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ARTHUR CHAPMAN

KETTERING SMETAK & PIKALA, P.A.

ATTORNEYS AT LAW

Minnesota Workers' Compensation Update

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A New Face in the Arthur Chapman Workers Compensation Group

Meet Hannah J. Mohs

Hannah's practice focuses on Workers' Compensation Claims. She has experience working in employer and insurer defense matters including initiation of litigation through appellate work. Her clients appreciate her strong communication skills and attention to details. You can reach Hannah at HJMohs@arthurchapman.com or (612) 375-5908.

Workers' Compensation Practice Group

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Christine L. Tuft, Partner
Susan K. H. Conley, Partner
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Save the Date!

2022 Workers Compensation Seminar

Thursday, June 16, 2022
McNamara Alumni Center, University of Minnesota
Minneapolis, Minnesota

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

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.

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500 Fax 612 339-7655

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000 Fax 715 808-0513

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Decisions of the Minnesota Supreme Court

Constitutional Law

Musta v. Mendota Heights Dental Center, 965 N.W.2d 312 (Minn. 2021). For a summary of this case please refer to the Medical Issue category.

Bierbach v. Digger's Polaris, 965 N.W.2d 281 (Minn. 2021). For a summary of this case please refer to the Medical Issue category.

Medical Issue

Johnson, William v. Darchuks Fabrication, Inc., 973 N.W.2d 227 (Minn. 2021). The employee sustained an admitted injury in September 2002 involving a severe right ankle sprain. He was subsequently diagnosed with complex regional pain syndrome (CRPS). Medical treatment included opioid medications, steroid injections, physical therapy, and sympathetic blocks, but the employee's pain did not respond to that conservative treatment, and surgical treatment was ruled out. He was never able to return to work and continues to report numerous symptoms, including constant pain. Since 2004, he has been treated with Endocet, an opioid pain medication. Regardless, his pain remains present constantly, limits his physical activity, and interferes with his sleep. The case settled in 2004 with medical expenses left open. Thereafter, the insurer continued to pay for medical treatment on an ongoing basis, including opioid pain medications.

In May 2016, an independent medical evaluator questioned the diagnosis of CRPS. Following receipt of the IME report, the insurer forwarded Minn. R. 5221.6110 (relating to long-term opioid medication usage) to the employee's treating provider, asking him to come into compliance with the treatment parameter. When the provider did not do so, the insurer denied payment for treatment related to the CRPS diagnosis, including the opioid pain medication. The employee filed a Medical Request seeking ongoing approval for Endocet. The insurer argued that the employee no longer had CRPS, that treatment with Endocet was not reasonable and necessary, and that treatment with Endocet was not in accordance with the treatment parameter for long-term usage of opioid pain medication.

The compensation judge determined that the employee continued to have CRPS, that treatment with Endocet was reasonable and necessary, and that the treatment parameters were inapplicable, as the insurer had disputed the employee's CRPS diagnosis. The Workers' Compensation Court of Appeals (WCCA) affirmed that decision. On appeal to the Minnesota Supreme Court the first time, the Supreme Court reversed the lower courts' decisions, concluding that the insurer disputed only the CRPS diagnosis, not liability for the underlying injury or the treatment reasonably necessary to cure and relieve that underlying injury. Therefore, the treatment parameters were applicable to the case. The Court remanded the case to the compensation judge to address the issue as to whether the ongoing use of Endocet complied with the long-term opioid medication treatment parameter. *See Johnson v. Darchuks Fabrication, Inc.*, 926 N.W.2d 414 (Minn. 2019).

On remand, the compensation judge determined that the ongoing use of Endocet was reasonable and necessary. He further found that the employee's use of Endocet was not compliant with the long-term opioid medication treatment parameter. He found that none of the departures authorized by Minn. R. 5221.6050, subp. 8 applied. Nevertheless, he determined that the Endocet medication was compensable as a "rare case" exception to the treatment parameters. *See Jacka v. Coca-Cola Bottling Company,* 580 N.W.2d 27 (Minn. 1998); *Asti v. Northwest Airlines*, 588 N.W.2d 737 (Minn. 1999). The judge ordered the insurer to continue paying for the Endocet medication. The WCCA affirmed that decision.

The insurer appealed the case to the Minnesota Supreme Court. Justice Moore, writing for the unanimous court, reversed the decision on remand. The Court initially addressed the concept of the Minnesota Workers' Compensation treatment parameters. Pursuant to Minn. Stat. § 176.135, subd. 1, the workers' compensation system requires employers to furnish such treatment "as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." At the direction of the Legislature, the Department of Labor and Industry developed the treatment parameters, setting forth standards for particular types of treatment for injuries. The parameters are used "to determine whether a provider…is performing procedures or providing services at a level or with a frequency that is excessive, unnecessary, or inappropriate." Minn. Stat. § 176.83, subd. 5. Minn. R. 5221.6110 was developed to address the long-term

use of opioid medication, and it requires detailed medical records, assessments, and evaluations to establish that the employee cannot function in daily living activities given the level of pain without long-term use off opioid medications. The rules set forth a number of requirements on the employee and his treating provider. In situations where the employee was already using opioid pain medication at the time of the creation of the rule in 2015, it requires the prescribing provider to, upon receipt of written notice of the rule from the insurer, come into compliance with the requirements of the parameter within three months after receipt of the notice to comply. The treatment parameters include Rule 5221.6050, subp. 8, which sets forth four circumstances under which a departure from the treatment parameter may be appropriate.

The Court then commented on its earlier decision in *Jacka*, noting that it had recognized that "the treatment parameters cannot anticipate every exceptional circumstance," and, thus, compensation judges "may depart from the rules in those rare cases in which departure is necessary to obtain proper treatment." Compensation judges are permitted to create an exception to the parameters in "rare cases" even where the treatment neither complies with the applicable treatment parameters, nor meets the requirements for a departure under the rule. In this case, the insurer argued that the judge erred in concluding that the employee's case is compensable as a "rare case" exception, as neither he nor his provider have tried to comply with the treatment parameters. It further argued that the employee's ongoing use of opioid pain medication, even without gaining substantial relief or progress, is "exactly the type of situation anticipated by the treatment parameters," and, therefore, not an exceptional case. It concluded that allowing a departure would eviscerate the treatment parameters and render them meaningless. The employee argued that any treatment that is reasonable and necessary satisfies the threshold requirement in the statute for compensation. He did not offer any explanation as to why he could not comply with the long-term opioid medication treatment parameter, why the specific requirements in the rule had not been met, or any reason why the treatment could not be compliant with the parameter. His argument was basically that the long-term opioid medication treatment parameter is "onerous" and "cumbersome" and that the Endocet treatment had adhered to the "spirit" of the parameter, as there was no evidence that he had misused the medication.

The Court rejected the assertion that merely demonstrating the treatment at issue is reasonable and necessary to cure and relieve the effects of the injury is sufficient to warrant a rare case exception. The Court concluded that acceptance of the employee's argument would eviscerate the treatment parameters. The Court cannot adopt an interpretation of the law that would so completely undermine the clear legislative intent to establish standards for medical care in the treatment parameters. The *Asti* case does not support a different conclusion. That case established only that exceptional circumstances may exist when the employee demonstrates that the particular parameter requirements at issue prevent him from obtaining the treatment that is necessary to cure and relieve the effects of the injury. That is not present in this case. The very purpose of Minn. R 5221.6110 is to address when long-term use of opioid medication is reasonable and necessary and when that particular treatment plan is no longer reasonable or necessary. The rule guides the assessment of whether long-term opioid medication treatment is reasonable and necessary and requires the provider to regularly revisit that assessment. The Court cannot conclude as a matter of law that exceptional circumstances exist to justify a departure from the parameters when there is no explanation for non-compliance with the requirements that establish whether the treatment is reasonable and necessary. Therefore, this case is distinguishable from *Asti*. The record here does not establish that the employee's non-compliance with the opioid treatment parameter is an exceptional circumstance not contemplated by the parameter. Further, the employee's non-compliance with the parameter does not better achieve the objectives of the workers' compensation system to cure and relieve the effects of his injury.

Near the end of its decision, the Court also commented on several observations that it found relevant, although it noted that none were essential to its decision. First, the medical provider had indicated that alternative treatment options were available to the employee, but there was no indication that any of those alternatives had been investigated. It further noted that the compensation judge had suggested that the employee or his provider had found the requirements of the treatment parameters to be onerous and draconian, and that that was an acceptable justification for non-compliance with the parameter. The Court noted that an unwillingness to comply with the parameters based on disagreement with or dislike of a particular parameter cannot justify a departure from that parameter. Finally, the Court commented on the fact that the promulgation of the parameter at issue was expressly required by the Legislature when an epidemic of opioid use was underway across the

country. It cited to the Statement of Need and Reasonableness (SONAR) for the rule at the time it was promulgated. It noted that the employee's arguments would render meaningless the parameter, which was intended to specifically address the significant and serious concerns with ongoing opioid medication usage. Second-guessing the merits of a policy decision made by the Legislature and the Department of Labor and Industry under these circumstances is not an appropriate role for the Court.

The Court concluded that there was no justification for why the treatment was not compliant with the long-term opioid medication treatment parameter, and therefore, the lower courts erred as a matter of law in concluding that non-compliance could be excused under the rare case exception recognized in *Jacka*. The employee's treatment with opioid medication is, therefore, not compensable treatment. In a footnote, the Court indicated that the employee is not necessarily barred from pursuing compensation for future use of Endocet. It would have to be assumed, based on the decision, that such future use would have to be in compliance with the treatment parameter.

Bierbach v. Digger's Polaris, 965 N.W.2d 281 (Minn. 2021). The employee suffered a work-related ankle injury and was diagnosed with intractable pain. He enrolled in Minnesota's medical cannabis research program and later filed a claim petition seeking reimbursement from his employer for the cost of his medical cannabis. The compensation judge ordered the employer to reimburse the employee for the cost of his medical cannabis. The employer appealed. The WCCA affirmed the compensation judge's order, and the employer and insurer appealed to the Minnesota Supreme Court. The main issue on appeal was whether the federal Controlled Substance Act (CSA) preempts the requirement in Minnesota law for an employer to reimburse an injured employee for the cost of medical treatment under Minn. Stat. § 176.135, subd. 1(a), when the treatment for which payment is sought is medical cannabis. Following its concurrent decision and analysis on preemption in *Musta v. Mendota Heights Dental Center* (see below), the Minnesota Supreme Court held the federal CSA preempted the workers' compensation court's order mandating that the employer pay for the employee's medical cannabis. The employer and insurer were not required to reimburse the employee for her purchase of medical cannabis. This case has been appealed to the U.S. Supreme Court.

Musta v. Mendota Heights Dental Center, 965 N.W.2d 312 (Minn. 2021). The employee sustained a work-related neck injury in 2003 and underwent conservative care followed by surgery. She was ultimately prescribed medication to manage continued pain, and in late 2009 she discontinued the narcotic pain medication due to the side effects. In 2019, she was certified to participate in Minnesota's medical cannabis program, and she began using medical cannabis to treat for pain from her work-related injury. She requested reimbursement for the cost of medical treatment under Minn. Stat. § 176.135, subd. 1 (2020). At hearing before the compensation judge, the parties stipulated that the employee's use of medical cannabis was reasonable, necessary, and causally related to the work injury. However, the employer and insurer asserted reimbursement was prohibited by federal law under the Controlled Substance Act (CSA). The compensation judge found there was no risk the employer and insurer would be criminally prosecuted under federal law, and therefore, no preemptive conflict between federal law and Minnesota law existed. The judge ordered the employer and insurer to reimburse the employee for her medical cannabis. The employer and insurer appealed, and the WCCA affirmed the compensation judge's decision.

The issues on appeal before the Minnesota Supreme Court were: (1) whether the WCCA correctly concluded it lacked subject matter jurisdiction to decide whether federal law preempts Minnesota law requiring an employer to reimburse an employee for treatment of a work-related injury; and (2) whether the federal CSA preempts the requirement in Minnesota law for an employer to reimburse an injured employee for the cost of medical treatment when the treatment for which payment is sought is medical cannabis. On the first issue, the Minnesota Supreme Court explained that the statutory jurisdiction of the compensation courts does not extend to interpretation of laws outside of legal questions and facts arising under the workers' compensation law. The Court held the WCCA does not have jurisdiction to decide whether federal law preempts Minnesota law that requires an employer to "furnish" medical treatment when the treatment for which reimbursement is sought is medical cannabis. On the second issue, the Minnesota Supreme Court found that the CSA preempts mandated reimbursement of an employee's medical cannabis purchases under an "impossibility theory" of conflict preemption. The Court concluded that mandating the employer to pay for the employee's medical cannabis makes the employer criminally liable for aiding and abetting the possession of cannabis under federal law. Thus, as it is impossible to comply with both state and federal law, the Court reversed the WCCA decision and held the CSA preempted Minnesota law. The employer and insurer were not required to reimburse the employee for her purchase of medical cannabis. This case has been appealed to the U.S. Supreme Court. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Causal Connection

Quandt v. State of Minnesota, Bureau of Criminal Apprehension, File No. WC20-6386, Served and Filed June 3, 2021. For a summary of this case, please refer to the Evidence category.

Evidence

Quandt v. State of Minnesota, Bureau of Criminal Apprehension, File No. WC20-6386, Served and Filed June 3, 2021. The employee injured her back at work. The employer admitted liability and paid benefits. The employee had treated for low back problems prior to the work injury. She was released to return to work without restrictions and the employer discontinued all benefits. She was seen by an IME provider, Dr. Reiser, who opined there was no objective findings on examination and that the work injury was a temporary aggravation of a pre-existing condition which had resolved. The employee was referred by her attorney to Dr. Agre, who opined that the work injury was a permanent aggravation of a pre-existing low back condition, which had resulted in continuing disability and need for work restrictions, and that the employee had not reached maximum medical improvement. At the beginning of the hearing, the employee introduced an exhibit which itemized out-of-pocket medical expenses and travel costs incurred from the work injury in the amount of $670. In off-the-record discussions between the attorneys and the compensation judge, the employer's attorney noted that a number of the expenses were incurred before the injury. The employee's attorney stated he would withdraw the exhibit and present an amended exhibit. Compensation Judge Behounek agreed to hold the record open for one week for that purpose. The employer's attorney stated he would want to comment on this new exhibit. The amended exhibit was sent by mail to the compensation judge one week later, now in the amount of $10,788.16. The new exhibit consisted of several pages of itemized expenses, some of which were for copays or mileage involving providers whose records were not in evidence. No medical records or reports were provided to explain any of the items. The employer's attorney sent an email to the judge the next day, objecting to consideration of a new claim that had not been made at hearing. Judge Behounek did not address the employer's objection. She adopted the employee's expert opinion and found the work injury was a permanent aggravation of the pre-existing low back condition and that it was a substantial contributing factor in the employee's condition, disability, and need for treatment. She awarded wage loss benefits and reimbursement of out-of-pocket expenses and mileage. The WCCA (Judges Stofferahn, Sundquist, and Quinn) affirmed the decision to accept an expert's opinion, since the opinion of that expert was not shown to have inadequate foundation. However, the WCCA vacated the compensation judge's award of out-of-pocket expenses and mileage, concluding it was an abuse of discretion. The WCCA explained there were no extenuating circumstances offered by the employee's attorney as to why the "amended" claim for out-of-pocket expenses was not made at the hearing. With the new post-hearing exhibit, the employer was presented with a claim more than 16 times larger than was alleged by the employee at the hearing. Compounding the prejudice to the employer was the failure of the compensation judge to address the objections raised by the employer's attorney.

Erickson v. Grand Itasca Clinic and Hospital, File No. WC21-6413, Served and Filed November 16, 2021. The employee sustained a right shoulder injury on September 28, 2017, when he reached up and out from his body to adjust a surgical light and felt a pop and pain in the shoulder. The injury was admitted, but the nature and extent of the injury was disputed. Following the injury the employee did not seek immediate medical attention. He was a physician, so he managed his own conservative care with exercises, medications, and job modifications. Several months after the injury he consulted with an orthopedic surgeon. The record from the consultation noted that the employee had a prior shoulder surgery in 2016. He testified that he recovered approximately 99% from the surgery and did not have any symptoms until the date of injury. He testified that the symptoms from the 2017 injury were a different type of pain. The employee underwent an independent medical examination with Dr. Szalapski, who opined that the 2017 injury was not a substantial contributing factor to the employee's condition. Further he opined that based on his personal experience the act of reaching to adjust a surgical light would not cause substantial shoulder problems. Based upon the report the employer denied benefits, claiming that the employee's temporary aggravation resolved on September 29, 2017. The employee filed a claim petition and included a second medical opinion from

Dr. Gregerson opining that the 2017 injury was a significant aggravating factor and led to the required surgery. At the hearing the employee moved to exclude Dr. Szalapski's report as it was biased, misstated facts, and he could not use his own personal experience as expert knowledge. Compensation Judge Lund disagreed and adopted Dr. Szalapski's opinion. The judge denied the requested surgery and did not address the reasonableness and necessity of the surgery. The employee appealed arguing that Dr. Szalapski's report lacked foundation, as it adopted misstatements that the employee's 2017 injury affected the front of his shoulder rather than the back, that it did not explain the relationship of the 2016 condition to the 2017 symptoms, and that he relied on his own personal experience outside the scope of testimony. The WCCA (Judges Sundquist, Stofferahn, and Hall) found the compensation judge relied on an opinion that misstated the location of the injury and lacked explanation for that opinion. In review the opinion of his personal experience, the WCCA found that Dr. Szalapski relied on evidence not relevant to the case, did not adequately explain his opinion, and misstated a fact which discredits the report. The WCCA determined that the compensation judge's reliance on this opinion is contrary to the weight of the evidence and the judge erred in adopting the opinion. Although the compensation judge discussed other factors relied upon, those factors did not provide substantial evidence to support the causation findings. The WCCA reversed the opinion for the denial of surgery and remanded for a determination as to whether surgery was reasonable and necessary.

Medical Issues

Medina v. Paymasters, Inc., File No. WC21-6390, Served and Filed June 17, 2021. For a summary of this case, please refer to the Penalties category.

Occupational Disease

Sershen v. Metropolitan Council, File No. WC21-6395, Served and Filed June 24, 2021. The employee was employed with several different employers from 1986 through 2017 where he was exposed to occupational noise, including SPX, ATEK, and appellant, Metropolitan Council. Over time, the employee developed hearing loss and was prescribed hearing aids. Prior to the hearing on the employee's claims, he entered into a *Pierringer* settlement with two of his prior employers, SPX and ATEK. He subsequently proceeded with his claims for medical benefits and permanent partial disability benefits against the remaining employers and insurers. Compensation Judge Grove found that the employee's workplace noise was a substantial contributing factor to his hearing loss. She also found that the most significant workplace noise exposure was during his employment with SPX, and that his exposures at his other employers, including the Metropolitan Council, were not significant. Judge Grove ultimately ordered that Metropolitan Council, the last employer where any occupational exposure to noise occurred, to pay the employee's medical benefits. She found that the issue of PPD was moot under Minn. Stat. § 176.66, subd. 10, since the employee previously resolved all claims against SPX, the employer with the last significant exposure, pursuant to the *Pierringer* settlement – the PPD issue was not before her. Metropolitan Council appealed. The WCCA (Judges Quinn, Milun, and Hall) affirmed. On appeal, Metropolitan Council made two arguments. First, it argued that substantial evidence did not support the compensation judge's finding that the employee suffered an occupational disease, specifically hearing loss. On this issue, the WCCA found that the compensation judge did not abuse her discretion in relying on only a portion of an expert medical opinion. The WCCA also found that the judge's apparent rejection of another portion of the expert medical opinion did not indicate an intention to reject the entire opinion. Metropolitan Council's second argument was that even if there was a work-related hearing loss, it should not be liable because the compensation judge found that the noise exposure the employee experienced while working for Metropolitan Council was insignificant, and because of the *Pierringer* settlement, it was effectively barred from making a petition for reimbursement against SPX. Minn. Stat. § 176.66, subd. 10, states that "the insurer who was on the risk during the employee's last significant exposure to the hazard of the occupational disease is the liable party." However, Minn. Stat. § 176.135, subd. 5, calls for the insurer during the last exposure, even if not significant, to make medical payments for the occupational disease. When this payer is not the insurer during the last significant exposure and the payer has made medical payments pursuant to the statute, that insurer may be reimbursed, in cases of disablement, under Minn. Stat. § 176.66, subd. 10. The WCCA found that based on the plain meaning of these statutes, the compensation judge did not err in ordering Metropolitan Council to pay for the medical expenses at issue. Metropolitan Council argued that even if medical expenses were properly ordered, in this case, the compensation judge's failure to rule on the PPD rating, combined with the *Pierringer* settlement, effectively bars them from being able to bring a petition for reimbursement against SPX. The WCCA was not persuaded by this argument. Instead, the

WCCA found that the issues of whether the employee has a PPD rating and whether that arises to "disablement" under Minn. Stat. § 176.135, subd. 5 were not at issue at this hearing, and pertain to a potential future claim for reimbursement against SPX through a petition for reimbursement.

Penalties

Medina v. Paymasters, Inc., File No. WC21-6390, Served and Filed June 17, 2021. The employee sustained injuries and sought treatment with three medical providers. The employer did not pay medical expenses billed by the providers. Consequently, the employee filed a claim petition seeking, among other claims, payment of the outstanding medical bills. All three medical providers filed motions to intervene. At the hearing, the employer requested that if payment was ordered to the intervenors, the compensation judge include language in the order that payment would be made pursuant to the fee schedule, apparently intending to preserve a defense that would prohibit payment to them under Minnesota Statutes chapter 256B and the Workers' Compensation Act. Minn. Stat. § 256B.0644 governs reimbursement for certain state health care programs and includes a requirement that providers in those programs demonstrate participation in the medical assistance and MinnesotaCare programs. The employer presented no evidence at the hearing to demonstrate that Minn. Stat. § 256B.0644 applied to the intervenors and made no argument on the record at the hearing in support of a defense to payment under this chapter. Compensation Judge Grove found the treatment provided by the intervenors was reasonable and necessary and ordered the self-insured employer to pay the intervenors' claims pursuant to the fee schedule within 14 days. The self-insured employer did not make payment and did not appeal the decision. The employee filed another claim petition seeking payment of the intervenors' claims and for penalties against the employer for failure to make payment pursuant to an order from the previous hearing.

The employer filed a motion to dismiss the claim petition, alleging that the intervenors' claims were excessive health care charges under Minn. R. 5221.0500, subp. 1.E, because the intervenors did not accept medical assistance or MinnesotaCare patients, as required under Minn. Stat. § 256B.0644 for certain state health care programs. The employer's motion to dismiss was heard at a special term conference on September 9, 2019. The employer presented evidence that the intervenors did not participate in medical assistance or MinnesotaCare programs and argued that the reference to Minn. Stat. § 256B.0644 in Minn. R. 5221.0500, subp. 1.E, made that statute part of the medical fee schedule, and that payment to the intervenors was accordingly prohibited. The employee responded that this argument had not been raised at the initial hearing. Compensation Judge Grove found that she had jurisdiction to interpret the phrase "pursuant to the Minnesota Workers' Compensation Medical Fee Schedule" from her previous order. Based on a determination that Minn. R. 5221.0500 and its reference to Minn. Stat. § 256B.0644 were not part of the Minnesota Workers' Compensation Medical Fee Schedule, the judge concluded that payment of the medical bills identified in the claim petition was not prohibited by the medical fee schedule. The judge therefore denied the employer's motion to dismiss and ordered an evidentiary hearing. The employee's claim for payment to the intervenors and for penalties came on for hearing. At issue were whether the employer neglected or refused to pay compensation within the meaning of Minn. Stat. § 176.225, subd. 1(3); whether the employer was guilty of inexcusable delay in paying the claims of the intervenors within the meaning of Minn. Stat. § 176.225, subd. 5; and whether interest was due and owing pursuant to Minn. Stat. § 176.225, subd. 5. A penalty under Minn. Stat. § 176.221 was not listed as an issue. The employer argued that the judge would need to "reconsider" and "alter" her determination that Minn. R. 5221.0500 and Minn. Stat. § 256B.0644 were not part of the medical fee schedule. The employee requested penalties of 30 percent and an additional 25 percent for the intervenors and argued that the employer was prohibited from litigating a defense that had not been presented to the compensation judge at the underlying hearing in 2019. Compensation Judge Grove denied the claim for penalties, finding that the employer's argument regarding the interpretation of the term "medical fee schedule" was asserted in good faith and constituted a "colorable" defense to payment of the intervenors' claims; that there was no neglect or refusal to pay compensation within the meaning of Minn. Stat. § 176.225, subd. 1(3); and that there was no inexcusable delay within the meaning of Minn. Stat. § 176.225, subd. 5. The judge ordered interest paid because payment to the intervenors had not been made when due in the absence of an appeal under Minn. Stat. § 176.255, subd. 5. The employer appealed the finding that payment of the intervenors' claims was not prohibited under the fee schedule, but then later withdrew the appeal after settling with the three intervenors. The employee cross-appealed the compensation judge's finding that the employer is not obligated to pay penalties pursuant to Minn. Stat. § 176.225 for failing to pay medical bills for 16 months after an order by the compensation judge.

The WCCA (Judges Sundquist, Stofferahn, and Quinn) reversed the compensation judge's decision and ordered penalties to be paid. The WCCA found there was no basis for the compensation judge's finding that the self-insured employer had a colorable or good faith defense to the ordered payment of the intervenors' claim and further explained that to allow the employer to refuse payment to the intervenors for over 16 months without penalty does not assure the quick and efficient delivery of benefits to the employee under the Workers' Compensation Act as the intended by the legislature.

Procedural Issues

Dillon v. Surly Brewing Company, File No. WC20-6363, Served and Filed August 16, 2021. The pro se employee, who had extensive pre-existing medical conditions with his bilateral knees, sustained an injury to his bilateral knees during a work retreat on November 15, 2017. Employees were asked to demonstrate a physical ability. When the employee displayed his ability, he jumped and touched his toes while in midair and then landed. He landed on both feet and felt extreme pain, right greater than left. Based on a CT scan he was diagnosed with a comminuted intraarticular fracture of the right lateral tibial plateau. The employer and insurer initially admitted the injury to the right knee and paid for some of the medical treatment for the right knee, but denied liability for the left knee. A November 17, 2017 MRI showed a medial meniscus tear of the left knee, which was said to be of uncertain age, but consistent with chronic degenerative changes. The employee continued to experience pain and receive treatment for his left knee. His treating doctor repeated an MRI, which showed a chronic rupture of the ACL. He underwent arthroscopic partial medial and lateral meniscectomies on the left knee in May 2018. The employee moved to Massachusetts and continued to receive treatment for his left knee. Due to bone-on-bone arthritis, his doctor recommended a total knee replacement in September 2019. The employer and insurer continued to deny liability for the left knee and amended their position to deny primary liability for the right knee, alleging that benefits paid to-date were made under a mistake of fact. The employee's pre-trial statement alleged penalties, entitlement to permanent partial disability benefits (PPD) related to the right knee, and unspecified PPD ratings to the left knee. At the hearing, the issues presented to Compensation Judge Hartman on the record were whether the employee sustained a compensable injury, and if so, whether the employee suffered an injury to his left knee as a result of the November 15, 2017 incident. Judge Hartman determined the employee suffered a compensable work-related injury to his right knee, but the judge accepted the opinion of Dr. D'Amato that the employee did not sustain an injury to his left knee as a result of the November 15, 2017 incident. The employee appealed claiming the judge erred in not addressing claims for penalties and PPD benefits for the right knee, and that there was not substantial evidence to support the determination that the employee sustained an injury to his left knee on November 15, 2017.

However the employee's claims for penalties and PPD benefits for the right knee were not raised by his pleadings. Additionally, although the issues were included in the employee's pretrial statement, these issues were not raised at the hearing. While a pro se employee might be given some benefit of the doubt on some procedural matters, there was no medical evidence or doctor's report presented to the compensation judge as to the extent of the any PPD rating for the employee's right knee. The WCCA (Judges Quinn, Stofferahn, and Sundquist) affirmed the decision stating that because no claim of entitlement to PPD benefits for the right knee, nor claim to an award of penalties, were presented to the compensation judge at the pretrial hearing or in the pleadings, no error was committed in declining to address the claims. Additionally, substantial evidence in the record supports the conclusions regarding the compensability of the left knee injury as the judge's choice between competing expert opinions is to be affirmed so long as the chosen opinion is adequately founded. *See Nord*.

Temporary Partial Disability

Long v. Minnesota Vikings Football Club, File No. WC21-6402, Served and Filed September 1, 2021. The employee sustained an injury on November 13, 2016, and was unable to continue playing football. Thereafter, he established a limited liability company called "Laurilo." Laurilo purchased rental properties in 2018 and 2020. The employee initially contracted with a property management company to oversee the rental properties, but later began performing the management activities himself, which included collecting rent, accounting, paying bills, and communicating with tenants. The properties owned by Laurilo generated $10,500 per month in rental fees. The employee did not pay himself any salary or wage for his property management work. Rather, he reinvested the monthly income from the rental properties back into the business to obtain additional real estate. He filed a claim petition in March 2020 alleging entitlement to temporary partial disability (TPD) benefits from March 6, 2020 onward. The employer denied the claim. The parties stipulated to an average weekly wage of $8,711.65. The employee argued that the rental income from Laurilo's properties was wages for

the purposes of calculating TPD benefits. The employer argued the contrary. Compensation Judge Lund determined that the rental income constituted wages for purposes of TPD benefits. The WCCA affirmed. The majority (Judges Milun, Stofferahn, Hall, and Quinn) rejected the employer's argument that the rental income represented only passive investment income, not wages. The majority explained that the employee performed the day-to-day management of the rental properties. He was not simply a passive investor, but rather, an active manager. Although he did not pay himself a wage, that was not disqualifying. The fact finder is tasked with determining the fair market value of the employee's labor. The majority cited *Hansford* for the proposition that, in the absence of specific evidence supporting a prescribed method of wage calculation, "a compensation judge may use any method which reasonably reflects the employee's injury-related loss of earning power." In this case, the compensation judge was not unreasonable in concluding that the $10,500 in monthly rent represented the employee's wages for purposes of calculating TPD.

The dissent (Judge Sundquist) argued that the compensation judge arbitrarily determined the employee's wage and erred as a matter of law in awarding TPD benefits based upon income from capital investment. There was no substantial evidence to support a wage of $10,500 per month. The employee submitted no expert testimony on the issue and there was no evidence to establish the amount of hours worked, the skills required, or the costs to maintain the rental properties. Moreover, under *Backhaus*, wages do not include income from capital investment.

Vacating Awards

Leadens v. Diversified Distributors, File No. WC20-6375, Served and Filed June 25, 2021. The employee injured her left knee on October 1, 1979. She underwent six left knee surgeries between 1979 and 1992. She developed low back problems in 1990, which her chiropractor related to the 1979 left knee injury. She underwent an L3-S1 fusion in 1995 and a hardware removal procedure in 1996. The employee continued to treat for low back pain, including an MRI and multiple SI joint injections in 1998. On September 21, 1998 she settled her claim on a full, final and complete basis, with the exception of future medical expenses, for $105,000. She was not represented at that time, nor did she discuss the terms of the settlement with the compensation judge who issued the Award. She continued to treat for low back and left knee pain following the settlement. She underwent a left knee hardware removal surgery in 2000, a fusion of L2-3 in 2008, and a total left knee replacement in 2013. She also began experiencing right knee pain in 2004, and her treating surgeon opined that the right knee condition was, to some degree, from favoring the right knee because of the problems she had with her left knee. She ultimately underwent a right total knee replacement in 2017. In 2019 her treating physician rated permanent partial disability of an additional 20% for each knee, noting that it was his "understanding" that her right knee condition was also related to the October 1, 1979 injury. The employee retained counsel and underwent an independent medical evaluation with Dr. Wicklund, who opined that the low back condition was related to the October 1, 1979 injury, but the right knee condition was not. The employee then filed a Petition to Vacate the Award on Stipulation in October 2020, arguing that there was a substantial change in medical condition which warranted the vacation under Minn. Stat. § 176.461. The WCCA (Judges Stofferahn, Milun, and Quinn) denied the employee's petition. The majority (Judges Stofferahn and Milun) rejected the employee's argument that stipulations for settlement in which a party is not represented are "per se unreasonable and [are] voidable" on the basis of public policy and fairness principles. The WCCA agreed that settlements involving unrepresented parties should be closely reviewed in terms of best practices, and acknowledged that lack of representation can be considered as to the reasonableness of the agreement, but held that a per se rule is inappropriate. The WCCA further explained that under *Hudson* and *Ryan*, the burden is on the employee to prove that there has been: (1) a substantial change in medical condition; (2) the change was clearly not anticipated at the time of settlement; and (3) the change could not reasonably have been anticipated. The majority concluded that the employee failed to meet her burden with regard to the left knee and low back conditions. The evidence relating her right knee condition to the October 1, 1979 injury was "equivocal." The evidence further established that the employee was experiencing ongoing problems with her left knee and low back around the time of the 1998 settlement and there was no evidence that either condition had resolved or would not require additional treatment in the future.

Judge Quinn issued a concurring opinion agreeing that the employee had failed to meet her burden in this particular case. He went on to indicate that while he agreed with the majority opinion that the medical evidence did not support a consequential injury to the employee's right knee, he questioned whether the WCCA could ever vacate an Award due

to any post-settlement consequential injury given the Supreme Court's holding in Ryan. He elaborated on what he considered to be "unreasonable" and "essentially impossible" burdens imposed by Ryan when petitions to vacate are brought based upon the development of a post-settlement consequential injury. According to the concurrence, *Ryan* held that consequential injuries are, by their nature, able to be anticipated at the time of settlement, and therefore, can likely never serve as grounds to vacate an award. This case was summarily affirmed by the Minnesota Supreme Court on December 14, 2021. ✦

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500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500
Fax 612 339-7655

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000
Fax 715 808-0513

ArthurChapman.com

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