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Minnesota Workers' Compensation Update

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Arising Out Of

Hohlt v. University of Minnesota, 897 N.W.2d 777 (Minn. June 28, 2017). The employee worked for the employer as a building painter, and had worked in a number of buildings on the University of Minnesota campus. On the date of injury, she was painting in the Mayo building, working the 3 PM to 11:30 PM shift. She parked in the Oak Street ramp, a public parking ramp owned and operated by the employer. She parked there because it offered a cheaper rate after 2 PM. The ramp was located four blocks away from the Mayo building. The employee punched out early at 10:30 PM. It was sleeting and snowing that evening, and she walked on the sidewalk between the Mayo building and the Oak Street ramp to get to her vehicle. The City of Minneapolis owned the sidewalk, but the employer had the responsibility to maintain the sidewalk, including keeping it clear of snow and ice, pursuant to city ordinance. The employee reached the intersection. As she walked forward onto the sidewalk curb ramp, not yet having reached the street, she slipped on the

continued on next page . . .

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ice and fell, sustaining an injury. The employer denied primary liability. Compensation Judge Cannon determined that the injury did not arise out of the employment, as the hazard faced by the employee of falling on winter ice or snow was not unlike the hazard faced by the general public. He did not specifically decide the issue of whether the injury occurred in the course of employment, although he implied that the injury would likely have been found to be in the course of. Both parties appealed to the WCCA. The WCCA reversed the compensation judge, holding that the injury occurred in the course of employment, as at the time of the incident, the employee was on the premises of the employer, walking a short distance from where she worked on the most direct route to a parking ramp owned and operated by the employer. It also held that the injury arose out of the employment, as the employee's presence on the employer's premises was not due to her membership in the general public, but was because of her employment, and that is why she encountered the risk of the icy sidewalk.

The case was appealed to the Minnesota Supreme Court. In a 3-2 decision, with Justice Lillehaug writing for the majority, the Supreme Court affirmed the WCCA holding. The Court determined that the facts were essentially undisputed, so the appeal focused on a question of law, which the WCCA and the Supreme Court could consider *de novo*. In analyzing the legal issue, the Court affirmed its previous holdings that the "arising out of" and "in the course of" requirements are distinct, and each must be met for an injury to be compensable. With regard to the "arising out of" element, the Court held that a causal connection must exist between the injury and the employment. *See Gibberd*. The Court held that the causal connection exists because the employee's employment exposed her to a "hazard that originated on the premises as part of the working environment." *See Dykhoff; Nelson*. When "the employment creates a special hazard from which injury comes, then, within the meaning of the statute, there is that causal relation between employment" and the injury. *See Nelson; Hanson*. That "hazard" was the employer-maintained sidewalk. It determined that the sidewalk was part of the employer's premises. The employee was exposed to the icy sidewalk (the hazard) on the employment premises because she was there, not as a member of the general public, but because of her employment. Citing to Foley and Hanson, the Court indicated that the test is not whether the general public is also exposed to the risk, but whether the employee was exposed to the risk because of the employment.

The Court distinguished the result in the *Dykhoff* case. In that case, the employee fell on a flat, dry, and clean floor on the employment premises. The *Dykhoff* Court determined that there was nothing about the floor that increased the employee's risk of injury. Ms. Dykhoff had failed to show any increased risk or hazard. The Court held that *Dykhoff* "is a case about an unexplained injury." In contrast, the employee in *Hohlt* had fully explained her injury, which was the result of an icy sidewalk, not a clean floor. With regard to the "in the course of employment" requirement, the Court reaffirmed its prior holdings that an employee is in the course of employment while providing services to the employer, and also for "a reasonable period beyond actual working hours if an employee is engaging in activities reasonably incidental to employment." It noted that the employee slipped and fell shortly after leaving work, which was a reasonable period beyond actual working hours. The direct walk to her car, only four blocks away, was reasonably incidental to employment. [In a footnote, the Court noted that an employee's walk to an employer parking lot that is "abnormally far" from the workplace would not be reasonably incidental to employment. It did not define what "abnormally far" is.]

Justice Anderson wrote a lengthy dissent on behalf of the minority. He would have determined that the employee did not satisfy either the "arising out of" or the "in the course of" requirements. With regard to "arising out of," Justice Anderson noted that a causal connection is met when the employment "peculiarly exposes the employee to an external hazard whereby he is subjected to a different and greater risk than if he had been pursuing his ordinary personal affairs." The employment must expose the employee to an increased risk or a special hazard. He would have determined that the employee did not establish that her injury was caused by the employment. She fell on a public sidewalk, and any member of the general public was equally at risk for falling on the same sidewalk due to the same conditions faced by the employee. The risk of falling on an icy sidewalk was not unique or peculiar to the employee's job as a painter, she was not exposed to any greater risk than if she had been walking on the same sidewalk in pursuit of personal activities, and she was not performing any work activities while on the public sidewalk. Also, Justice

Anderson reasoned that it was the employee's personal choice to park in the parking ramp. Also, her injury did not occur in the parking ramp, but on a public sidewalk. Justice Anderson also would have determined that the injury did not occur "in the course of employment." The injury occurred four blocks from the building in which the employee worked, which was a significant distance, more significant than any case in which an injury had been awarded before. How far would the Court allow an employee to walk between two parts of the employment premises before it would not be compensable? The majority did not define what "abnormally far" is. The employee in *Hohlt* was not told by the employer where to park. The employee chose where to park, and indeed, the employer did not require the employee to even drive to work in the first place. Justice Anderson concluded that fundamentally, this case represented a "coming and going" dispute. Injuries that occur during a commute are typically not compensable. Here, the employee had punched out, was not performing work duties, and was walking on a public sidewalk, simply going home.

Kubis v. Community Memorial Hospital Association, 897 N.W.2d 254 (Minn. June 28, 2017). The employee injured her shoulder while allegedly rushing up a set of stairs at the end of her shift because she was concerned about working overtime and she needed to respond to the oncoming shift. The claim was denied on the basis that it did not arise out of her employment because there was no increased risk associated with her employment. Compensation Judge Baumgarth found the employee's testimony regarding "rushing" was not credible and held that the injury did not arise out of employment. The WCCA (*en banc*) reversed, holding that the employee was fatigued and hurrying because of the concern over overtime and her need to check in with the people on the next shift. According to the WCCA, being fatigued and hurrying rose to the level of an increased risk. The WCCA did not address the judge's finding that the employee's testimony was not credible. The case was appealed to the Minnesota Supreme Court. In a decision written by Justice Anderson, it reversed the WCCA's decision. The Supreme Court did not address whether the employee's subjective belief was enough to constitute an increased risk, or whether the WCCA misapplied *Dykhoff v. Xcel Energy*. Instead, the Minnesota Supreme Court reversed the WCCA's decision because the WCCA applied the wrong standard of review. The Supreme Court noted that the compensation judge made a credibility determination and found the employee's testimony regarding rushing was not credible. The compensation judge's decision was supported by substantial evidence that a reasonable mind would accept as adequate, and the WCCA was required to affirm the compensation judge's findings.

Justice Lillehaug wrote a dissenting opinion in which he indicated he would have given the WCCA deference and affirmed its decision. According to Justice Lillehaug, the compensation judge did not make a determination on the employee's credibility regarding whether she was rushing up the stairs to report to the incoming staff and that this finding was uncontroverted and supported the WCCA's determination that her injury arose out of her employment. Justice Lillehaug argued that the WCCA's decision was thorough, well-reasoned and correct and that the majority should have given deference to the WCCA, but instead substituted its own judgment. Justice Lillehaug also argued that *Kirchner v. County of Anoka* should have been applied to the facts of this case, because the facts were similar in all relevant ways and that the employee should have been awarded benefits. Justice Lillehaug noted that there was difficulty in applying the "increased risk test" and proposed the "positional risk test" as a better alternative.

Common Enterprise

Kelly for Washburn v. Kraemer Construction, Inc., 896 N.W.2d 504 (Minn. June 7, 2017). Appellant Jessica Kelly, trustee for next-of-kin of Richard Washburn, sued respondent Kraemer Construction, Inc. in district court, alleging that Kraemer's negligence was the cause of Washburn's death by electrocution at a construction site. Washburn worked for Ulland Brother's, Inc., a general contractor. Ulland subcontracted for Kraemer to provide crane work for the repair of two bridges. The case centered on the placement of two concrete culverts at one of the bridges. For the work, Ulland employees worked on the rigging and Kraemer employees worked with a crane. Kraemer moved for summary judgment in district court, arguing that it was engaged in a common enterprise with Ulland, and therefore, the election of remedies provision in the Minnesota Workers' Compensation Act required dismissal of Kelly's lawsuit, as workers' compensation benefits had already been received. The district court denied summary judgment. The Minnesota Court of Appeals reversed and remanded for entry of summary judgment in favor of Kraemer. Kelly

appealed to the Minnesota Supreme Court. In a 3-2 decision, with Justice Chutich writing for the majority, the Supreme Court affirmed, holding that Kraemer was in a common enterprise with Ulland as a matter of law, requiring dismissal of Kelly's lawsuit. Under Minn. Stat. §176.061, subds. 1, 4, when a worker is injured "under circumstances which create a legal liability for damages on the part of a party other than the employer . . . at the time of the injury," and the third party has workers' compensation insurance and was engaged in a "common enterprise" with the employer, the party seeking recovery "may proceed either at law against [the third] party to recover damages or against the employer for benefits, but not against both." There is a three-part test to determine whether the parties were engaged in a common enterprise. These factors include: (1) The employers must be engaged in the same project; (2) The employees must be *working together* (common activity); and (3) In such fashion that they are subject to the same or similar hazards. *See McCourtie v. United States Steel Corporation*, 253 Minn. 501, 93 N.W.2d 552, 556 (1958). The primary issues on appeal were whether there was a genuine issue of material fact regarding whether the employees were engaged in a common activity and subject to the same or similar hazards. Finding that neither crew could have accomplished the day's goal of setting the culvert sections without contemporaneous assistance of the other crew, the Court held that, as a matter of law, the Kraemer crew and the Ulland crew were working together in a common activity. The Court pointed out that the Kraemer crew could not have moved the culvert sections without the Ulland crew positioning, attaching, and maneuvering them, and the Ulland crew could not have placed the culvert sections without the Kraemer crew directing and operating the crane. The Court also found that, as a matter of law, looking at the circumstances surrounding the work, the Kraemer crew was subject to the same or similar hazards as the Ulland crew because members of both crews could have been injured by movement of the crane load, failure of the crane, collision with a bulldozer on site, or slipping and falling in the dewatered streambed. Therefore, the Court found that because all three factors were met, the parties were engaged in a common enterprise and the election of remedies applied.

Justice McKeig wrote the dissenting opinion finding that the majority misread the common enterprise jurisprudence, foreclosing a remedy for victims of work-related accidents. Specifically, Justice McKeig found that the majority misapplied the precedent on the issue of whether the workers were engaged in a common activity. In determining whether workers were engaged in a common activity, Justice McKeig pointed out that they have distinguished between work that is oriented toward a common goal and work that is truly a common activity.

Justice McKeig found that the Kraemer crew executed its duties independent of the Ulland crew, neither required nor requested the assistance of any Ulland employee to complete its function at the site, and that the two crews coordinated their work but did not collaborate. Because the majority's conclusion that the Ulland and Kraemer crews work was interdependent improperly weakens the "common activity" prong, Justice McKeig, joined by Justice Lillehaug, dissented.

Interveners

Gist v. Atlas Staffing, Inc., Case Nos. A17-0819 and A17-1096 (Minn. April 4, 2018). The employee was exposed to silica at his job with the employer, a known cause of end-stage renal disease. Shortly after leaving his job, he was diagnosed with end stage renal disease. He made a claim for workers' compensation benefits. The employer denied liability. The employee sought treatment with Fresenius Medical Care, which billed Medicaid, Medicare, and the employee's private insurer for the treatment, and it accepted payments from each. Fresenius intervened in the case, seeking payment of its *Spaeth* balance, which was in excess of the amounts it had received from Medicaid, Medicare, and the private insurer. The compensation judge determined that the end-stage renal disease was work-related. She further determined that the Minnesota workers' compensation fee schedule applies to all charges for services provided to the employee for the work-related condition while in the state of Minnesota. For services which had been provided in Michigan, the Michigan fee schedule would apply. The judge further concluded that she lacked subject matter jurisdiction to interpret the Medicaid and Medicare laws, and ordered the employer to pay Fresenius in accordance with all other state and federal laws, its outstanding intervention interests associated with the end-stage renal disease. She also ordered the employer to reimburse the private insurer and the Minnesota Department of Human Services (Medicaid). The judge's Findings and Order were served on the parties on October 24, 2016. Fresenius' counsel, but not Fresenius itself, was served. On November 8, 2016, the employer filed a notice of appeal to the WCCA. That notice

had been served on Fresenius the day before. Fresenius then served a notice of cross-appeal by mail on November 22, 2016, which was received by the OAH on November 28, 2016. On May 12, 2017, the WCCA dismissed Fresenius' cross-appeal for lack of subject matter jurisdiction, concluding that it should have been filed by November 23, 2016. Subsequently, the WCCA upheld the judge's decision that the employee's condition was work-related. The WCCA also affirmed the judge's determination that she lacked subject matter jurisdiction to interpret and apply Medicaid and Medicare statutes and rules. The WCCA also affirmed the judge's determination that Fresenius was entitled to its Spaeth balance pursuant to the Minnesota workers' compensation law, despite accepting payments from Medicaid and Medicare. The employer appealed to the Supreme Court, and Fresenius moved to lift the stay of its appeal.

The Supreme Court (Justice Lillehaug) affirmed in part, reversed in part, and remanded. First, the Supreme Court determined that substantial evidence supported the judge's determination that the employee's kidney condition was work-related, and it affirmed that decision.

The Supreme Court next addressed whether Fresenius was entitled to a *Spaeth* balance for its remaining bill after payment by Medicaid. The Court determined that the Medicaid regulation is unambiguous. It imposes a bright-line rule: when a provider participates in Medicaid, bills services to Medicaid, and accepts Medicaid payment for those services, it accepts the amount paid as "payment in full," and thus, cannot recover from third parties any unpaid amounts. As such, after accepting a payment from Medicaid for services, a provider is barred from recovering any additional amounts for those services from a liable employer. There is no exception for workers' compensation cases. The Court rejected Fresenius' argument that since DHS had now also been reimbursed for its Medicaid payments, that allows Fresenius to bill the full amount to the employer. The fact remains that Fresenius already accepted Medicaid payments, and that triggered the regulation's "in full" requirement. The Court concluded that the *Spaeth*-balance rule will not be extended in the Medicaid context. It noted that the Medicare regulation does not include "in full" language, although the Court did not specifically address whether medical entities which accept payment from Medicare may pursue their *Spaeth* balances. [It is possible that specific issue was not appealed.]

The Supreme Court next determined that Fresenius' appeal had been timely, as it had not personally been served with the original Findings and Order. Pursuant to Minn. Rule 1415.0700, service on the party's attorney is considered service on that party, except that all final orders, decisions, awards, and notices of proceedings must also be served directly on the party. Therefore, the Findings and Order needed to be directly served on Fresenius itself. Since that did not happen, Fresenius' time to cross-appeal had not expired by the time it filed its appeal.

The final issue was raised by Fresenius' cross-appeal, that being whether the Minnesota fee schedule applies to medical bills for treatment incurred prior to a finding of primary liability. The WCCA did not consider this issue, as it had determined that the cross-appeal was untimely. Therefore, this issue was remanded to the WCCA for consideration.

Comment: This decision clarifies certain issues, but has left the door open with other issues. It is now clear that a medical entity which accepts Medicaid payments for services rendered is precluded from seeking payment of its residual *Spaeth* balance. However, it would appear that the Supreme Court has also determined that the same rationale does not apply to a medical entity which accepts payment from Medicare. That entity may proceed with a claim for its residual *Spaeth* balance. The issue which is still to be determined is whether a medical provider is subject to the Minnesota fee schedule for services rendered before there is a finding of primary liability. Once liability is determined, it appears clear that the fee schedule will apply to all services after that date. The WCCA will now determine whether the fee schedule applies to services before a finding of primary liability. The assumption has always been that the fee schedule applies to all medical bills which are ultimately determined to be work-related, but we will have to wait and see what the WCCA says.

Jurisdiction

Ansello v. Wisconsin Central, Ltd., 900 N.W.2d 167 (Minn. August 9, 2017). The employee sustained a low back injury in 2006 while performing longshoreman work for the employer. Benefits were paid by the employer and insurer under the Federal Longshore and Harbor Workers' Compensation Act (as opposed to the Minnesota Workers' Compensation Act.) The employee aggravated his back

at work in 2014 and subsequently scheduled low back fusion surgery. He filed a Medical Request under the Minnesota Workers' Compensation Act to seek payment for medical treatment. The compensation judge held that the Longshore Act provides a basis for fully compensating the employee for medical treatment, and the medical expenses claimed by the employee under the Minnesota Workers' Compensation Act would "supplant, rather than supplement," benefits available under the Longshore Act. Therefore, he denied the employee's claim based on a lack of jurisdiction. The judge also invoked the doctrine of *forum non conveniens*, concluding that a Minnesota workers' compensation court is not a convenient venue to litigate his current medical claims, since benefits were previously submitted under the Longshore Act. The employee appealed. The WCCA reversed and remanded. The WCCA found that concurrent state coverage under the workers' compensation system is available for employees who receive benefits under the Longshore Act. The WCCA noted that, to avoid double recovery, federal and state benefits must be credited against one another. On appeal to the Minnesota Supreme Court, the WCCA was affirmed. The Minnesota Supreme Court (Justice Gildea) expounded on the *Sun Ship* case from the United States Supreme Court, which held that there is concurrent jurisdiction between the Longshore Act and state workers' compensation laws for land-based injuries covered under more than one law. Regarding the concept of *forum non conveniens*, the WCCA cited federal case law that establishes a strong presumption in favor of the plaintiff's choice of forum. The WCCA determined that there is nothing inconvenient about the employee seeking benefits through the state system, given that he is a Minnesota resident, the injury occurred in Minnesota, and the employer's facility is located in Minnesota. The Minnesota Supreme Court upheld the WCCA on this point, as well, finding that the compensation judge abused his discretion. The Court pointed out that in every case in which the Minnesota Supreme Court has considered the doctrine of *forum non conveniens*, the two forums were in different states or in different nations. In this case, the choice was between a Minnesota compensation judge in Duluth and a federal compensation judge traveling to hear the case in Duluth.

Gist v. Atlas Staffing, Inc., Case Nos. A17-0819 and A17-1096 (Minn. April 4, 2018). For a summary of this case, please refer to the Interveners category.

Rehabilitation / Retraining

Halvorson v. B&F Fastener Supply, 901 N.W.2d 425 (Minn. September 20, 2017). The employee injured multiple body parts while working for the employer and was unable to return to work with the employer. She underwent two surgeries. Eventually, she began working for a new employer within similar restrictions as prior to her latest surgery. The employer and insurer filed a request to terminate the employee's rehabilitation benefits because she was no longer a "qualified employee" under Minn. Rule 5220.0100, subp. 22, as her new job at McDonald's was suitable gainful employment, and there was "good cause" to terminate her rehabilitation under Minn. Rule 5220.0510, subp. 5, because she would not likely benefit from further rehabilitation services. At the hearing, however, the only issues the parties argued were: (1) whether the employee was still a qualified employee; and (2) whether she had returned to suitable gainful employment. Compensation Judge Behr held that the employee's new job was suitable gainful employment, and that she was not a qualified employee under Minn. Rule 5220.0100, subp. 22, and he allowed the rehabilitation plan to be terminated. The employee appealed arguing that the compensation judge committed an error of law by finding the employee's work was suitable gainful employment and that he improperly expanded the issues at hearing to include whether there was good cause to terminate her rehabilitation services. The WCCA reversed, holding that it was necessary to evaluate the plain language of the statute and rules for vocational rehabilitation services, that the compensation judge had improperly expanded the issues at hearing, and that the compensation judge also applied an incorrect standard to terminate rehabilitation benefits. The Minnesota Supreme Court (Justice Stras) agreed with the WCCA. Under Minn. Rule 5220.0100, subp. 22, the definition of "qualified employee" does not provide a specific provision to terminate rehabilitation benefits. In addition, Minn. Stat. §176.102, subd. 6(a), which addresses an employee's initial eligibility for rehabilitation services, does not provide an independent mechanism for an employer to terminate rehabilitation benefits. Instead, to terminate rehabilitation benefits, the standards are found under Minn. Rule 5220.0510, subp. 5 (stating that to terminate or suspend rehabilitation benefits, the employer and insurer can bring a rehabilitation request for good cause under one of four criteria), and Minn. Stat. §176.102, subd. 8 (stating that to terminate rehabilitation, one of five different criteria can be met to meet "good cause"), but none of the factors laid out in this rule or statute were raised at the hearing. Because the

proper standards for terminating rehabilitation benefits were not before the compensation judge, the Minnesota Supreme Court upheld the WCCA's reversal of the judge's decision to terminate rehabilitation benefits.

Standard of Review

Kubis v. Community Memorial Hospital Association, 897 N.W.2d 254 (Minn. June 28, 2017). For a summary of this case, please refer to the Arising Out Of category.

Mattick v. Hy-Vee Foods Stores, 898 N.W.2d 616 (Minn. July 12, 2017). The employee initially fractured her right ankle in 2000, before starting to work for the employer, Hy-Vee. She had two surgeries following the 2000 fracture and was ultimately able to return to work for Hy-Vee, where she spent 40 to 45 hours per week on her feet. In 2004, the employee was diagnosed with post-traumatic arthritis after experiencing a month of pain in her ankle. From 2004 to 2014, she continued to experience minor pain and swelling, mostly related to changes in the weather. On January 18, 2014, the employee twisted her right ankle while working at Hy-Vee. Following the injury, she was diagnosed with a sprain and was able to continue working full-time. The employee's ankle improved somewhat but she continued to treat through March 2014, when she twisted her ankle again, outside of work. Ultimately, the employee's condition progressively worsened resulting in an ankle fusion. The rationale for the surgery was a diagnosis of advanced degenerative arthritis in her ankle. Hy-Vee denied payment for the surgery. At the hearing, the employee submitted expert reports from her treating providers, Dr. Collier and Dr. Ryssman, as well as reports from her independent expert, Dr. Bert. Dr. Collier opined that although the employee's work injury was not the primary cause of her arthritis, it led to the flare up along with the ankle sprain that she received. On the Health Care Provider Report, Dr. Collier checked "yes," that the employee's condition was caused, aggravated, or accelerated by her work. Dr. Ryssman declined to provide an opinion on whether the employee's work injury aggravated her arthritis but opined that the surgery was reasonable and necessary. Dr. Bert opined that the employee's work injury permanently aggravated her arthritis and substantially contributed to her need for surgery. The employer submitted its own independent medical examination report from Dr. Fey, who opined that there was no objective basis for finding that the work injury accelerated or in any way modified her arthritic condition. Dr. Fey opined that the work-related sprain was mild and temporary. Compensation Judge Dallner denied the employee's claim for the ankle surgery, finding Dr. Fey's report most persuasive. In a 2-1 decision, the WCCA reversed, finding that Dr. Fey's report lacked adequate foundation and that the compensation judge's finding was not supported by the evidence. Hy-Vee sought review of the WCCA's decision at the Minnesota Supreme Court. With Justice McKeig writing, the Supreme Court reversed the WCCA's decision, reinstating the compensation judge's decision. On appeal to the Supreme Court, the employer argued that the WCCA exceeded the scope of its review, substituting its own findings for those of the compensation judge. The Supreme Court agreed, finding that the compensation judge did not abuse her discretion by relying on Dr. Fey's report and that the WCCA clearly and manifestly erred by overturning the compensation judge's finding that the work injury was not a substantial contributing cause of her ankle surgery which was performed to address a preexisting arthritic condition. The Court reiterated that, under *Nord*, a compensation judge's choice between conflicting expert opinions must be upheld unless the opinion relied on lacks adequate foundation. An expert opinion lacks adequate foundation when: (1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion; (2) it does not explain the basis for the opinion; or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence. *See Hudson*. In this case, Dr. Fey's opinion did not lack adequate foundation. The Court also stressed that, per the *Hengemuhle* standard, the WCCA's job is to review a compensation judge's decision in order to determine if the findings and order are supported by substantial evidence, or evidence that a reasonable mind might accept as adequate, based on the entire record.

Vacating Awards

Hudson v. Trillium Staffing, 896 N.W.2d 536 (Minn. June 7, 2017). The employee was injured at work and the parties settled his claims. The employee's treatment was extensive prior to the settlement, but none of the doctors gave him a permanent partial disability rating. About one year later, the employee filed a petition to vacate the settlement, based on a new medical opinion from Dr. Ghelfi that he had a 75 percent permanent partial disability rating and was unable to work because of his injuries. The WCCA relied on Dr. Ghelfi's opinion, determined that the employee's condition had substantially changed, and vacated the award. The employer and insurer appealed to the Minnesota Supreme Court, arguing that

the medical evidence from Dr. Ghelfi was insufficient to vacate the award. The Minnesota Supreme Court reversed the WCCA, holding that it abused its discretion in setting aside the award on stipulation. In a decision written by Justice Stras, the Supreme Court held that the WCCA did not scrutinize Dr. Ghelfi's factual foundation enough and that in order for an expert's opinion to be admissible, the expert must have adequate factual foundation. Dr. Ghelfi's opinion was flawed because she did not specify what facts led to her giving the employee a 75% PPD rating for his traumatic brain injury, and she did not explain how she calculated the rating. The Court also concluded that the facts as submitted were not sufficient to qualify for a 75% PPD rating under Minn. Rule 5223.0360, Subp. 7(D)(4), in that there was nothing to show that the employee needed to be sheltered and be supervised in all activities. In fact, the evidence showed that he was substantially independent. ✦

Decisions of the Minnesota Court of Appeals

§176.82 Actions

Sanchez v. Dahlke Trailer Sales, Inc., File No. A15-1183, Minn. Ct. App. (unpublished) Filed June 28, 2017. The employee, an undocumented worker, was employed by the employer and was injured while using a sandblaster. After filing a workers' compensation claim, his deposition was taken, and the attorney for the employer asked about his immigration status. The employee acknowledged he was ineligible to work in the U.S. The next day, the employer put the employee on indefinite leave and made him sign a document indicating he was on unpaid, indefinite leave until he could show he could legally work in the U.S. The employee filed a claim for retaliatory discharge per Minn. Stat. §176.82. The employer filed a motion for summary judgment, which was denied. A second motion for summary judgment was filed, which was granted by the Anoka County District Court on the basis that there was no adverse employment action as a result of the employee filing a workers' compensation claim. The Minnesota Court of Appeals (Judge Reilly) reversed on the basis that the district court did not address whether the employer articulated a legitimate, nondiscriminatory reason for its action, nor did it consider whether the employer's reason was pretextual. The employer argued that requiring it to continue to employ an undocumented worker after discovering his immigration status would violate federal law. The Court of Appeals held that *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) determined that the Immigration Reform Control Act (IRCA) prevents employers from hiring illegal immigrants, but does not preclude an undocumented worker from filing a retaliatory discharge cause of action against the employer. To establish a prima facie case for wrongful retaliation under Minn. Stat. §176.82, the employee must demonstrate: (1) the employee engaged in statutorily protected conduct; (2) the employee suffered adverse employment action by the employer; and (3) the existence of a causal connection between the two. The filing of the workers' compensation claim satisfied the first prong. The parties were in dispute as to whether the employer's action satisfied the second prong, but the Court of Appeals held indefinite unpaid leave was an adverse employment action. With respect to the third prong, there was evidence the employer knew the employee was undocumented two years before the work injury and told the employee, following the initiation of the workers' compensation claim, that he did not like that the employee got an attorney involved. Because the appellants and the district court did not address the last two prongs, the order granting summary was reversed and the case was remanded for further proceedings.

Daniel v. City of Minneapolis, File No. A17-0141, Minn. Ct. App. (unpublished opinion), Filed December 18, 2017. The employee worked as a firefighter for the Minneapolis Fire Department. He sustained numerous work-related injuries, including several ankle injuries for which he filed a claim under the Workers' Compensation Act. The employee was prescribed with tennis shoes with arch support and high ankle boots. The fire department stated that the employee could not wear his tennis shoes in the station house because they were not in conformity with the dress code. There were several meetings between the parties in an attempt to agree on a shoe. In January 2015, the employee began receiving workers' compensation benefits. In December 2015, the employee sued the city, alleging: 1) the fire department

violated the Minnesota Human Rights Act by discriminating against his disability, failing to accommodate his disability, and retaliating against him for engaging in MHRA-protected conduct; and 2) the fire department violated the workers' compensation act by retaliating against him for seeking workers' compensation benefits and failing to provide continued employment when it was available. In March 2016, the employee settled his workers' compensation claim on a full, final, and complete basis, closing out any claims he had made or could make under the Workers' Compensation Act. After this settlement, the city filed a motion for summary judgment, arguing that the district court lacked subject-matter jurisdiction over the employee's MHRA claims due to the exclusivity provision in the Workers' Compensation Act. The district court disagreed with the city and denied its motion. The city appealed. The Minnesota Court of Appeals (Judge Bratvold) determined that the Minnesota Supreme Court has ruled that the exclusivity provision of the Workers' Compensation Act precludes subject-matter jurisdiction over MHRA claims arising from an injury that is compensable under the Workers' Compensation Act. See Karst; Benson. Thus, it reversed the district court's decision to deny the city's motion for summary judgment related to the MHRA claim and remanded the case for further proceedings regarding the employee's claims pursuant to Minn. Stat. §176.82. ✦

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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Disclaimer

This publication is intended as a report of legal developments in the workers' compensation area. It is not intended as legal advice. Readers of this publication are encouraged to contact Arthur, Chapman, Kettering, Smetak & Pikala, P.A. with any questions or comments. ✦

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Minnesota Workers' Compensation Update

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Decisions of the Minnesota Workers' Compensation Court of Appeals

Aggravation

Cochran v. Target Stores, File No. WC16-6013, Served and Filed June 5, 2017. The employee appealed from Compensation Judge Wolkoff's denial of his claim for benefits based on a determination that the employee's work injury was temporary and had resolved. The WCCA (Judges Hall, Stofferahn, and Sundquist) essentially made a Hengemuhle ruling, concluding that the compensation judge appropriately found the medical expert for the employer and insurer to be credible as to the question of whether the employee had recovered from his work injury, and he detailed his decision in that regard.

Azuz v. Vescio's, File No. WC17-6086, Served and Filed February 1, 2018. The employee sustained an admitted injury to her low back in April 2013 and benefits were paid. The evidence revealed that she had a pre-existing degenerative condition in the lumbar spine. As time went on, it was determined that the employee was not a surgical candidate. Her treating physician determined that maximum medical improvement had been reached and rated 10% permanent partial disability. The employee then moved to Chicago, where she underwent additional treatment. Ultimately, she underwent fusion surgery in the low back, with medical bills in excess of

continued on next page . . .

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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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$200,000. Dr. Wengler performed an independent medical evaluation on behalf of the employee, determining that the work injury was a substantial contributing factor to her condition, opining that the surgery was appropriate, and assigning a 37% permanent partial disability rating. The employer's IME, Dr. Simonet, opined that the work injury was a temporary aggravation of her pre-existing degenerative disc disease. Compensation Judge Wolkoff determined that the employee's work injury was temporary in nature, and he denied all of the employee's claims. The WCCA (Judges Sundquist, Milun, and Hall) affirmed. There was no dispute in this case that the employee's injury was an aggravation of a pre-existing condition. The dispute was whether the aggravation was permanent or temporary. The judge appropriately cited to medical records supporting his decision of a temporary aggravation. The employee also argued that the judge did not analyze the appropriate factors in determining whether the aggravation was temporary or permanent. Pursuant to *McClellan*, a judge may review several factors when determining whether an aggravation of a pre-existing condition is temporary or permanent: the nature and extent of the pre-existing condition and the extent of restrictions and disability resulting therefrom; the nature of the symptoms and extent of medical treatment prior to the aggravating incident; the nature and severity of the aggravating incident and the extent of the restrictions and disability resulting therefrom; and the nature of the symptoms and extent. These principles serve as a guide, not a requirement, to assist the compensation judge in determining the nature of an aggravation. *See Calbillo*. Overall, the evidence supported the judge's determination that the aggravation was temporary in nature.

Apportionment

Bolstad v. Target Center/Ogden Corporation, File No. WC16-5979, Served and Filed May 5, 2017. The employee worked as an audio technician and stage manager for Target Center and obtained jobs at other venues, through his union, when there were no events at Target Center. On November 28, 1990, he sustained a right shoulder injury while working for Target Center, insured by Broadspire. In 2000, he sustained a right shoulder injury after a skiing incident. On April 7, 2004, he sustained another right shoulder injury while working for Target Center, insured by Gallagher Bassett. On August 1, 2009, he sustained a third right shoulder injury while working for Target Center, insured by Sedgwick. As a result of the three separate right shoulder injuries he sustained while working for Target Center, he underwent three separate surgeries, received medical benefits, indemnity benefits, and permanent partial disability ratings. On October 2, 2009, the employee underwent an MRI of his left shoulder, which revealed a full-thickness rotator cuff tear. He alleged that this constituted a consequential *Gillette* injury as a result of his three right shoulder surgeries. On January 23, 2010, he dislocated his left shoulder while working at Target Center, insured by Sedgwick. This injury was also admitted, and the employee received wage loss benefits and medical benefits. He subsequently dislocated his left shoulder while skiing. He was able to return to work for Target Center after his injuries, but there was a period of time when he was unable to perform the union jobs. He did not look for work outside of his union during that period of time. The employee underwent separate independent medical examinations by each insurer. Each IME opined something different regarding whether any of the right shoulder injuries were permanent injuries, the cause of the employee's left shoulder condition, and apportionment between the parties. In 2011, the employee filed a claim petition seeking various benefits. Sedgwick also filed a petition to discontinue, petition for contribution, and petition for joinder, seeking reimbursement for wage loss and medical benefits it paid to the employee under a 2012 temporary order. Compensation Judge Marshall denied the employee's claim that he suffered a *Gillette* injury to his left shoulder on October 2, 2009, and denied that the employee had sustained any consequential injury to his left shoulder as a result of the right shoulder injuries. The judge held that the employee's left shoulder treatment was causally related to the 2010 date of injury. He also held that medical treatment to the right shoulder should be equally apportioned among the 1990, 2004, and 2009 dates of injuries. All three insurers appealed. The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed as modified, holding that the compensation judge had substantial evidence to support his finding that the employee did not sustain a *Gillette* injury to the left shoulder consequential to his right shoulder injuries and that the ski accident following his January 2010 left shoulder injury was not a superseding, intervening left shoulder injury. The WCCA also affirmed the compensation judge's decision to apportion all three right shoulder injuries equally among the three insurers, but modified the

award of TPD based on the laws in effect on the dates of each injury. With regard to the employee's claim for TPD when he was unable to perform the union jobs, there was substantial evidence that he had restrictions from his injuries, he had reduced earnings as a result of those injuries, and that he conducted a reasonable and diligent job search by relying exclusively on his union hiring hall in looking for work within his restrictions. The WCCA also noted that for those periods of time during which he used accrued vacation time, he was entitled to concurrent receipt of wage loss compensation while he received vacation pay pursuant to *Weigand v. Independent School District No. 2342*.

Oleson v. Independent School District #272 Eden Prairie Schools, File No. WC17-6034, Served and Filed July 7, 2017. (For additional information on this case, please refer to the Evidence category.) The WCCA (Judges Sundquist, Milun, and Stofferahn) affirmed Compensation Judge Grove's decision that Dr. Wicklund's IME report was well-founded and could be relied upon in determining causation and apportionment between two dates of injury, even though some of the medical treatment rendered was after the IME report.

Arising Out Of

Keltner v. Spartan Staffing, LLC, File No. WC17-6026, Served and Filed September 5, 2017. The employee died as a result of a fall off a ledge that was 18 or 19 feet off the floor. One side of the ledge was open with no barrier so that forklifts could put pallets in the open space. Hanging above the floor on the third tier were signs that read, "Do not go beyond this point. Wear fall protection." An OSHA investigation revealed that the employee's death was caused by a fall from the ledge. The employer denied primary liability and the matter went to a hearing. Compensation Judge Grove found that the death arose out of and in the course of the employee's work for the employer. The employer appealed and asserted three main arguments. First, the employer contested that this death arose out of the employee's work for the employer because he was not yet scheduled to start work at the time of the fall. The WCCA (Judges Stofferahn, Hall, and Sundquist) affirmed the compensation judge's findings that the employee's injury arose out of and in the course of his employment, agreeing that, although the injury occurred before he was to begin his shift, the employee had clocked in, was wearing the required clothing for the job, and was in the area where he previously worked. Second, the employer and insurer argued that the employee's death was not compensable because he was engaged in a prohibited act at the time of the fall. Specifically, he must have passed the point where the warning sign was hanging. The WCCA affirmed the compensation judge's determination that the requirements to prove a prohibited act were not met. This defense requires an employer and insurer to meet a six part standard. *See Hassan*. Although the WCCA did not state what part of the standard was not met, it indicated that this was explained in the judge's memorandum. Interestingly, the WCCA then stated in a footnote that it was not making a determination as to the viability of this defense, such that it could be used in subsequent cases, noting that it is a common law defense and not part of the Workers' Compensation Act. Third, the employer and insurer argued that the employee's death was not compensable because it was self-inflicted. There were indications from the employee's girlfriend that the employee may have purposefully committed suicide and that he used methamphetamine. The compensation judge did not find this evidence persuasive for various reasons, including that the employee had put on all his gear that he needed for work, and the WCCA affirmed that finding.

Roller-Dick v. Centracare Health System, File No. WC17-6051, Served and Filed October 19, 2017. The employee was leaving work at the end of her workday. She used a stairway to go from the second floor to the first floor and then was going to exit near the parking lot to go to her car. The floor covering the stairs was rubber, and there were hand railings on both sides of the stairs; but she did not initially use the hand railings. She had a purse hanging from her elbow and was using both hands to carry a plant. (There was nothing in the decision about where the plant came from, whether she was required to take it home from work, and/or why she was taking it home, etc.) She was wearing rubber-soled shoes. On the second step, she "slipped" and fell to the bottom of the flight, fracturing her ankle. She dropped the plant and grabbed one of the railings as she fell down the stairs. She testified that, "I feel that the rubber on the bottom of my shoe stuck to the rubber surface of the stair material." There was no water on the stairs, nor were they otherwise defective or non-compliant with the building codes or OSHA standards. Compensation Judge Grove determined that the employee's injury did not arise out of her employment. The WCCA (Judges Stofferahn, Milun, and Hall) reversed. Pursuant to the *Dykhoff* holding, a causal connection must exist between

the injury and the employment. A "causal connection" is supplied if the employment exposes the employee to a hazard which originates on the employment premises as a part of the working environment. Here, the compensation judge denied that the employee's injury arose out of employment because she failed to establish that her risk of injury on the stairs on the employer's premises was any greater than "she would face in her everyday life." The WCCA held that that was not the correct test. Because the injury occurred on the employer's premises, the question is whether the employee encountered an increased risk of injury from a hazard which originated on the employer's premises. A "hazard" is not defined as being *itself* a danger, but as a *possible source* of peril, danger, duress, or difficulty. In *Dykhoff*, the employer's premises constituted a neutral risk. In contrast, using stairs is not a neutral risk. If using stairs was a neutral risk, stairways would not have handrails. When someone falls on a flight of stairs, certainly the occurrence of an injury is more likely, as is an increase in the severity of the injury suffered. For these reasons, a flight of stairs cannot be considered a neutral condition. "A flight of stairs alone increases the risk of injury, as did the icy sidewalk in *Hohlt*, and it is not necessary to require a showing of 'something about' the staircase that further increased the risk." The WCCA held that this case was "virtually indistinguishable" from the facts in *Kirchner v. County of Anoka*. It noted the employee was not able to use the handrail because she was using both of her hands to carry the plant to her car. This case was appealed to the Minnesota Supreme Court and oral arguments occurred on March 8, 2018.

Comment: It will be interesting to see what the Supreme Court does with this case on appeal. In the *Kirchner* case, the employee was injured while walking down the stairs at work. In *Dykhoff*, when citing *Kirchner*, the Supreme Court indicated that "many workplaces have stairways and there is nothing inherently dangerous or risky about requiring employees to use them. But we recognized in *Kirchner* that if there is something about the stairway or other neutral condition that 'increases the employee's exposure to injury beyond that' the employee would face in his or her everyday non-work life, an injury causally connected to that condition could satisfy the 'arising out of requirement." In *Kirchner*, the Court determined that the injury arose out of the employment because the employee had to "negotiate the steps without the benefit of" a handrail. Without the protection of the handrail, the employee was at an increased risk of injury, and the requisite causal connection between the employment and the injury existed. In the *Roller-Dick* case, the WCCA is clearly going well beyond the previous decisions in *Kirchner* and *Dykhoff*. Further, pursuant to the *Kubis* case, summarized above, the Supreme Court did not determine that the injury arose out of the employment simply because it occurred on a stairway. There is a different group of judges on the Supreme Court at this time, so we will need to stay tuned as to how they may continue to evolve the "arising out of" increased risk test.

Lein v. Eventide, File No. WC17-6101, Served and Filed December 29, 2017. The employee was injured on January 19, 2015, when she fell and sustained injuries descending a flight of stairs on the employer's premises. The employer and insurer denied liability for the injury on the basis that the employee's injury did not arise out of her employment. At the hearing, the parties submitted expert opinions on the issue of whether or not something was wrong with the stairs. Compensation Judge Marshall concluded that the employee failed to establish she was exposed to an increased risk citing factors such as the lack of an OSHA investigation, the failure to show a defect in the stairs, and the employer's compliance with building codes. The employee appealed to the WCCA, which reversed, concluding the judge erred by importing general tort liability doctrine. The employer and insurer appealed to the Minnesota Supreme Court, which issued an Order vacating the WCCA's decision and remanding to the WCCA for reconsideration in light of the *Kubis* and *Hohlt* decisions. On remand, the WCCA (Judges Stofferahn, Milun, and Sundquist) reversed and remanded. Citing *Roller-Dick*, the WCCA found the employee's burden of proof to establish her injury arose out of her employment was met upon the showing that she fell and was injured on a stairway located on her employer's premises. The compensation judge improperly decided the case under a negligence theory, which is specifically prohibited under the Minnesota Workers' Compensation Act. As concluded in *Roller-Dick*, stairs themselves constitute an increased risk. Therefore, an injury on stairs is considered to have arisen out of the employment. This case does not contravene *Kubis*, as the WCCA has not exceeded its scope of review by rejecting the compensation judge's findings. The conclusion in this case relies solely on the compensation judge's finding that the employee was injured on the flight of stairs, which does not require substituting factual findings for those made by the compensation judge. This case also is in line with *Hohlt*, in that just like an icy sidewalk, stairs are not a neutral condition. Both

stairs and an icy sidewalk are in and of themselves an increased risk as the condition is encountered on the employer's premises as the result of the employment. Therefore, because the employee fell on stairs at her work, her injury arose out of her employment.

Attorney Fees

Weatherly v. Hormel Foods Corporation, File No. WC17-6038, Served and Filed June 13, 2017. The employee's attorney, Donaldson Lawhead, appealed from Compensation Judge Cannon's denial of *Roraff* and *Heaton* fees, and the WCCA (Judges Stofferahn, Hall, and Sundquist) affirmed. *Heaton* fees are awarded when there is a rehabilitation dispute and the employee is awarded rehabilitation benefits. However, there was no rehabilitation dispute in this case. Similarly, *Roraff* fees are awarded when there is a dispute regarding medical benefits, but it was found that there was no genuine dispute over medical benefits in this case. The employee attempted to supplement the record at the appellate level, but the WCCA denied the employee's motion to supplement the record based on Minn. Stat. §176.421, subd. 1, which indicates that appeals only deal with the record "as submitted," and not on anything that was not heard and considered by the compensation judge.

Hufnagel v. Deer River Health Care Center, File No. WC17-6057, Served and Filed December 5, 2017. The employee sustained an admitted work injury in 2009 and underwent significant medical treatment. She was able to return to work, and the employer was subsequently purchased by a different employer. The employee continued to work for the new employer, and alleged additional injuries in 2014 and 2015. The employee filed a claim petition for benefits and medical services. Both employers had independent medical evaluations performed. The 2009 injury was admitted, but the 2014 and 2015 injuries were denied. The defendants both maintained that none of the work injuries were substantial contributing causes of the employee's current condition and need for treatment. Apportionment was one of the issues. There were two medical interveners. Compensation Judge Kohl determined that the employee sustained injuries in 2014 and 2015, and that those injuries were temporary in nature. Benefits and medical treatment were ordered to be paid by the second employer during the period of the temporary aggravations, and the judge also found that the 2009 injury continued to be a substantial contributing factor to the current ongoing need for medical treatment. There was no apportionment. The decision was not appealed. The employee's attorney filed for attorney's fees, claiming almost $32,000 in fees pursuant to Minn. Stat. §176.191, subd. 1 and the *Roraff* case, based on 78.15 hours of time at hourly rates ranging from $405-$435, and after offsetting contingent fees. The employers objected, claiming that the excess fees were excessive and that .191 fees were not applicable. The compensation judge awarded $8,000 in *Roraff* fees, and assessed those against the second employer. The judge denied the .191 fees. The WCCA (Judges Hall, Stofferahn, and Sundquist) vacated and remanded. .191 attorney's fees are authorized where the primary issue is apportionment of benefits. The judge failed to consider the degree to which the two employers sought to place on each other the sole responsibility for payment of benefits. These efforts rendered apportionment a significant issue in the case and greatly increased the burden on the employee's attorney to provide effective representation. It remanded the case to the judge to determine the appropriate amount of .191 fees and the appropriate apportionment for those fees, noting that .191 fees can be apportioned differently from how the benefits were awarded. The WCCA also vacated the finding relative to the *Roraff* fee and remanded to the compensation judge. On remand, the judge is to consider whether the totality of fees awarded is adequate to compensate the employee's attorney for the representation provided. It also noted that the judge had inappropriately refused to award fees on a theory advanced by the employee's attorney, which had ended up being rejected. The WCCA noted that time must be spent on all issues, and the fact that some are unsuccessful does not make the time spent unreasonable. This case was appealed by the second employer to the Minnesota Supreme Court and oral argument occurred on April 10, 2018.

Wilson v. Twin Town Logistics, File No. WC17-6072, Served and Filed February 9, 2018. The employee sustained a work injury in 2013, and benefits were paid by the insurer. In January 2014, the employee filed a claim petition seeking attorney's fees and penalties for late payment of attorney's fees. The insurer was subsequently declared bankrupt. The claim petition was stricken from the calendar. The claims were submitted to MIGA, which determined that the claims were not covered. The claims were then borne by the employer directly. The claim petition was reinstated on the active trial calendar in 2015. The employee amended the claim petition to include

claims for wage loss benefits, medical treatment, rehabilitation services, and penalties for late payment of wage loss. Compensation Judge Bouman awarded penalties for late payment of wage loss and medical bills. In November 2016, the employee's attorney filed for attorney's fees, including contingent fees based on the penalties, $2,368 in *Roraff* fees, and $30,572 in excess fees under *Irwin*, based on 186.1 hours of time at an hourly rate of $330. The employer objected. Judge Bouman determined that based on the prior litigation, the employee's attorney had been paid $11,200 in fees. She awarded the employee's attorney $3,000 as a combination of *Roraff/Heaton* fees and excess fees. The employee's attorney appealed. The WCCA (Judges Stofferahn and Sundquist) affirmed. Contingent attorney's fees are presumed to be adequate for the recovery of rehabilitation and medical benefits. Additional fees may be assessed if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representation regarding the medical or rehabilitation disputes. Where the attorney fee requested is in excess of the statutory cap on fees, the judge must consider the request in light of the factors set out in *Irwin*. Those factors require consideration of the statutory guidelines on fees, the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained. In this case, the judge determined that contingent fees did not adequately compensate the employee's attorney and that excess fees of $3,000 were appropriate. The judge in this case examined the Irwin factors. She noted the total amount involved in the dispute. She noted that the employee's attorney is an experienced practitioner. She noted that he took full responsibility for securing the employee's benefits. She noted that the nature of the claims and the proof required was not particularly complex or unusual. Although the stay on litigation due to the insolvency of the insurer made the case complicated, the issues themselves were not complex or technically difficult. The judge carefully reviewed the extensive itemized statement submitted by the employee's attorney, showing $32,766 in attorney time and $4,544 in staff time. She found that some of the itemized time was excessive, duplicative, and included "secretarial-type services." The employee's attorney argues that the judge erred in not identifying with exactitude how the claimed time was excessive. The WCCA reviewed the itemized statement of time, noting hundreds of entries, and it determined that a detailed finding on each entry is not necessary or reasonable. While time expended by an attorney is a factor to be considered, an attorney is not automatically entitled to payment of all time set out in a fee statement. The WCCA generally gives deference to a judge's decision as to what constitutes a reasonable fee under the circumstances. The WCCA will examine whether the award by a judge amounts to an abuse of discretion. An abuse of discretion occurs when a judge makes "an erroneous legal conclusion or a clearly erroneous factual conclusion." *See Ansello*. In this case, the judge's findings did not rise to the level of clearly erroneous, and she did not abuse her discretion.

Judge Milun dissented. She would have determined that the factual findings made by the judge did not support the award. She would have determined that the award was inadequate compensation, and that it resulted in an abuse of discretion by the judge.

Causal Connection

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Interveners and Jurisdiction categories.) There was no question in this case that the employee was exposed to silica as a result of his job duties. The issue was whether the exposure to silica caused the employee's kidney failure. Compensation Judge Bouman relied on the employee's expert medical opinion to find that the employee's kidney failure was caused by his exposure to silica and was work-related. The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed, finding that substantial evidence supported that position. Note: This case was appealed to the Minnesota Supreme Court. Please see that decision in the accompanying Supreme Court edition of the Workers' Compensation Update.

Little v. Menards, Inc., File No. WC17-6036, Served and Filed July 27, 2017. The WCCA (Judges Hall, Stofferahn, and Sundquist) affirmed Compensation Judge Marshall's finding that the employee suffered a consequential left shoulder injury that arose out of his back injury (due to a fall attributed to radicular symptoms), despite the fact that the employee had prior left shoulder surgery that allegedly resolved prior to the work injury.

Kness v. Kwik Trip, File No. WC17-6048, Served and Filed August 11, 2017. The employee sustained a low back injury at work. She began treating with Dr. Sinicropi, who ultimately recommended surgery. The employer obtained an independent medical examination with Dr. Deal, who opined that the employee's injury resolved within six weeks post-injury. Dr. Sinicropi authored a narrative report in response to Dr. Deal's report. Based on Dr. Deal's IME report, as well as the fact that the employee refused a job offer, the employer filed a NOID to discontinue temporary total disability benefits. Compensation Judge Behounek allowed the discontinuance, relying on Dr. Deal's opinion that the employee's injury had resolved. The employee appealed. The employee mistakenly contended on appeal that the compensation judge made a specific finding that Dr. Sinicropi's opinion lacked foundation. The employee argued that, since Dr. Sinicropi had reviewed Dr. Deal's comprehensive report, Dr. Sinicropi had the same foundation upon which to base his opinion as did Dr. Deal. The WCCA (Judges Sundquist, Milun, and Hall) pointed out that the compensation judge did not make a finding on foundation, and instead found that the preponderance of the evidence supported the discontinuance of benefits. The WCCA, therefore, affirmed the compensation judge's finding that the employee's injury was resolved, finding that substantial evidence, including the adequately founded medical opinion of the independent medical examiner, supported the compensation judge's decision.

Allen v. Trailblazer Joint Powers Board, File No. WC17-6050, Served and Filed September 7, 2017. The WCCA (Judges Sundquist, Milun, and Stofferahn) found that there was substantial evidence, in the form of medical records from the employee's treating doctors, for Compensation Judge Tate to conclude that the employee's ongoing post-concussion symptoms were causally related to the work injury. The employer and insurer raised particular concern that the employee had not lost consciousness after the work-related head injury, but the WCCA found that proof of loss of consciousness is not a requirement for the existence of the employee's ongoing condition.

Credit

Bruton v. Smithfield Foods, Inc., File No. WC17-6113, Served and Filed May 21, 2018. The employee sustained an injury in August 2016 while working for Smithfield. Smithfield has a high deductible on its insurance policy of $2 million. The third party administrator denied primary liability for the alleged injury, and the employee filed a claim petition for temporary total disability benefits, plus other benefits. Smithfield then authorized payment to the employee through its short-term disability policy, which is self-funded and administered by the employer. This paid 80% wage replacement. The STD payments are taxed. The employee also received PTO benefits from the employer. Subsequently, the employer admitted liability for the injury and admitted that the employee was TTD. It commenced payment of TTD, but did not pay TTD during the time that STD had been paid. It did pay a small amount which represented the underpayment between what would be payable as TTD and the after-tax STD benefits. The employer asserted its right to an offset, reducing TTD by the STD payments and the PTO benefits already paid during the same time frame. The employee objected to the offsets. The case was submitted to the judge on stipulated facts with a copy of the STD policy, an exhibit showing the payments made to the employee, and an exhibit showing the calculation as to what TTD would have been paid. Compensation Judge Hartman found that the employer was entitled to offset the TTD by the amount of the STD benefits paid to the employee, but not the payment of PTO. The employee appealed the offset of STD benefits. The WCCA (Judges Quinn, Milun, and Hall) reversed. The only entities, by law, that may make workers' compensation payments are: a self-insured employer; the State of Minnesota and its political subdivisions; the Special Compensation Fund; and a workers' compensation insurer. The employer agrees that the employee is entitled to TTD payments. Under such circumstances, the employer's insurer must make these payments. While there is a very high deductible, meaning the insurer might end up being paid back by the employer, the insurer still must make the payments. The STD plan is not one of these four types of entities. Payments made under the STD policy were not workers' compensation payments. The Act provides two routes by which an employer may seek to reduce an employee's benefits by the amount of other benefits the employee received. An employer may seek an offset from payment of full wages under a wage continuation program, or the employer may seek an offset as a result of an asserted right of intervention. If there is an intervention by another party, the employer does not technically get an offset, so much as the benefits are split between being paid partially to an employee and partially to an intervener. In this case, there was no wage continuation program. The employer,

although self-funding the STD plan, is not the same as the plan. Therefore, the STD payments were not wage continuation. The second route is the intervention route. The WCCA agreed with the employer's argument that it is not necessary for an employer to intervene when it is already a party to the action. However, it is not clear from the record that the employer is the same entity as the STD plan. The STD plan was not an ERISA plan. There is no explanation in the stipulated facts as to whether the STD plan and the employer are the same entity, nor any explanation of the relationship between the two. The compensation judge treated them as if they were the same entity, but there are no findings in that regard. As such, we cannot conclude that an intervention claim by the STD plan was not necessary to assert a right to an offset. Without such an intervention, there can be no reduction of benefits otherwise owed to the employee. Because neither of the two avenues potentially available for the employer to reduce the TTD payments owed are possible, no offset is allowable under the law. The employee is entitled to be paid the full amount of TTD benefits for his injury. In addition, even if we were to find the employer and the STD plan to be the same entity, and thus an intervener seeking recoupment of its paid out STD benefits, the decision would be the same. The STD plan did not assert any right of intervention. The employer's legal obligation is to pay TTD benefits, and if there had been an intervention, part of those would go to the employee and part would go back to the STD plan. If one were to assume that they are the same entity, this may seem like a difference without a distinction, but there are significant distinctions. The judge, in allowing the employer an offset, applied a public policy analysis disfavoring double recovery. Such an offset, however, must follow the requirements of the Act. The judge failed to address or analyze the contractual terms of the STD policy. In reviewing that policy language, it gives it no right to reimbursement. In fact, the policy specifically forbids payments when there is an entitlement to workers' compensation benefits. Yet, it creates no right to reimbursement when there is a denial of workers' compensation liability, payments of STD are made, and a later admission of workers' compensation liability results in STD payments that should not have been paid. In other words, the policy does not contain a "claw back" provision for reimbursement. Without a right to reimbursement under the policy language, there is a serious question as to whether the STD policy has the legal right to intervene. Since the policy does not provide for a right to reimbursement, the STD policy has no right to intervene.

Comment: This was Judge Quinn's first authored decision as a judge on the WCCA. Under the unique facts in this case, and based on the poorly drafted STD policy, it would appear that this employee will receive a double recovery of benefits, first having received extensive STD benefits, and now being awarded TTD benefits for the same exact period of time. An employer which is truly self-insured can still assert a right of an offset for STD benefits it pays instead of TTD benefits. It is recommended that employers which are not self-insured, but which self-fund STD plans, should examine the language of the STD policy and verify that it provides a right of reimbursement. It would then appear that the appropriate method for asserting an offset would be by way of a motion to intervene.

Death

Grieger v. Menards, File No. WC17-6091, Served and Filed April 10, 2018. The employee worked part-time at the employer. In November 2015, he slipped in the employer's parking lot, hitting his head. He died of the injury. He was survived by his wife. There were no dependent children. The employer accepted liability and paid dependency benefits based on an average weekly wage of $205.18. The wage was based on the calculation formula set forth in Minn. Stat. §176.011, subd. 6, so the employee's spouse was paid 50% of that amount. The spouse filed a claim petition, arguing that her benefits should be adjusted such that over the course of 10 years of payments, she would receive the $60,000 minimum death benefit. [Based on the average weekly wage used, if she was paid for 10 years, she would not reach the $60,000 minimum.] She also claimed that the insurer should have calculated the wage based on Minn. Stat. §176.011, subd. 18, which indicates that benefits should not be computed on less than the number of hours normally worked in the employment or industry in which the injury was sustained. Multiple experts testified regarding the number of hours normally worked in the employment or industry in which the employee worked at the time of his death. One expert indicated that the average number of hours worked was 32.3, whereas the defense expert testified that it was 21.07. A human resources individual from the employer testified that the average of all of the employer's casual part-timers was approximately 21 hours per week. Compensation Judge Marshall determined that the employer was properly paying dependency benefits based on the average weekly wage at the time of death. He also determined that

the benefits need not be prorated to reach the $60,000 death benefit. The WCCA (Judges Sundquist, Stofferahn, and Hall) issued a mixed decision. It determined that the use of the 26-week formula for calculating the average weekly wage has no application in computing the daily wage and weekly wage when the employee is not a full-time worker and compensation is for death benefits. *See Helmke*. Here, three vocational and employment witnesses testified as to what constituted the collective "number of hours normally worked in the employment or industry in which the injury was sustained." Had the judge adopted the least number of hours cited in the expert testimony of 20 hours per week, it would result in an average weekly wage of $217, more than the wage that was being paid. The judge is required to apply a different standard than the averaging of the employee's actual wages over the 26 weeks before the death. *See Crepeau*. Therefore, the WCCA vacated that portion of the decision and remanded the issue to the judge for a determination of the benefit payable using the number of hours normally worked in the employment. The WCCA affirmed the decision that the dependency benefits should not be prorated so as to allow for payment of $60,000 over the course of 10 years. Such a proration is premature. Dependency benefits are adjusted on October 1 of each year, and the amount of the adjustment cannot be predicted. It is conceivable that the spouse will ultimately reach or exceed the minimum of $60,000 paid out over the 10-year term of weekly payments. In the event that the payments do not reach the $60,000 minimum at the conclusion of the 10 year period, the difference will be payable by the employer at that time.

Evidence

Oleson v. Independent School District #272 Eden Prairie Schools, File No. WC17-6034, Served and Filed July 7, 2017. (For additional information on this case, please refer to the Apportionment category.) The WCCA (Judges Sundquist, Milun, and Stofferahn) affirmed Compensation Judge Grove's decision that Dr. Wicklund's IME report was well-founded and could be relied upon in determining causation and apportionment between two dates of injury, even though some of the medical treatment rendered was after the IME report.

Bromwich v. Massage Envy Roseville, File No. WC17-6065, Served and Filed October 18, 2017. The employee alleged that she sustained a wrist injury as a result of performing a massage on a client. She initially treated with a chiropractor, whose notes stated, "Woke up with right wrist pain, fingers numb, pain with ROM." She later began treating with an orthopedic surgeon and underwent surgery. The employer and insurer had an IME, who opined that her wrist condition was not work-related. The employee underwent a second surgery. She asserted a claim for various benefits. The treating surgeon wrote a narrative report indicating that causation of the employee's condition by the work injury could not be answered with "absolute medical certainty," but that "certainly, it seemed to be an aggravating factor in the development of the employee's symptoms." Compensation Judge Daly found that the employee had sustained a work-related injury and awarded benefits. The employer and insurer appealed, arguing that the absence of corroboration in the initial chiropractic notes of a work injury precluded the compensation judge from finding that there was a work injury, and further, that he erred in adopting the treating surgeon's opinion regarding causation.

The WCCA (Judges Hall, Milun, and Stofferahn) affirmed. The WCCA found that reliance on a treating physician's opinion regarding causation where that opinion does not express absolute certainty does not constitute error. Pursuant to *Boldt v. Jostens, Inc.*, 261 N.W.2d 92 (Minn. 1977), "it is well established that the truth of the opinion need not be capable of demonstration, that an expert is not required to express absolute certainty in the matter which is its subject, and it is sufficient if it is probably true." The surgeon's opinion, when evaluated with the remaining medical records and the employee's testimony, met this standard.

Gillette Injuries

Bolstad v. Target Center/Ogden Corporation, File No. WC16-5979, Served and Filed May 5, 2017. For a description of this case, please refer to the Apportionment category.

Nelson, Larry v. Smurfit Stone Container Corporation, File No. WC17-6053, Served and Filed October 9, 2017. The employee sustained a work-related right shoulder injury in 2009 and underwent an arthroscopic rotator cuff repair later that same year. He returned to work and continued to work until May 31, 2012, when he was laid off. At that time, he was asked to sign a document stating that he did not have a work-related injury. He soon thereafter applied for and was awarded Social Security retirement benefits. He testified that, when he was laid off, he had problems with his left shoulder. He

did not begin treating for his left shoulder until late 2015, at which point he was recommended for left shoulder arthroscopic surgery. The employee claimed a *Gillette* injury to his left shoulder, culminating on May 31, 2012, as well as permanent total disability benefits beginning on that date. Compensation Judge Arnold denied the employee's claim for PTD benefits for lack of a diligent job search, but awarded temporary total disability benefits from the date of the left shoulder surgery in January 2016 through the date of the hearing. The employer and insurer appealed, arguing that the employee did not treat for his left shoulder until over three years after he stopped working for the employer and that he had signed a document stating that he did not have any work injury when he was laid off. However, the WCCA (Judges Milun, Stofferahn, and Hall) found that the compensation judge appropriately relied on the treating doctor's opinion that the employee had sustained a *Gillette* injury. It further found that case law supports the proposition that the last day the employee stops the employment can be concluded to be the date of injury, regardless of whether due to disability or layoff. As to the award of TTD benefits, the employer and insurer further argued that TTD benefits should not have been awarded, given that the compensation judge noted that there was not a diligent job search. However, the WCCA upheld the compensation judge's award of TTD benefits, finding that the job search finding was made only in the context of his denial of PTD benefits from and after May 31, 2012. It noted that the employee was taken entirely off-work after his January 2016 surgery, so the award of TTD benefits was appropriate.

IME

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the Maximum Medical Improvement, Medical Issues, and Rehabilitation categories.) The employee refused to allow the independent medical examiner to touch her arm and hand during an IME for a right upper extremity injury. Thus, the WCCA (Judges Sundquist, Stofferahn, and Hall) determined that there was substantial evidence to support Compensation Judge Daly's finding that the employee refused a reasonable request for examination and TTD was suspended until the employee complied with the examination, per Minn. Stat. §176.155, subd. 3.

Interveners

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Causal Connection and Jurisdiction categories.) The employee received medical treatment that was paid for by Medicare. A medical provider then intervened in the workers' compensation action for payment of a *Spaeth* balance. The employer argued that because the medical provider/intervener accepted payment from Medicare, the claims were deemed to have been paid in full and the intervener could not make a claim for additional payments. Compensation Judge Bouman found that she did not have subject matter jurisdiction to make a decision on this issue and apply federal Medicaid and Medicare law. The WCCA (Judges Milun, Stofferahn, and Sundquist) agreed. The medical intervener then argued that its acceptance of Medicare or Medicaid payments does not relieve the employer of its obligation to pay the *Spaeth* balance. The compensation judge ordered the employer to pay the *Spaeth* balance, and the WCCA affirmed that order. The WCCA reasoned that workers' compensation is primary and, if found liable, Medicare and Medicaid would step out of the process and let the workers' compensation insurer pay. Thus, even when there have been Medicare or Medicaid payments, the employer must still pay reasonable and necessary medical costs for an injured employee. Note: This case was appealed to the Minnesota Supreme Court. Please see that decision in the accompanying Supreme Court edition of the Workers' Compensation Update.

Hemphill v. Soude Enterprises, File No. WC17-6046, Served and Filed August 1, 2017. The employee sustained an admitted injury, but the nature and extent of the injury was disputed and litigated in 2013. In 2013, the judge issued a decision finding that the employee sustained an avulsion fracture of the left thumb, but denied claimed injuries to her neck, back, and arm. In 2014, the employee filed another Claim Petition, and her attorney put a number of providers on notice of their possible rights to intervene. The 2014 Claim Petition was stricken from the active trial calendar. The employee filed a request for formal hearing after a medical conference, and her QRC filed a rehabilitation request, both of which were consolidated with the employee's Claim Petition. The WCCA opinion noted that it was not clear what entities may have filed motions to intervene. No interveners appeared at the hearing. At the end of the hearing, the attorney for the employer and insurer mentioned a letter from Mayo Clinic withdrawing its intervention claim. Compensation Judge Cannon awarded part of the employee's wage loss claim, denied the rehabilitation request, and denied the intervention claims because none of the interveners

appeared in support of their claims. After the hearing, the attorney for the Teamsters Fund wrote a letter to the compensation judge asking for reconsideration because their motion to intervene complied with Minn. Stat. §176.361 and the Teamsters Fund was not ordered to appear at the hearing. The compensation judge issued an Amended Findings and Order ordering the self-insured employer to pay the intervention claims related to the employee's left thumb injury but did not specify the interveners. The employer appealed and the WCCA (Judges Stofferahn, Milun, and Sundquist) vacated and reversed. The WCCA held that employee's attorneys, attorneys for employers and insurers, and compensation judges should ensure that all parties' rights, including the rights of interveners, are addressed at the hearing. The matter was remanded to the compensation judge to determine whether intervention interests existed as a result of the work injury.

Jurisdiction

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Causal Connection and Interveners categories.) The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed Compensation Judge Bouman's determination that a compensation judge does not have jurisdiction to interpret or apply laws designed specifically for the handling of claims outside the workers' compensation system. Note: This case was appealed to the Minnesota Supreme Court. Please see that decision in the accompanying Supreme Court edition of the Workers' Compensation Update.

Gerardy v. Anagram International, File No. WC16-6005, Served and Filed September 15, 2017. (For additional information on this case, please refer to the Temporary Total Disability category.) The WCCA (Judges Milun, Stofferahn, and Hall) affirmed the decision of Compensation Judge Behounek not to rule on the employer's alleged negligence, as liability for workers' compensation benefits is determined without regard to negligence. In determining that wage loss benefits were not owed, the Compensation Judge found that the employee was terminated for economic reasons versus his ability to work. The employee believed that he was wrongfully terminated and argued that the Compensation Judge did not have the subject matter jurisdiction to make this determination. However, the WCCA found that there was no error of law in determining the reason for the employee's termination for the purpose of determining eligibility for wage loss benefits. This case was summarily affirmed by the Supreme Court on April 19, 2018.

Hinkle v. Ruan Transportation, Inc., File No. WC17-6083, Served and Filed January 5, 2018. The employee was a Georgia resident, who was hired in Georgia in 2008 as an over-the-road truck driver, answering an ad out of a Georgia newspaper. He was assigned to an account with a home terminal in Georgia. In 2014, he was assigned to a different account with a home terminal in Minnesota, and that account also had a terminal in Georgia. He received his route assignments from his dispatcher in Minnesota. He attended mandatory training and safety meetings in Minnesota. He rented trucks from a facility in Georgia, and he picked up and delivered products in several states. He picked up or delivered products in 20 states, and he picked up and delivered in Minnesota 19 times in the 10 months before his injury, more than any other state. He traveled through Minnesota about eight times per month and would also pick up paperwork and attend classes in Minnesota. In October 2015, he was injured when he was adjusting the load on his truck in Georgia. He reported the injury by telephone, and the employer filed a first report of injury in Georgia, which listed its address in Minnesota. Initially, the claim was paid under Minnesota law, but in July 2016, the employer began paying benefits under Georgia's law. The employee filed for Minnesota benefits. Compensation Judge Hartman determined that the case was compensable under Minnesota law. The WCCA (Judges Hall, Milun, and Stofferahn) affirmed. Extraterritorial application of Minnesota's workers' compensation law is allowed under Minn. Stat. §176.041, subd. 2, which indicates that if an employee regularly performs primary duties of his employment in Minnesota and receives an injury outside of Minnesota in the employee of the employer, Minnesota law applies. The employer argued that the amount of time the employee spent and the amount of work performed in Minnesota were negligible compared to his overall employment activity. They argue that regularity implies majority and that the employee does not work "customarily, usually, or normally" in Minnesota. The WCCA disagreed. The statute does not require that more of the employee's time be spent in Minnesota than elsewhere, only that the employee regularly performs "primary" job duties in Minnesota. *See Gillund*. In this case, the employee's home terminal was located in Minnesota, he received his routes from a dispatcher in

Minnesota, he made 19 trips to and from Minnesota in the 10 months before his injury, and he picked up and delivered in Minnesota several times. As such, the statute was met. An employee temporarily out of the state may also be covered under Minnesota workers' compensation law pursuant Minn. Stat. §176.041, subd. 3, which indicates that if an employee hired in Minnesota by a Minnesota employer receives an injury while temporarily employed outside of Minnesota, such injury is subject to Minnesota law. Application of this section requires hiring of an employee in Minnesota by a Minnesota employer. The employer asserts that it is an Iowa employer, as its home office is located in Iowa. The WCCA disagreed. A determination of whether an employer is a Minnesota employer is based on the nature and degree of its activities in Minnesota, not the location of its home office. The employer has two terminals in Minnesota, and its employees perform services in Minnesota. The employer also maintained that the employee was not hired in Minnesota, as he was originally hired in Georgia in 2008. He had temporarily quit the employer in 2014 for 45 days, but then was rehired when the employer flew him to Minnesota in 2014 to fill out paperwork to become rehired. This was sufficient to show hiring in Minnesota. Based on the amount of time he spent in Minnesota, the evidence supported the decision that the employee's employment relationship remained centered in Minnesota, although he had no actual permanent situs of employment and could be considered always in a temporary location. *See Vaughn*.

Maximum Medical Improvement

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Medical Issues, and Rehabilitation categories.) The WCCA (Judges Sundquist, Stofferahn, and Hall) affirmed Compensation Judge Daly's determination that the employee had reached maximum medical improvement, based on substantial evidence.

Medical Issues

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Maximum Medical Improvement, and Rehabilitation categories.) The WCCA (Judges Sundquist, Stofferahn, and Hall) affirmed Compensation Judge Daly's determination that work hardening therapy and a functional capacities evaluation were reasonable and necessary, based on substantial evidence.

Colton v. Bloomington Plating, File No. WC17-6090, Served and Filed March 26, 2018. The employee worked for Bloomington Plating, insured by Federated. He sustained injuries in 1985 and 1986. In 1987, he settled with Federated with medical expenses left open. He then went to work for the State of MN/Department of Corrections. He had another injury in 2006 with that employer. In 2012, the employee, Federated, DOC, and the Special Compensation Fund agreed to a settlement which closed out all claims, except for certain future medical expenses. DOC was to be the paying agent, Federated agreed to reimburse DOC for 44% of medical treatment expenses, and the Fund was to reimburse Federated for the amount it paid to DOC. [The Fund was involved for Second Injury Fund reimbursement.] DOC has a contract with CorVel, which provides that CorVel will provide managed care services and medical bill payment services, will maintain a "statewide network of participating providers" for medical services to injured employees, and will provide "pharmacy benefit management services." DOC paid medical expenses on behalf of the employee in the amount of $55,386 between 2012 and 2014, and it submitted a request to Federated for 44% of that amount. Federated paid DOC that amount and requested reimbursement from the Fund. The Fund refused to pay that amount, arguing that some of the prescriptions claimed exceeded the maximum allowable for those prescriptions. The Fund cited to Minn. Rule 5221.4070, subp. 4A(2), which sets the maximum fee for electronic transactions involving drug prescriptions as being the maximum allowable cost for that drug as established by the Department of Human Services, together with a professional dispensing fee of $3.65 per prescription. Federated maintained it should either be reimbursed by the Fund, or if the Fund was correct in its position, Federated should not have paid the disputed amount to DOC and should be reimbursed by DOC. Federated also asserted a claim for attorney's fees under Minn. Stat. §176.191, as well as a claim for penalties. DOC took the position that the rule did not apply in this case. It has a contract with CorVel, a certified managed care provider, which in turn has a contract with Caremark, a network of pharmacies which will provide medications at a specified amount. Under Minn. Rule 5221.4070, subp. 1aH(3), CorVel is defined as a workers'

compensation payer because it has been designated by DOC to act on its behalf in paying drug charges. As such, DOC argued that Minn. Rule 5221.4070, subp. 5 applies, which indicates that subps. 3 and 4 do not apply "where a contract between a pharmacy, practitioner, or network of pharmacies or practitioners, and a workers' compensation payer provides for a different reimbursement amount." DOC argued that the maximum fee allowed provision under subp. 4 does not apply, and that the disputed amount of the claimed prescription expenses should be paid by the Fund. Compensation Judge Marshall determined that the Fund should reimburse Federated for the disputed amount on the prescriptions. It denied the claim for .191 fees to Federated, as well as penalties. The WCCA (Judges Stofferahn, Hall, and Sundquist) affirmed. Based on Minn. Rule 5221.4070, subp. 1aH(3), CorVel meets the definition of a workers' compensation payer. In turn, there is an agreement between CorVel and Caremark to pay the pharmacy network, and that meets the requirements of subp. 5. The Fund also argued that the disputed amount was a management fee for CorVel and is not medical services for which the Fund is partly responsible. The WCCA disagreed. It is correct that pharmacy or medical bills include an administrative component. Minn. Rule 5221.4070 specifically allows for payment of a drug cost as well as a "dispensing fee." The court noted that it could see no way that this dispensing fee could be categorized as anything other than an administrative cost of the provider.

Permanent Total Disability

Oseland v. Crow Wing County, File No. WC17-6120, Served and Filed May 1, 2018. Following a work injury in 1980, the employee was determined to be permanently and totally disabled as of July 1, 1987. PTD benefits were being paid, and pursuant to existing case law and rules, the insurer took an offset for Public Employees Retirement Association (PERA) benefits received by the employee. The employee ultimately died in February 2013, at which time PTD benefits stopped. In August 2014, the Minnesota Supreme Court issued its decisions in *Ekdahl* and *Hartwig*, clarifying that the PTD offset did not apply to PERA benefits. In September 2015, the Department of Labor and Industry (DOLI) alerted insurers that "time sensitive" correspondence would be sent out advising insurers as to DOLI's position on the effects of the new case law. In the letter, DOLI advised that the two cases applied prospectively and retroactively to all cases with dates of injury before and after October 1, 1995. As such, there were employees who had been underpaid PTD benefits. Further, the Special Compensation Fund would have been paying too much in supplementary benefit reimbursement. At that time, the Fund elected not to pursue collection of its overpayment. Insurers were advised to make payment of underpayments to the employees. The insurer advised DOLI that it was going to be reviewing its open files first, and then would turn to its closed files. On November 16, 2015, the insurer notified DOLI that it had identified two files that were impacted by the case law, and this employee's file was one of those. In June 2016, DOLI sent the insurer its calculation of the amount of underpayment payable to the employee and the amount of over-reimbursement of supplementary benefits from the Fund. The insurer advised the employee's daughter-in-law in July 2016 that it was reviewing DOLI's calculations to see if there was agreement on the numbers. In September 2016, the insurer advised DOLI that its calculation of the underpayment of PTD benefits was about $10,000 less than the calculations of DOLI. DOLI responded, noting that it agreed with the insurer's calculations. At that time, the insurer contacted one of the employee's sons and notified him that there was an underpayment of approximately $159,000. The employee's son was told that the insurer needed the name of the estate, the name of the personal representative, and the estate tax number and address. The insurer asked again for this information one month later. At that time, the employee's heirs retained counsel, and a claim petition was filed in November 2016, claiming an underpayment of PTD benefits and claiming interest on that amount. The insurer admitted the underpayment of PTD, noting that it would make payment upon submission of the estate tax information. In January 2017, a decree of descent was issued by Crow Wing County District Court, naming the employee's heirs for purposes of the workers' compensation underpayment. Those heirs claimed the underpayment was the amount initially calculated by DOLI. The insurer, therefore, requested a settlement conference. The parties then entered into a partial stipulation for settlement in March 2017, in which the insurer agreed to pay the amount it acknowledged owing. The claim for the additional underpayment, interest, and penalties went to a hearing. Compensation Judge Tate determined that the insurer had appropriately calculated the underpayment, so no additional underpayment was due. Interest was allowed on the

underpayment from the date the original benefits were owed, with the interest rate to be determined by the statute in effect at the time the benefit was to have been paid. The employee's claim for penalties was denied. The employee's claim for taxable costs associated with obtaining the decree of descent was denied. The WCCA (Judges Stofferahn, Milun, and Hall) vacated the determination and remanded the case to the judge. In 2017, the legislature enacted Minn. Stat. §1292 to clarify the holdings in *Hartwig* and *Ekdahl*. The Fund has subsequently issued guidance for its application to cases involving dates of injury prior to October 1, 1995, such as the current case. Application of the statute was not considered by the parties or by the judge. The case was remanded to the judge for further findings based on the new statute.

Procedural Issues

Carda v. State of Minnesota/ Department of Human Services, File No. WC17-6030, Served and Filed July 11, 2017. Compensation Judge Tejeda expressly accepted the expert medical opinion of the self-insured employer that the employee was able to work full-time without restrictions, and this was sufficient grounds to discontinue temporary total disability compensation. The employee had a visit with her treating doctor one week before the hearing, and the treating doctor opined that the employee should remain off work, but the medical record was not produced at the hearing. No party requested that the compensation judge reopen the record for the receipt of this report. However, the employee asked the WCCA to vacate the compensation judge's findings and order, arguing that the judge committed an error of law. The WCCA (Judges Hall, Milun, and Sundquist) denied the request to vacate, holding, "[w]hile we have previously held that a compensation judge has the authority to hold the record open for post-hearing medical evidence, we cannot conclude that a compensation judge is compelled to do so on his own motion where no party has so requested. Accordingly, we decline to hold that the judge committed an error of law in this case." The employee went on to argue that even in the absence of an error of law, the interests of justice require that the judge's findings and order be vacated. The employee cited a Minnesota Supreme Court case, *Horan*, where that court considered a post-hearing affidavit "in the interests of justice."

The WCCA noted that it is a limited, administrative body, whereas the Minnesota Supreme Court has equitable powers that are inherent to the judiciary. Therefore, the WCCA did not deem itself to have the authority to vacate the compensation judge's findings and order in the absence of a factual or legal error.

Otterness v. Andersen Windows, File No. WC17-6063, Served and Filed December 5, 2017. The employee sustained injuries while working on January 12, 2012, and November 15, 2012. The employer admitted liability and paid benefits. The employer obtained an independent medical examination from Dr. Dick, who opined that the employee's 2012 injuries were temporary aggravations to the employee's pre-existing condition, that he had reached maximum medical improvement, and had a zero percent permanent partial disability (PPD) rating. Dr. Dick also opined the employee could do home exercises and walk as reasonable ongoing treatment for his condition. His treating doctor gave him a 10 percent PPD rating. The employee filed a Claim Petition seeking various benefits and payment of medical expenses. He also filed a rehabilitation request seeking retraining. The case was initially block assigned to Compensation Judge Grove. Prior to the hearing, the employee's attorney attempted to talk to the employee about inadequacies in the medical evidence he had to support his claimed injuries and claim for benefits. The employee's attorney had the case stricken from the active trial calendar. The employee then requested it be reinstated and it was assigned to Compensation Judge Wolkoff. The employee's attorney withdrew from representation, and the employee represented himself at the hearing. At the hearing, he attempted to introduce as an exhibit text messages between his attorney and him regarding possibly settling his claim and also getting additional medical evidence to support his claims. Judge Wolkoff ruled that the text messages were inadmissible and accepted the opinion of Dr. Dick that the employee's injuries were temporary in nature and had resolved. The employee filed an appeal requesting "a fair, impartial, non-bias (sic) review of this case/claim." The WCCA (Judges Hall, Milun, and Sundquist) affirmed the compensation judge's decision that the text messages were inadmissible. It also held that there was substantial evidence to support the compensation judge's decision to accept Dr. Dick's medical opinions regarding the nature and extent of the employee's injuries. With regard to the employee's objection to the change in the compensation judge assigned to hear his case, the WCCA held that the employee did not explain how the reassignment prejudiced

him, and that the employee failed to formally object to the judicial re-assignment, so the procedural posture of the employee's claim was proper.

Devos v. Rhino Contracting, Inc., File No. WC17-6075, Served and Filed January 8, 2018. The employer was an uninsured entity which was based in North Dakota. The employee had worked for the employer in 2011 and 2012. The employee suffered an injury in September 2012 while working in Minnesota. The parties agreed that in 2012, the employee did not work 15 consecutive days in Minnesota, nor did he work more than 240 hours in Minnesota. However, a dispute existed as to whether he was recalled or rehired in 2012, and whether that occurred in North Dakota or in Minnesota, where the employee resided. A claim petition was filed, and the Special Compensation Fund filed a motion to dismiss, asserting that the employee's claim was barred by Minn. Stat. §176.041, subd. 5b and arguing that the employee was not entitled to benefits because he was an employee hired in North Dakota by a North Dakota employer, and his alleged injury arose out of his temporary work in Minnesota. The case had been stricken from the calendar at the employee's request for two years. Upon reinstatement, a special term conference was scheduled to consider the Fund's motion to dismiss. Compensation Judge Arnold held a special term conference via telephone. No witness testimony was received, but certain documentary exhibits were submitted and appearances were noted on behalf of the employee and the Fund. The employee's attorney indicated at the conference that he misunderstood and thought that it was a Pretrial Conference. Arguments were presented. At the request of the employee's attorney, the record remained open for the submission of additional evidence on the issue of where the employee was hired. No additional evidence was submitted. Instead, the employee submitted a formal objection to the motion to dismiss. He argued that dismissal was not appropriate because factual disputes exist. The compensation judge granted the Fund's motion to dismiss, and the employee appealed. The WCCA (Judges Sundquist and Stofferahn) vacated the dismissal and remanded the case to the judge. In order for Minn. Stat. §176.041, subd. 5b to apply, various individual components of that statute need to be met. Although the judge determined that the statute had been met, there was no explanation or identification of evidence relied upon. The telephone conference was on the record, but the transcript of the proceeding was minimal. It is clear that the employee's attorney misunderstood the nature of the conference and was not prepared to present evidence to refute the motion to dismiss. He was clear, however, about his position that a factual dispute existed as to where the employee was hired. There was no stipulated set of facts presented to the judge, and it is unclear what evidence he considered. Under these circumstances, the dismissal was vacated and the matter remanded for a fact finding on the issues of when and where the employee was hired in 2012, and whether the employer is a North Dakota employer.

Judge Milun dissented. She would have determined that the evidence was sufficient in the record to support the judge's finding. Further, the employee had had two years in which to show jurisdiction existed. Although the employee's attorney made an argument as to a theory of the employee being hired, that was not evidence.

Murphy v. Riverview Healthcare Association, File No. WC17-6088, Served and Filed May 3, 2018. The employee worked for the employer on a part-time basis in a supply clerk position. On January 25, 2016, she and several co-workers were assigned an additional project to "redo" the storage room, which was a multi-week project in which all materials had to be removed, shelves torn down, new shelves set up, and the products replaced. For the first two weeks of the project, the employee went to full-time status, but due to stiffness and exhaustion from the extra work, she then chose to reduce her schedule to her normal part-time basis by the third week of the project. She was not scheduled to work on February 12, 2016. On that date, she awoke at home in bed noting that her left arm was raised overhead and that it felt numb. When she pulled it down with her other hand, she had the onset of pain in the left shoulder. The pain worsened as the day progressed, and she went to the hospital. She reported that she had been doing repetitive work recently, but that she had not had pain during her work activities. She underwent an MRI of the cervical spine on February 18, 2016, and was diagnosed with a large ruptured disc. Her treating surgeon saw her on February 25, 2016, and he recommended emergency surgery, which was performed on February 26, 2016. On March 17, 2016, the employee filed a report of injury, claiming an injury at work on or about January 25, 2016. The employer accepted primary liability and commenced payment of wage loss benefits and medical expenses. The employee did not have a good result from the surgery, and by June 2016, was diagnosed with complex regional

pain syndrome. Her treating surgeon recommended additional cervical spine surgery. The employer had an IME performed in September 2016, and the IME concluded that the employee did not sustain any type of a work injury. On October 26, 2016, the employer filed a Petition to Discontinue benefits based on a defense of no primary liability and payment under a mistake of fact. The IME had also commented that the employee would reach maximum medical improvement one year post-surgery, and in January 2017, the employer filed an NOID seeking to discontinue temporary total disability benefits on the basis of MMI. That decision was decided separately from the Petition to Discontinue, and it is not part of this appeal. A hearing on the Petition to Discontinue was ultimately held on May 19, 2017. The employee's attorney objected to the hearing on procedural grounds and on the basis that it would be unfair to determine primary liability and causation at an expedited hearing. He also sought to supplement the record with further medical evidence. Compensation Judge Rykken refused to hear the additional evidence, and she determined that the employee had not sustained a work-related injury. The WCCA (Judges Hall, Stofferahn, and Sundquist) affirmed. Pursuant to the statute, commencement of payment by an employer does not waive any rights to any defense the employer has on any claim either with respect to the compensability of the claim or the amount of compensation due. The Supreme Court has previously held that consideration of primary liability in an expedited discontinuance proceeding is not constitutionally improper so long as the opposing party has reasonable notice. *See Kulenkamp*. In this case, the hearing on the Petition to Discontinue did not take place for six months, which was ample time for the employee to prepare. The employee also asserted that the employer should have been barred from raising its primary liability defense in the hearing on the Petition to Discontinue, as it had not raised that issue at the expedited hearing on the issue of MMI. The WCCA noted that only issues that are specified on the NOID can be addressed at that time, and the issue of primary liability was not raised in the NOID. The employee also argued that the issues of primary liability and MMI were required to be combined into one pleading. The WCCA rejected that argument, noting that the statute provides various options for an employer to discontinue benefits, including a NOID and a Petition to Discontinue. Nothing makes these options mutually exclusive. The employee then contended that the employer should be estopped from raising the issue of primary liability. The employee asserted that she sustained further injury consequential to her surgery, and as such, there is an issue as to whether the employer should be permitted to cover the surgery, and then when it comes to light that the employee may have sustained a consequential injury as the result of that treatment, subsequently contest primary liability. Essentially, the employee argued that she may not have undergone the surgery but for the fact that the employer accepted liability and agreed to pay. The WCCA did not really address this estoppel issue, noting that the surgery had taken place on February 26, 2016, and that the employee did not even report the injury until March 17, 2016. As such, it was not possible that she could have relied on the acceptance of liability to undergo the surgery in the first place. The employee also argued that the employer should be precluded from asserting a primary liability defense in this case due to the extensive amount of benefits that it had already paid. The WCCA completely rejected that argument, noting that there was no prejudice to the employee from the payments already made. Finally, the WCCA held that the compensation judge did not abuse her discretion in not keeping the record open for another supplemental medical report.

Psychological Injury

Nelson, Dale v. State of Minnesota/ Department of Human Services, File No. WC17-6033, Served and Filed July 27, 2017. The employee appealed from Compensation Judge Marshall's determination that the employee did not suffer from PTSD as a result of his work injury, which resulted from an assault. The compensation judge chose between two conflicting medical opinions and sided with the medical expert of the self-insured employer that the employee did not have PTSD. In line with the *Hengemuhle* standard, the WCCA (Judges Milun, Stofferahn, and Hall) upheld the compensation judge, determining that his findings were supported by substantial evidence.

Rehabilitation/Retraining

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Maximum Medical Improvement, and Medical Issues categories.) The WCCA (Judges Sundquist, Stofferahn, and Hall) affirmed Compensation Judge Daly's determination that the employee's restrictions were causally related to the work injury, and therefore, a rehabilitation consultation was appropriate.

Beguhl v. Supportive Living Solutions/Whittier Place, File No. WC17-6078, Served and Filed January 11, 2018. Prior to going to work for the employer, the employee had sustained previous injuries involving her spine, right shoulder, and left foot. While working for the employer, the employee sustained injuries in November 2015 and 2016. The employee sought ongoing benefits. Independent medical evaluations were performed, and the employer maintained that the effects of the work injuries had been temporary in nature. Subsequent to the work injuries, the employee had begun working with a QRC. The employer contested the billings of the QRC. Compensation Judge Tate determined that the work injuries remained substantial contributing factors of some, but not all, of the employee's conditions, and she awarded benefits to the employee, as well as payment of the outstanding rehabilitation bills. The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed. With regard to causation and the award of benefits, those findings were supported by substantial evidence and were affirmed. With regard to the rehabilitation bills, the employer argued that some of the billings were not payable for a variety of reasons: QRC's frequent use of a standard billing amount (.2 of an hour) did not actually identify the reasonable time spent for services; the QRC's description of the service provided was inadequate; the billed time was not reasonable due to the particular service provided; the billed time was an administrative task not in furtherance of the rehabilitation plan; and the QRC failed to reduce the charged hourly fee as required by the rules. The WCCA has previously determined that adoption of a minimum time increment for timekeeping of QRC services, very close to the objected time in this matter, is in most cases reasonable. *See Boss*. The WCCA determined that the disputed descriptions of QRC activity were adequate to describe the services provided. The actual time spent appeared sufficient on the record to support the time billed. Several services were identified by the employer as unpayable under Minn. Rule 5220.1900, subp. 7, including leaving voicemail messages and providing services after a request to suspend services has been filed. The WCCA rejected this argument. The absence of the employer's consent shall not preclude a compensation judge from determining the reasonable value or necessity of case activities. The QRC takes the risk of nonpayment, but upon a showing of the need and reasonableness of the service, all appropriate services are compensable. *See Parker*. The WCCA did accept the employer's argument that certain administrative tasks were not in furtherance of the rehabilitation plan. The decision was modified to exclude those items. The WCCA also determined that the hourly reduction was applied. The employer had also argued that some of the QRC fees improperly included medical management services related to certain body conditions that were determined not to be compensable. The WCCA determined that one purpose of medical management is to ensure that the ultimate goal of the rehabilitation plan can be accomplished. Since the employee's ability to work is affected by her medical condition, regardless of the origin of any particular aspect of that condition, a qualified employee is entitled to reasonable medical management of her whole condition, not merely the portion identified as being a compensable work injury.

Dahl v. Rice County, File No. WC17-6093, Served and Filed March 5, 2018. The employee was a deputy sheriff for the employer from 1992 until 2006, with an average weekly wage of $1,168.53. During the years of his employment, he suffered four low back injuries, and ultimately, could not continue his work because the restrictions could not be accommodated. He underwent two low back fusion surgeries, resulting in permanent physical limitations. He was left with the ability to work in the light physical demand level. Following his severance from employment, he began working with a QRC. Numerous job leads were provided, and some of them led to extended periods of alternative employment. The evidence documented that the employee was engaged in job search, but at no time did he submit job logs. Some of the jobs which he held subsequent to severance from the employer paid well (in excess of his pre-injury wage), and others did not. Some required activities beyond his physical restrictions. Some required knowledge and skills beyond his capabilities. More recently, the jobs that he had been involved in were part-time or seasonal positions. In 2016, the QRC developed a retraining proposal for a three-year teaching degree at the University of Mankato with an occupational goal of high school teacher. The proposal was rejected at an Administrative Conference, and the employee appealed. The QRC testified in support of the retraining plan, and noted that although he had never seen any job logs, the fact that the employee had been employed in various capacities over 11 years since his severance from the employer shows that he was looking for work. He acknowledged that he had been frustrated over the years with the employee's lack of job logs, but nevertheless, felt that the employee had reasonably cooperated with rehabilitation and that there was no barrier to retraining in this regard. The employee also had an

independent vocational examiner, Mr. Askew, testify in support of the retraining plan, arguing that it met the *Poole* factors. The employer had an independent vocational evaluation by Ms. Schrot, who testified that the proposed retraining plan was not viable, as there are not an adequate number of positions open that would interest the employee following the completion of the plan, and jobs available would not restore the employee's economic status. She also commented that the job search was not diligent, and that the employee had not fully cooperated with rehabilitation. Compensation Judge Wolkoff approved the retraining plan. The WCCA (Judges Hall, Milun, and Sundquist) affirmed. The employer argued that the employee's job search was deficient. The compensation judge acknowledged that the job search activities were not perfect. However, a diligent job search is not necessarily required for retraining. *See Fisher*. While a well-documented job search may be preferred in the typical retraining case, there is no legal requirement that an employee complete and submit job logs. The evidence in the record details numerous employment positions that the employee sought and obtained over the years, and the QRC had testified that the employee had sufficiently cooperated with the rehabilitation process. The WCCA also determined that substantial evidence supported the judge's finding that the employee had the ability to succeed in the program. It also determined that the judge had considered the evidence appropriately, concluding that retraining to become a high school teacher is likely to restore the employee's economic status.

Settlement

Dahl v. AG Processing, Inc., File No. WC17-6032, Served and Filed June 21, 2017. The employee injured his right shoulder in October 2004. That injury was admitted. He underwent treatment, including shoulder surgery. The medical records also referenced pain in the cervical spine. The employer and insurer did not admit an injury to the cervical spine. An independent medical evaluator determined that there had been no injury to the cervical spine. The employee had subsequent right shoulder surgeries, which were paid. The employer and insurer maintained a denial of the cervical spine. In 2008, the parties entered into a stipulation for settlement, which provided for a full, final, and complete settlement of the 2004 date of injury, "except for certain future medical expenses which will remain open to the right shoulder." The stipulation referenced the IME report. Subsequently, the employee had ongoing treatment regarding the right shoulder with ongoing references to cervical spine symptoms, as well. The employee ultimately brought a medical request seeking payment of the medical treatment relating to the cervical spine. Another IME was performed, and the physician opined that the cervical spine condition was not related to the work injury. Compensation Judge Baumgarth determined that the stipulation for settlement closed out the employee's claim for treatment due to the contested cervical spine condition, and left open only certain types of treatment for the admitted right shoulder condition. The employee appealed at that time. Also at that time, the Minnesota Supreme Court had issued its decision in *Ryan v. Potlatch Corporation*. The WCCA had remanded the case to the compensation judge at that time for reconsideration of his findings based on the holding in *Ryan*. The judge maintained his decision, and the case was again appealed. The WCCA (Judges Sundquist, Stofferahn, and Hall) affirmed. The WCCA rejected the employee's argument pursuant to the *Sweep* case that the cervical spine must remain open, as it was not specifically referenced in the stipulation for settlement. The WCCA noted that prior to the settlement, the employee had asserted a claim relating to his cervical spine, and as such, that injury was among the "any and all claims" the employee settled. Pursuant to the holding in Ryan, a settlement agreement may close out conditions and complications that arise from the same injury and are within the reasonable contemplation of the parties at the time of the settlement agreement, even where those conditions or complications were not yet fully realized at the time of the stipulation. The cervical spine injury claim was clearly within the reasonable contemplation of the parties at the time they entered into the stipulation. The WCCA also rejected the employee's alternative argument that the cervical spine symptoms were a consequential injury, as opposed to an independent condition. Even if that was true, under the current *Ryan* holding, a consequential condition which was within the reasonable contemplation of the parties could be foreclosed by a stipulation for settlement despite the fact that the condition only became compensable subsequent to the stipulation.

Allan v. Kolar Buick GMC, File No. WC17-6028, Served and Filed June 22, 2017. The WCCA (Judges Hall, Milun, and Stofferahn) affirmed Compensation Judge Arnold's interpretation of the stipulation for settlement concluding that the claim against a specific employer was closed out pursuant to an analysis under *Ryan v. Potlatch Corporation*. The WCCA held that the fact that the employee did not identify a separate date of injury until well after the settlement did not alter the analysis because the condition at issue was known to the parties at the time of the settlement.

Superseding Intervening Injury

Bolstad v. Target Center/Ogden Corporation, File No. WC16-5979, Served and Filed May 5, 2017. For a description of this case, please refer to the Apportionment category.

Temporary Partial Disability

Bolstad v. Target Center/Ogden Corporation, File No. WC16-5979, Served and Filed May 5, 2017. For a description of this case, please refer to the Apportionment category.

Petzel v. DS Agri Construction, File No. WC16-6020, Served and Filed May 16, 2017. The WCCA (Judges Sundquist, Milun, and Stofferahn) affirmed Compensation Judge Behounek's decision that the employee's work was sporadic and insubstantial and that the employee was not gainfully employed, so he was not entitled to temporary partial disability benefits.

Temporary Total Disability

Bolstad v. Target Center/Ogden Corporation, File No. WC16-5979, Served and Filed May 5, 2017. For a description of this case, please refer to the Apportionment category.

Gerardy v. Anagram International, File No. WC16-6005, Served and Filed September 15, 2017. (For additional information on this case, please refer to the Jurisdiction category.) The WCCA (Judges Milun, Stofferahn, and Hall) found that there was substantial evidence in the record that supported Compensation Judge Behounek's determination that the employee was not entitled to temporary total disability benefits because the work injury resolved prior to the time period of the claimed benefits. This case was summarily affirmed by the Supreme Court on April 19, 2018.

Nelson, Larry v. Smurfit Stone Container Corporation, File No. WC17-6053, Served and Filed October 9, 2017. For a summary of this case, please refer to the *Gillette* Injuries category.

Vacating Awards

Holtslander v. Granite City Roofing, Inc., File No. WC16-6009, Served and Filed May 24, 2017. The employee sustained an admitted injury to numerous body parts, including his low back, on August 11, 1997. He sustained subsequent admitted injuries to numerous body parts, including his low back, on January 7, 1998, with the same employer and insurer. A few years later, in 2000, he again sustained various admitted injuries to various body parts, including his low back, while working for the same employer, which was then insured by a different insurer. The employee filed a claim petition for medical benefits and attorney's fees, and one of the insurers filed a petition for contribution. The parties eventually settled out his claims, except for limited medical benefits to his low back, right shoulder, right elbow, and cervical spine. At the time of the settlement, the employee was not working and the parties agreed he was not capable of returning to his pre-injury job as a roofer. After the settlement, the employee underwent three fusion surgeries, had hardware removed once, received a spinal cord stimulator, and it was also recommended he receive a replacement spinal cord stimulator. He filed a petition to vacate the award on stipulation. The employee argued at the time of the settlement he thought his condition was stable, that he would not require additional medical treatment, and that he would have fewer work restrictions and be able to obtain other employment. He argued that the stipulation should be vacated because of a mutual mistake of fact and because of a substantial change in his medical condition. The WCCA (Judges Milun, Stofferahn, and Hall) determined that there was no mutual mistake of fact. The WCCA held that there was a substantial change in the employee's condition because he had undergone numerous surgeries since the settlement, he had applied for and begun receiving social security disability benefits and was no longer able to work, he likely had additional permanent partial disability benefits, he had undergone extensive and costly treatment since the settlement, and the parties' initial settlement did not address the potential that he would become permanently and totally disabled as a result of his work injuries in the future. *See Fodness*. This case was summarily affirmed by the Supreme Court on February 13, 2018.

Logan v. New Horizon Academy, File No. WC17-6031, Served and Filed June 30, 2017. The WCCA (Judges Stofferahn, Milun, and Hall) reversed Compensation Judge Tejeda's vacation of a portion of the stipulation addressing Roraff fees which was, allegedly, inadvertently included in the stipulation. The WCCA found that the compensation judge had no authority to issue an order vacating a portion of the stipulation.

Hartzell v. State of Minnesota, Department of Trial Courts, File No. WC17-6037, Served and Filed August 4, 2017. The WCCA (Judges Milun, Stofferahn, and Hall) found that the employee failed to demonstrate a causal relationship between her work injury and any current disability, or a substantial change in her medical condition. Therefore, the WCCA denied the employee's petition to vacate the award on stipulation.

Kellogg v. Phoenix Alternatives, Inc., File Nos. WC17-6035 and WC17-6047, Served and Filed September 14, 2017. The employee claimed that he settled his case under the assumption that he would receive SSDI benefits, but he did not. He sought to vacate the stipulation based on mutual mistake of fact. The WCCA (Judges Hall, Milun, and Stofferahn) denied the petition to vacate on this basis, given that there was no mistake of fact at the time of the stipulation. Instead, the employee was making a false assumption. A separate argument was made by the employee to vacate the stipulation based on a substantial change in medical condition. The employee's original injury was a low back injury, and he asked the WCCA to vacate his stipulation based on the assertion that he now had a sacroiliac (SI) joint condition. The WCCA refused to vacate the stipulation, determining that the SI joint condition was part and parcel of the low back, and therefore the SI joint condition was anticipated at the time of the settlement.

Rossbach v. Rossbach Construction, Inc., File No. WC17-6070, Served and Filed November 2, 2017. The employee petitioned to set aside an Award on Stipulation on the grounds of either fraud or mistake of fact. He sustained a work injury and the employer and insurer paid benefits in excess of $60,000. The adjuster obtained a quote regarding the projected cost of future vocational rehabilitation services, estimated to be $11,300. The adjuster wrote to the employee, who was not represented by an attorney, noting the projected cost of rehabilitation services and asking the employee whether he was open to settling his claim for $11,500 with medical benefits open. The employee accepted the offer. The stipulation was drafted, indicating it was a full, final, and complete settlement of all benefits, except future medical expenses. The proposed Award on Stipulation, which was submitted to the Office of Administrative Hearings with the executed Stipulation for Settlement, incorrectly stated that all parties were represented by counsel. In fact, neither party was represented by counsel. The compensation judge issued the Award on Stipulation, adopting the proposed Award as submitted. The employee later alleged that at the time of the settlement, he believed that he was only giving up his right to vocational rehabilitation benefits, not his right to future wage loss benefits. Thus, he filed a petition to vacate the Stipulation for Settlement with the WCCA. The WCCA (Judges Sundquist, Stofferahn, and Hall) found that the compensation judge made a mistake or error in issuing the Award on Stipulation, given that the parties were not actually represented by counsel as noted in the proposed Award on Stipulation; thus, the Stipulation was voidable. If both parties are represented by counsel, then the stipulation is presumed to be fair and reasonable and in conformity with the law. Upon receipt of such a settlement, the judge must immediately sign the award. However, if the parties are not both represented by counsel, a two-step process must be followed. First, the parties must establish that the stipulation is reasonable, fair, and in conformity with the Act. Second, the stipulation must be approved by a judge. Neither step was followed here.

The WCCA referred the parties' Stipulation for Settlement to the chief judge of the OAH for review to determine whether the settlement reflected the intent of the parties at the time of the stipulation and was fair, reasonable, and in conformity with the Workers' Compensation Act, and if appropriate, approve the stipulation. If the Award on Stipulation is approved, then the matter shall be returned to the WCCA to address the employee's petition to vacate. ✦

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