healthesystems pharmacotherapy evaluations into evidence. The compensation judge found that the medication prescribed by CNP Stark did not comply with the treatment parameters, specifically Minn. R. 5221.6110, and that the prescriptions did not qualify for a departure from the parameters or for a "rare case" exception and were not reasonable and necessary care for the employee's work injury. The WCCA (Judges Quinn, Stofferahn, and Christenson) affirmed. The issue before the WCCA was whether the compensation judge's findings of fact and order were clearly erroneous and unsupported by substantial evidence in view of the entire record. The WCCA affirmed the compensation judge's decision and held that substantial evidence supported the findings of fact and order.

Occupational Disease

Sershen v. Metropolitan Council, File No. WC22-6488, Served and Filed May 11, 2023. The employee worked for 30 years as a safety manager for several employers, monitoring workplace noise levels. He developed hearing loss in the second of these jobs, and in the third job at SPX, he had hearing tests which showed hearing loss. He continued working in noisy jobs. He ultimately went to work at Metropolitan Council primarily in a desk job, but occasionally visiting noisy job sites. Less than one year before he retired, he had a hearing test, which again showed hearing loss, and he purchased hearing aids. He filed a workers' compensation claim against all of his employers. Dr. Mumovic determined that the employee suffered from hearing loss and that the substantial contributing factor may have been high noise exposure in the workplace. She concluded that the work at Metropolitan Council was a substantial contributing factor in the hearing loss, that there was a two percent permanent partial disability, and that the employee would benefit from digital hearing aids. Metropolitan Council offered a medical opinion from Dr. Hopfenspirger, who noted hearing loss is generally multifactorial, but that noise exposure appeared to be an obvious factor. He felt that it was impossible to know which of the factors is mostly to blame or even what the relative contribution of each may have been, but that the work with Metropolitan Council was not a substantial contributing factor. He noted a seven percent PPD and that digital hearing aids were the only reasonable treatment option for the hearing loss.

The parties stipulated that the employee had settled his claims against two of the prior employers, including SPX, under a *Pierringer* settlement, and those parties were dismissed. Compensation Judge Grove found that the employee sustained an occupational disease of hearing loss, that he had been exposed to the hazard of workplace noise at all five employers, and that his "last significant exposure" was during his employment at SPX. Despite finding that the work at Metropolitan Council did not contribute substantially to his hearing loss, the judge ordered the Council to pay medical benefits because the employee was last exposed to hazardous noise while working there. She concluded that the claim for PPD was moot due to the *Pierringer* settlement. The WCCA affirmed, rejecting the Council's argument that the judge prejudiced its right to seek reimbursement from SPX, the employer where the last significant exposure occurred, by failing to determine whether the employee has a PPD rating, and if so, whether that rose to establish disablement at SPX. The WCCA noted that due to the *Pierringer* settlement with SPX, the employee had no further claims for any benefits from SPX, and PPD could not be awarded to the employee to be paid by SPX. Further, no PPD could be awarded against the Council, as there was no significant noise exposure there. Since the employee could not be awarded any PPD benefits, the judge found that the exact nature and extent of the PPD was moot. Issues regarding potential reimbursement and how the *Pierringer* settlement affected the rights and responsibilities of SPX and the employee were preserved for future litigation.

The Supreme Court (Justice Gildea) affirmed the determination that the employee had sustained an occupational disease of hearing loss arising out of his employment over the course of his career, noting that substantial evidence supported that determination. Metropolitan Council asserted that when a compensation judge determines which employer represents the last significant exposure to the hazard of the disease and the evidence may support a finding of disablement at that employer, medical benefits should be awarded against that employer under the occupational disease statute (Minn. Stat. § 176.66), not the last-exposure employer under the medical benefits statute (Minn. Stat. § 176.135, subd. 5). The Council argued that it is not liable for the occupational disease because the judge found that the employment there did not contribute substantially to the hearing loss and that the last significant exposure was at SPX. Under that statute, the employer in whose employment the employee

was last exposed in a significant way to the hazard of the occupational disease is liable for the compensation. In that statute, "compensation" is defined as wage loss. Here, the judge did not make an award under the occupational disease statute, but instead, awarded medical benefits under the medical benefits statute, which indicates that payment shall be made by the employer on the date of the employee's last exposure to the hazard of the occupational disease. Reimbursement for these benefits can then be sought from the employer which is liable under the occupational disease statute. In other words, the last-exposure employer is entitled to pursue reimbursement of medical expenses from the last-significant-exposure employer in the case of disablement. The Supreme Court affirmed that the Council was responsible for payment of medical expenses under the medical statute, and substantial evidence supported the finding that the employee was last exposed to the hazard while working at the Council. There is no requirement that this last exposure be significant. The medical statute acts as a special provision, which is construed as an exception to the general provision dealing with the definition of occupational disease.

With regard to the *Pierringer* settlement, the Court noted that it has never addressed whether a *Pierringer* settlement is properly used in the context of the workers' compensation system. That issue was not before the Court. The parties assumed that such settlements are appropriately used in the workers' compensation system. The Court went forward with its analysis without specifically indicating that *Pierringer* settlements can be used in a workers' compensation setting. A *Pierringer* settlement allows the plaintiff to settle with one or more of the defendants, while reserving his right to proceed against the non-settling defendants and agreeing to indemnify the settling defendants from the liability they might have for contribution or indemnity to the non-settling defendants. The settling defendants should be dismissed, but their liability should nevertheless be submitted to the factfinder. The plaintiff's recovery is then limited to the percentage of damages attributable to the non-settling defendants, such that they will not pay more than their fair share. Claims for contribution by the non-settling defendants against the settling defendants are barred. Here, the compensation judge failed to fully apply *Pierringer* principles, determining that all issues other than the award of medical benefits were moot. This was error. The underlying principle is that the settlement agreement should not prejudice the rights of a non-settling party, and the judge was required to determine liability for all benefits as if the employers subject to the *Pierringer* settlement were still present. Only after the judge has determined liability for all benefits can the benefits that fall to a settling employer be eliminated from the employee's recovery. If a *Pierringer* settlement is used, all aspects of the *Pierringer* rule must be applied. Doing so helps to ensure that liability for workers' compensation benefits is not shifted to an employer that would not otherwise be liable for those benefits. The judge should have resolved whether the Council has a right to be reimbursed by SPX, the last-significant-exposure employer. The employee argues that a claim for reimbursement must be pled for the judge to make a reimbursement determination. But such a requirement in this context runs counter to our *Pierringer* principles. On remand, the judge must determine whether the employee suffered "disablement" at SPX, whether the Council is entitled to reimbursement for its share of liability, and if so, how that reimbursement is to be made consistent with *Pierringer* principles.

At the hearing on remand, the parties stipulated that the employee had at least a two percent PPD rating. Metropolitan Council argued that the employee had suffered disablement at SPX sufficient to create a right of reimbursement. The employee asserted that he was never unable to earn full wages, because of his hearing loss, so there was no disablement. Compensation Judge Grove found that no disablement had occurred and, in the absence of a right to reimbursement, potential questions over the effect of the *Pierringer* agreement on such a reimbursement were moot. Metropolitan Council appealed. The WCCA (Judges Quinn, Milun, and Christenson) affirmed. The WCCA concluded that the Minnesota Supreme Court has consistently held that "disablement," for the purposes of Minn. Stat. §176.135, subd. 5, "requires an inability to earn full wages at the specific job the employee was performing at the time of his last employment during exposure to the hazard." In this case, the Court did not direct otherwise, and had they intended "disablement" to be expanded to include PPD only, it would have clearly and unambiguously so stated.

Withdrawal From Labor Market

Hanson, Sheila v. Kato Cable, File No. WC22-6477, Served and Filed January 24, 2023. The employee developed pain in her shoulder, shortly after beginning employment in 2016. She underwent left shoulder surgery in 2018. The insurer for the employer admitted a *Gillette* work injury and paid various workers' compensation benefits. The employee returned to her job with the employer with permanent work restrictions. She began experiencing similar symptoms in her right shoulder, which extended into her neck, in 2019 and began treatment. These injuries were likewise admitted as *Gillette* work injuries. The employee's permanent work restrictions from the left shoulder injury remained unchanged, but then applied to both shoulders

and the neck. The employee continued working for the employer, but informed the employer in October 2020 that she was planning on resigning her job by the spring of 2021. The employer hired a replacement, who the employee trained, and by November 2020, the employee was essentially just watching her replacement do the job. On December 1, 2020, the employee submitted a resignation letter, indicating she felt as though she had been constructively discharged. The employee and her wife sold their home around the same time she resigned from the employer, with the intention of purchasing an RV, traveling the country, and both working remotely. The employee looked for work over the internet on a single occasion in December 2020. She then began working for her wife on January 1, 2021, about 25-30 hours per week and was learning to be a website designer for her wife's company. In June 2021, the employee began working with a QRC, who put together a rehabilitation plan stating that the employee's job at her wife's company was suitable and that she did not need to look for any other work or retraining programs. The insurer procured a vocational evaluation that opined the employee withdrew from the labor market. The employee filed a claim petition seeking past and ongoing temporary partial disability. Compensation Judge Chang awarded TPD benefits for various dates from the 2018 injury through the end of 2020, but denied TPD benefits from and after January 1, 2021, holding that the employee had withdrawn from the labor market. The WCCA (Judges Quinn, Stofferahn, and Christenson) affirmed. It determined the employee had restrictions on work activity, but not on work hours, and had not sought any additional work or demonstrated any efforts to improve her work situation or supplement her reduced income. Even though the employee fully cooperated with her QRC and the rehabilitation plan, the plan was not in place until after she had already withdrawn from the labor market. ✦

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