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ARTHUR CHAPMAN

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ATTORNEYS AT LAW

Minnesota Workers' Compensation Update

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Workers' Compensation Practice Group

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Two New Faces in the Arthur Chapman Workers Compensation Group

Meet Judson S. Ballentine and Eric S. Schwab

Judson (Jud) Ballentine focuses his practice on consulting on and defending workers' compensation claims. He handles workers' compensation matters for employers, insurers, and TPAs. He has a background in handling personal injury and immigration cases. Jud is fully proficient in Spanish. He lived in Guatemala for four years working for a non-profit, and assisted in resolving disputes between employees, volunteers, and program participants. Jud can be reached at 612 375-5985 or JSBallentine@ArthurChapman.com.

Eric focuses his practice on workers' compensation clients in Minnesota. He earned his JD attending Mitchell Hamline School of Law in 2019 and BS from the University of Minnesota in 2006. While attending law school, Eric worked as a workers' compensation claims adjuster handling a fully litigated desk. The years working as an adjuster gives Eric a unique perspective when handling matters for both employers and insurers. Eric can be reached at 612 375-5933 or ESSchwab@ArthurChapman.com

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

Rehabilitation/Retraining

Ewing v. Print Craft, Inc., 936 N.W.2d 886 (January 2, 2020). [Note: *see* June 2019 WCU for additional analysis of WCCA decision.] The employee sprained his left ankle in December 2015 when he slipped on ice and fell while leaving work. He treated with several specialists over the following months, including doctors at Mayo Clinic. He underwent testing to determine if he had CRPS, and doctors at the Mayo concluded that he did not have CRPS and that his work-related injury resolved no later than April 20, 2016. His primary care provider and his podiatrist, however, diagnosed him with CRPS related to the ankle injury. The employee met with the QRC on April 20, 2016. She prepared a rehabilitation consultation report after the meeting and indicated that the employee was a qualified employee for rehabilitation services. She continued to provide services from April 20, 2016, onward. The employee received medical treatment and rehabilitation services through the summer of 2016. In September 2016 the insurer emailed the QRC to inform her that the adjuster would not approve any further treatment for the employee until the adjuster received the results of an IME. The employer paid the QRC's invoices up to September 8, 2016, but refused to pay for any services after that point. The QRC continued to provide rehabilitation services and the employer did not submit a rehabilitation request. Dr. Gedan's IME report concluded that the employee did not suffer from CRPS or any work-related injury other than a left-ankle sprain. The employee subsequently filed a claim petition asserting that he had CRPS as well as a concussion. The employer denied liability for injuries other than a left ankle sprain. Neither the claim petition nor the answer mentioned rehabilitation services. The employer filed a NOID on December 7, 2016, and the employee objected. On January 4, 2017, a compensation judge granted the employer's request to discontinue benefits. The QRC received a copy of this order but continued to provide services through April 2017. The employee filed an objection to the discontinuance. The employer did not file a rehabilitation request until April 6, 2017. In the request it alleged that the QRC was performing medical management only with respect to solely denied conditions. A formal hearing took place on April 6, 2018, consolidating the claim petition, the objection to discontinuance of indemnity benefits, and the employer's request to terminate the rehabilitation plan. The QRC intervened and testified at the hearing. In the interim, the QRC continued to provide rehabilitation services. Compensation Judge Marshall found that the employee's work injury resolved on April 20, 2016, and he ordered that all claims through April 20, 2016, be paid and all other claims dismissed. The employee did not appeal the decision but the QRC did. The WCCA reversed, finding that Judge Marshall erred as a matter of law in assigning the cutoff date for rehabilitation services. The WCCA stated that employers must provide notice and show good cause under Minn. Stat. §176.102, subd. 8(a) and Minn. Rule 5220.0510, subp. 5 to terminate a rehabilitation plan. Therefore, the WCCA concluded, the "cutoff date for services" was April 6, 2017 – the day that the employer filed a rehabilitation request for assistance. The WCCA modified Judge Marshall's order to award payment to the QRC for all rehabilitation services provided through April 6, 2017. The employer appealed and the Minnesota Supreme Court (Justice Hudson writing for the court) reversed the WCCA. Reviewing the matter de novo, the Supreme Court found that an employer's liability for compensation under chapter 176 ends when an employee is no longer disabled. Employers are only liable for reasonable and necessary rehabilitation services provided to a qualified employee. The QRC did not challenge Judge Marshall's factual findings regarding the employee's ineligibility for treatment after April 20, 2016. Instead, she argued that an employer is liable

for rehabilitation services until the employer provides notice of its intention to terminate those services, relying on *Halvorson*. The Supreme Court rejected this argument. In *Halvorson*, the WCCA and the Supreme Court indicated that Minn. Stat. §176.102, subd. 8(a) "requires an employer to file a request and then make 'a showing of good cause' before terminating an employee's rehabilitation services." However, in that case the compensation judge had previously denied the employer's request to terminate the services, which meant the employer had a continuing obligation to pay for the services. Additionally, the QRC was providing rehabilitation services related to that compensable injury. Here, the compensation judge ruled at the administrative conference that the employer had no ongoing liability for benefits and the QRC was not providing services related to an admitted injury or an injury that had been deemed compensable by the court. Moreover, the QRC was on notice as early as September 2016 that the employer denied primary liability for any injuries other than a left ankle sprain, long before the rehabilitation request for assistance in April 2017. By continuing to provide rehabilitation services rather than pursuing other options available to her, including filing her own rehabilitation request for assistance or discontinuing service, she assumed the risk of non-payment. As a result, the Supreme Court reversed the WCCA's decision and reinstated Judge Marshall's decision. ✦

Decisions of the Minnesota Court of Appeals

176.82 Actions

Conn v. Bic Graphic USA Manufacturing Co., File No. A18-2112, September 23, 2019 (Minn. Ct. App.). The employee injured her shoulder at work for Bic in 2014. The injury was admitted and workers' compensation benefits were paid, including payment for two surgeries on her shoulder. After the second surgery, the employee was provided permanent restrictions that prohibited her from reaching above her shoulder more than 200 times per day. Operating machines was an essential function of the employee's job at Bic. In June 2016, when the employee's temporary total disability benefits expired, Bic informed the employee that it had no position within her restrictions and terminated her employment. The employee subsequently filed a claim against Bic in district court alleging violations of the Minnesota Workers' Compensation Act and the Minnesota Human Rights Act. The district court granted summary judgment in favor of Bic. The Minnesota Court of Appeals (Judge Ross) affirmed. The court agreed that the district court erred in concluding that the employee's claims were precluded by the Minnesota Workers' Compensation Act's exclusive remedy provision. *Daniel v. City of Minneapolis*, 923 N.W.2d 637, 653 (Minn. 2019) states that the Workers' Compensation Act's exclusivity provision does not apply to Minnesota Human Rights Act claims because those claims are based on the employer's illegal response to a work-related injury, not based on the work-related injury itself. However, the statute prohibits an employer from retaliation for employees "'seeking workers' compensation benefits,' not for exhausting workers' compensation benefits." Because it was undisputed that the employee was fired only after her workers' compensation benefits expired, there was no evidence to support her claim that her termination was in retaliation for her seeking workers' compensation benefits. The employee also failed to provide any evidence of violations of the Minnesota Human Rights Act where she failed to provide any evidence that she is a disabled person under the meaning of the statute. The employee's impairment restricts lifting and reaching, which do not limit any "major life activities." The employee provided no evidence that these restrictions disqualified her from any job other than the Bic machine mechanic position. In addition, employers are not obligated to create new jobs or alter existing jobs in order to accommodate. Because the employee did not establish that she was a qualified disabled person there is no factual basis to support her claim that Bic violated the Minnesota Human Rights Act by not reasonably accommodating her disability. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Gritz v. State of Minnesota, Department of Human Services, File No. WC19-6321, Served and Filed February 4, 2020. On May 10, 2018, the employee had attended a mandatory training session at the employer's premises. Following the training session, he was walking back to his desk with a fellow employee. They began descending a flight of stairs consisting of 10 steps, a landing, and 10 more steps. The stairwell was approximately five feet wide. It had brass handrails. He was walking down the right side of the stairwell. The employee testified to holding some paperwork in his right hand as he walked down the stairs. The employee reached the landing, and upon taking his first step down the second half of the staircase, he stepped too far. His heel hit the edge of the step, he lost his balance, reached for the handrail but was unable to hold it, and tumbled down 10 steps, injuring his right shoulder and neck. Because the stairs were not defective and had no other obvious hazards, the employer denied the injury on the basis that it did not arise out of the employment. Compensation Judge Baumgarth determined that the injury arose out of the employment based on the *Forrest* case, in which the WCCA held that using stairs at work constituted an increased risk in and of itself, such that an injury caused by the use of stairs is compensable. The WCCA (Judges Quinn, Milun, Stofferahn, Hall, and Sundquist) affirmed. The employer argued that the WCCA's decision in *Forrest* was wrongly decided and that the WCCA should overrule that precedent. It argued public policy that if the employee's injury is compensable under these facts, employers will become liable for workers' compensation benefits for every injury event that occurs on a flight of stairs, stating, "would then, all employers be required to remove stairs from its premises, factories, or farms, to protect their employees from harm?" The WCCA held that the employer was correct in its assertion that the use of stairs is no more dangerous at work than anywhere else. The same could be said of the use of ladders, saw blades, keyboards, icy sidewalks, and cars. The use of these tools is common everyday activities that people engage in at home, at work, and otherwise. For purposes of liability for a work injury, it does not matter that the employee's injury was sustained while engaging in a common everyday activity. The issue is not whether a similar injury could have happened in a similar manner away from work. The issue is whether the work activity brought the employee to the risk which resulted in injury. The issue is whether the employee is exposed to the risk because of employment. It is irrelevant if the stairwell can also be used by the public. *See Hohlt*. The WCCA has said on numerous occasions that the use of stairs, in and of itself, creates an increased risk of injury regardless of the condition of the stairs. *See Forrest; Lein*. We agree that employers cannot eliminate every possible risk of injury, including the removal of stairs from workplaces. Yet, an injury does not need to be preventable to be compensable. Employers are encouraged to strive towards safe and healthy workplaces, but doing so only reduces, but never eliminates, the risk or occurrence of injury.

Causal Connection

Karsky v. Tri County Coop Oil Association, File No. WC19-6310, Served and Filed January 28, 2020. The employee suffered an accepted work injury in the course of her employment as a manager at a café on August 2, 2011. She slipped and fell on a wet floor injuring her right elbow and shoulder. She had previous treatment to her right elbow in 2001 for right epicondylitis and early carpal tunnel syndrome. The employee was also involved in a motor vehicle accident in 2005, which involved multiple body parts including her right side. The employee had an MRI of her right shoulder in January 2018, which showed impingement syndrome and bursitis of the right shoulder. Dr. Brand reviewed the MRI and opined that the employee's right shoulder condition and need for surgery were related to the work activity on August 2011. He recommended right shoulder arthroscopic surgery. Dr. Brand performed that surgery on August 28, 2018, which consisted of subacromial decompression, distal clavicle resection, biceps tenodesis, and rotator cuff repair. At the request of the employer and insurer the employee was examined by Dr. Cederberg, who opined that the medical records showed a pre-existing right rotator cuff tendinopathy and right ulnar neuropathy. He diagnosed radial and ulnar avulsion fractures of the right arm that had healed and were work related. Compensation Judge Bouman denied the employee's claims, accepting the opinion of Dr. Cederberg. The WCCA (Judges Stofferahn, Milun, and Quinn) affirmed. The employee argued that Dr. Cederberg lacked proper foundation to support his opinion. The WCCA, citing *Ouassaddine v. Rosemount Aerospace*, Inc., found that Dr.

Cederberg's review of the employee's medical records, examination of the employee, and his testimony about the employee's condition was sufficient evidence to support his opinion. As the opinion of Dr. Cederberg was supported by substantial evidence the WCCA deferred to Judge Bouman's decision and affirmed.

Perpich v. Delta Airlines, Inc., File No. WC19-6317, Served and Filed March 4, 2020. The employee alleged an injury to her low back on March 6, 2014. She worked for Delta Airlines as a flight attendant. On March 6, 2014, in the process of serving meals to passengers on the aircraft, she was thrown to the floor of the airplane due to a sudden drop in altitude. She heard a loud popping in her left knee with instability, pain and swelling. There was concern of a new rupture of a previous ACL graft. The employee underwent surgery and was released with restrictions on May 2, 2015. On July 11, 2016, she began treating for low back pain. The doctor opined that her low back pain resulted from the March 6, 2014, incident. The employee underwent a discectomy and fusions at the L4-5 and L5-S1 levels on December 22, 2016, with Dr. Manuel Pinto. Dr. Pinto and Dr. Simonet provided opinions in favor of the employee's position that the March 6, 2014, incident caused the low back condition. The employer provided the opinion of Dr. Szalapski that the low back condition resulted from aging and was not due to the work incident, noting the lack of treatment or symptoms for years after the incident. Compensation Judge Marshall determined that the March 6, 2014, incident caused a permanent injury to the employee's left knee, but that the preponderance of the evidence failed to show that the employee suffered an injury to her low back. The WCCA (Judges Milun, Stofferahn, and Hall) affirmed. The employee's argument was that the opinion of Dr. Szalapski was not medically competent as Dr. Szalapski does not preform low back surgery. The WCCA citing *Branstad v. Fedex Freight East* and *Johnson v. A & B Welding & Construction, Inc.*, determined that a board certified doctor could opine on causation without being an expert on a specific procedure. In this case, the WCCA determined that Dr. Szalapski's opinion was not invalid, and therefore, the judge could rely on that opinion.

Gibson v. City of St. Paul, File No. WC19-6316, Served and Filed March 17, 2020. The employee had a prior work injury to his cervical spine and left shoulder while working for the South Carolina state highway department lifting a 200-pound deer carcass on September 26, 2016. The employee did not seek any treatment after December 2016. The employee relocated to Minnesota in 2017 and began working for the City of St. Paul. He sustained an accepted work-related injury on March 15, 2018, when he slipped and fell on ice while carrying five or six ten-foot poles, landing on his back. He sought treatment with Dr. Bannister on March 23, 2018. He reported pain in his neck, left shoulder and low back. He made no mention of his prior 2016 injury. The employee's treatment was transferred to Dr. Aadalen, who recommended a rotator cuff repair, subacromial decompression, and biceps tenotomy surgery. The employee underwent the surgery on August 27, 2018. On January 22, 2019, the employee was evaluated by Dr. Wicklund at the request of the employer and insurer. Dr. Wicklund opined that a fall would not cause the damage to the employee's biceps or rotator cuff, but may have caused a contusion to his low back. He also opined the employee had reached maximum medical improvement. Dr. Aadalen agreed with Dr. Wicklund's opinion on MMI. A hearing was held on June 3, 2019, and the employee was represented by counsel at hearing. Compensation Judge Bouman found that the employee had not shown that he had sustained injuries to his shoulder, left arm, or left leg, stating that Dr. Bannister's opinion did not support the assertion that the injuries to the employee's rotator cuff or bicep tendinosis were consistent with the mechanism of the work injury. Judge Bouman adopted the opinion of Dr. Wicklund. The pro se employee appealed. The WCCA (Judges Hall, Stofferahn, and Quinn) affirmed. The employee argued that Dr. Wicklund did not have foundation for his opinion. Citing *Gianotti v. Independent School District 152*, the WCCA determined that the review of medical records, history taken from the employee, and the explanation of his conclusion, which was sufficient for Dr. Wicklund to form a reasonable opinion that was not based on speculation or conjecture.

Gillette Injuries

Thompson v. Target Corp. Office, File No. WC19-6297, Served and Filed November 20, 2019. The employee, a 65-year-old retiree, was hired by Target in 2015 and worked part-time as a stock person. Prior to working for Target, the employee had undergone bilateral wrist surgery sometime in the 1990s. The surgery on her left wrist was not successful and resulted in ongoing tendinitis like symptoms. After seven months working for Target, the employee began treatment for pain in her thumbs. She related her thumb pain to her work. The employee's doctor diagnosed her with CMC arthritis in the thumbs and recommended surgery. The employer denied this surgery based on an independent medical examination. The employee filed a claim petition seeking approval of the surgery and payment of medical bills. Compensation Judge Daly issued a Findings and Order approving

the surgery and ordering payment of medical bills. He reasoned that although there were prior thumb symptoms, the employee had no treatment or symptoms for four years prior to working for Target, she had a new diagnosis and symptoms, the opinions of her doctor were well-founded, and the employee was credible. The employer appealed. The WCCA (Judges Quinn, Milun, and Hall) affirmed. The employer argued that the compensation judge should have considered the employee's pre-existing condition, her age, and prior medical care for similar conditions. The WCCA reasoned that, under *Gillette*, employers take employees as they find them and assume the risk that the employee's underlying condition could be aggravated by a work injury. The WCCA also reasoned that the factors cited by the employer in its appeal do not compel a denial of liability and that the compensation judge considered the issues in light of all the evidence. The WCCA concluded that the medical records, medical opinions, and testimony were substantial evidence to support the compensation judge's findings and conclusions.

Independent Contractors

Schultz v. Andy & Steve's Lawn and Landscape, File No. WC19-6298, Served and Filed December 11, 2019. Mr. Schultz ("worker") worked as a tree trimmer for several decades. He retired but then later re-entered the job market and found a tree trimming job with the employer. They signed a contract entitled an "Independent Contractor Release, Waiver of Liability, and Covenant Not to Sue" document. In 2017 the worker was performing tree trimming services for the employer when a tree limb hit the ground and rolled onto the platform where the worker stood. The force propelled the worker off the platform and onto the ground, where he fractured multiple vertebrae. As a result he became paraplegic. He filed a claim petition for permanent total disability benefits and medical benefits. Prior to the hearing the parties stipulated that if the worker was determined to be an employee of the employer, that he was permanently and totally disabled and that the medical treatment was compensable. Compensation Judge Pearson heard the matter and found that the worker was an independent contractor. The WCCA (Judges Sundquist, Milun, and Quinn) vacated and remanded. In distinguishing between an employee and an independent contactor the court utilizes the standards set forth in Minn. Rule Ch. 5224. These rules include safe harbor criteria for determining employee or independent contractor status for specific occupations, including laborers, in Minn. Rule 5224.0020 to 5224.0312. A tree trimmer falls under the rule for laborers. If a worker does not meet safe harbor criteria for either an independent contractor or employee status under the applicable rule, a decision is made as described in Minn. R. 5224.0330 and Minn. R. 5224.0340. Judge Pearson found that the worker met much of the safe harbor criteria for both employee and independent contractor and thus moved on to Minn. R. 5224.0330 and Minn. R. 5224.0340. The WCCA held that a compensation judge must specifically apply the evidence to each of the criteria set forth in the rules. Because Judge Pearson did not do this, the WCCA could not review the case and determine whether the decision was supported by the evidence and the rules. The WCCA thus vacated the finding that the worker was an independent contractor and remanded to Judge Pearson for application of each of the criteria under the safe harbor rule to the facts in this matter before proceeding to consideration and analysis of specific criteria in rules 5224.0330 and 5224.0340.

Interest

Maxfield v. Stremel Manufacturing, File No. WC19-6282, Served and Filed December 6, 2019. The employee suffered an admitted work injury to his low back in 1991. He had permanent restrictions and underwent retraining as a paralegal in 1995. He worked various jobs but was ultimately laid off in August 2015. He then brought a claim for entitlement to temporary partial disability benefits, additional permanent partial disability benefits, permanent total disability benefits, ongoing rehabilitation benefits, and payment of rehabilitation expenses. Judge Olson, in her Findings and Order dated June 13, 2016, denied additional permanency, payment of rehabilitation bills, and permanent total disability. Judge Olson awarded the temporary partial disability benefits and ongoing rehabilitation assistance. The employee appealed, and the WCCA affirmed the decision in regards to the permanent total disability benefits, but remanded for payment of the rehabilitation consultation. The parties then attempted to negotiate a settlement through April 3, 2017. When negotiations were unsuccessful, the employer and insurer paid the temporary partial disability benefits on June 7, 2017. The employee was unable to find work and in July 2017 filed a Claim Petition seeking permanent total disability benefits as well as penalties and interest for late payment of temporary partial disability benefits. The hearing was held on December 20, 2018, and on March 25, 2019, Judge Rykken issued a Findings and Order finding that the employee was not permanently and totally disabled and awarding penalties for late payment of temporary partial disability benefits and awarding interest beginning 14 days after settlement negotiations broke down, April 18, 2017. The WCCA (Judges Milun, Hall, and Sundquist) affirmed the determination on permanent total disability but reversed the decision on interest. The

WCCA determined that the interest on the temporary partial disability benefits began when the benefits were awarded by the compensation judge in June 2016, not the date settlement negotiations broke down. Citing Minn. Stat. §176.221, subd. 8, the WCCA determined payment was due no later than June 27, 2016, and the statute requires interest from the date the payment is due. See Oseland.

Intervention

Koehnen v. Flagship Marine Company, File No. WC19-6287, Served and Filed December 27, 2019. The employee sustained an admitted low back injury; however, the parties disputed the nature and extent of the injury. The parties settled the case and the Award on Stipulation was filed on April 23, 2018. Keith Johnson, D.C., a potential intervener, had been extinguished in the Stipulation for Settlement, as he had been served notice of his right to intervene and did not do so within 60 days. He subsequently brought this action on January 2, 2019, due to unpaid bills in excess of $9,000. The employee and the employer and insurer filed motions to dismiss Dr. Johnson's petition. The motions came on for hearing on April 14, 2019, before Compensation Judge Tate. Judge Tate found Dr. Johnson lacked standing to assert a claim for payment of outstanding bills, as he did not timely intervene. Dr. Johnson appealed the determination arguing that he has standing and is entitled to automatic payment of his bills under *Brooks*. The WCCA (Judges Sundquist, Milun, Stofferahn, Hall, and Quinn) affirmed. Dr. Johnson had not timely exercised his right to intervene after receiving notice of his right to do so. *See* Minn. Stat. §176.361. It relied on *Tatro v. Hartmann's Store* in which the Minnesota Supreme Court rejected claims by potential interveners which had no standing to directly petition under the workers' compensation statute. The WCCA noted that because Dr. Johnson was properly put on notice and chose not to intervene he did not have standing. This case is on appeal to the Minnesota Supreme Court and was argued on June 2, 2020.

Psychological Injury

James v. Independent School District No. 1, File No. WC19-6315, Served and Filed February 11, 2020. The employee was employed as a paraprofessional working with special needs children. On March 23, 2017, she was assaulted by one of her students and struck in the head several times. She was struck again across the head by the same student on March 27, 2017. The employee was able to continue working with the same student through the remainder of the school year. She then worked her regular job in the summer of 2017. During the summer, she still experienced symptoms but they were less severe. In September 2018, the employee's psychological symptoms returned for the school year. The employee began treating with Dr. John Cronin. Dr. Cronin put the employee on restrictions of no work for the school district. He diagnosed PTSD as well as an anxiety disorder. The employer and insurer admitted an eye injury and concussion from the assault, but denied psychological treatment. They relied on the opinion of Dr. Arbisi, who opined that the employee's psychological state was solely related to her pre-existing major depressive episode. He pointed to the employee's ability to continue working her summer job without complications. Compensation Judge Grove determined that the employee had proven a work-related psychological injury. She found the employee suffers from PTSD as well as a consequential psychological injury. She adopted the opinion of Dr. Cronin over Dr. Arbisi. She also noted she found the employee credible. The WCCA (Judges Quinn, Stofferahn, and Sundquist) affirmed. The WCCA determined that Judge Grove's reliance on the opinion of Dr. Cronin was supported by substantial evidence.

Res Judicata

Ouellette v. Wal-mart Stores, Inc., File No. WC19-6313, Served and Filed February 19, 2020. The employee initially sustained an injury to his left foot on March 17, 2011, which was admitted. He was subsequently diagnosed with complex regional pain syndrome. In January 2012, a spinal cord stimulator was implanted. He was unable to walk, and the device was removed. He claimed paraplegia. An IME was conducted by Dr. Exconde, who rated the employee with 75% permanent partial disability. The employer commenced payment of weekly PPD benefits. The employee filed a Claim Petition seeking payment of his benefits in a lump sum and seeking penalties for failure to pay benefits in that manner. The employer filed a Petition to Discontinue benefits. The case was heard in February 2014, and the judge determined that the preponderance of the evidence did not support a claim for 75% PPD. The employee appealed, and the WCCA affirmed. In February 2019, the employee filed a new Claim Petition claiming 83% PPD. The employer sought to dismiss the Claim Petition, arguing that the employee's claims were barred by *res judicata*. The judge agreed and dismissed the Claim Petition with prejudice. The WCCA (Judges Stofferahn, Milun, and Sundquist) noted that the employee's current claim for PPD was based on the original IME report from Dr. Exconde, which had served as the basis of his original claim for PPD. The employee's current effort to re-litigate the same claim with the same evidence is barred by *res judicata*, and that decision was affirmed. However, the compensation judge did not address the additional claim being made under alternative PPD rules with a separate attached medical report. These issues were not considered at the time of the earlier hearing and are not barred by *res judicata*. The case was remanded to the judge to consider the new evidence.

Superseding Intervening Cause

Arndt v. Tri County Coop Oil Association, File No. WC19-6309, Served and Filed February 11, 2020. The employee sustained a significant accepted work-related injury to his low back on December 12, 2012. He underwent two microdiscectomies in 2013 and was released from care with permanent restrictions. In 2015, the employee started his own business delivering barrels of hydrogen peroxide. He estimated the barrels weighed 510 pounds. On September 2, 2017, during a delivery, the employee moved a barrel out of a pickup truck. This activity caused a flare-up in low back symptoms. The employee underwent a fusion surgery with Dr. Abbasi at L3-5 levels. On September 4, 2018, the employee was evaluated by Dr. Barron at the request of the employer and insurer. Dr. Barron opined that the injury from September 2, 2017, was a superseding intervening cause of the employee's condition. Compensation Judge Cannon adopted the opinion of Dr. Barron and found that the injury on September 2, 2017, was a superseding intervening cause of the employee's condition, which severed the causal connection between the initial injury and the employee's subsequent condition. The WCCA (Judges Milun, Hall, and Sundquist) affirmed. The employee argued that Dr. Barron's report lacked sufficient foundation for his opinion as Dr. Barron misstated that the employee was "moving" a 500 pound barrel versus rolling a 500 pound barrel. The WCCA, citing *Scott v. Southview Chevrolet Company*, determined that facts of minor significance, which are unknown to the doctor, do not necessarily render an opinion without foundation.

Temporary Total Disability

Otto v. Heartland Motor Company, File No. WC19-6304, Served and Filed January 15, 2020. On May 7, 2015, the employee suffered an admitted work injury to his neck and left shoulder. He underwent a C5-7 fusion on March 12, 2018. Following his recovery, he received permanent work restrictions, which prevented him from returning to work as an auto mechanic. He also suffered post-fusion dysphagia, which caused an occasional gagging sensation. The employee applied and was approved for Social Security disability income benefits. He was offered a job from the employer as a diagnostic technician at a rate of $600 per week. His benefits would remain the same. He had earned a weekly wage of $1,601.40 prior to his injury. Although the employee believed he could do the job, he rejected the job offer from the employer due to the $1,000 decrease in weekly wage. The QRC and the employer and insurer's vocational expert, Debra Bourgeois, agreed the job was within the employee's restrictions. The QRC was of the opinion that the job was outside of the rehabilitation plan, and the vocational expert believed it was suitable employment. The employee testified he did not reject the job because of the SSDI award. He applied for and had interviews for two other jobs. He mentioned in those job interviews his dysphagia although he had no restrictions for that condition. The employer and insurer filed a petition to discontinue temporary total disability benefits based on the employee's withdrawal from the labor market, retirement, lack of diligent job search, and refusal of a job offer. Compensation Judge Cannon determined that the employee was conducting a diligent job search and that the job offer was inconsistent with his rehabilitation plan. He determined that the job offer was not suitable employment due to

the over $1,000 difference between the rates. He also found that there was no evidence the employee commenting on his dysphagia during interviews hurt his chances at jobs. He denied the request to discontinue benefits. The WCCA (Judges Quinn, Stofferahn, and Sundquist) affirmed. Citing *Schweder v. Covalence Specialty Materials Corp.* and *Hurd v. North Industrial Insulation*, it noted that decisions on withdrawal from the labor market and retirement are for the compensation judge to determine based on substantial evidence. The WCCA also determined that the employee's job search efforts constituted a diligent job search. Finally, the WCCA determined that the job offer was not consistent with the rehabilitation plan, agreeing that the offered job was not economically suitable due to the $1,000 gap between wages.

Vacating Awards

Gerdes v. Mammoth/Nortek, File No. WC19-6289, Served and Filed December 19, 2019. The employee suffered an admitted work injury to his neck on October 26, 1993, while pulling an 80-pound shaft at work. After a few months of conservative care, the employee was referred for surgery and underwent a cervical discectomy and fusion. The employee and employer reached three settlements for this claim. The last settlement was on February 23, 1998. The employee received a lump sum payment, and only future medical benefits related to his neck, thoracic spine, and shoulders remained open. The employee continued to receive treatment for his neck injury for several years, including three additional surgeries. In January 2019, the employee's doctor provided a narrative report stating that the employee's neck condition had worsened, and he had suffered additional permanent partial disability due to the subsequent neck surgeries after the 1998 settlement. The employee filed a petition to vacate the February 23, 1998, Award on Stipulation, alleging a substantial change in his condition. The WCCA (Judges Quinn, Stofferahn, and Sundquist) denied the petition to vacate, concluding that the employee failed to show good cause to vacate. The WCCA considered the *Fodness* factors and Minn. Stat. §176.461. The WCCA noted that while the employee had met some of the *Fodness* factors, he failed to demonstrate that the worsening of his neck condition was a substantial change. The WCCA cited Minn. Stat. §176.461(b)(4), which defines a substantial change as one that could not have been reasonably anticipated by the parties. The WCCA reasoned that it was reasonable to anticipate that vertebrae levels adjacent to a fusion would worsen over time, and noted that the worsening of the employee's neck condition was not only reasonably anticipated, but was in fact anticipated by the employee's own doctors. ✦

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.

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