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ARTHUR CHAPMAN

KETTERING SMETAK & PIKALA, P.A.

ATTORNEYS AT LAW

Minnesota Workers' Compensation Update

In This Issue

Workers' Compensation Practice Group

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Two New Faces in the Arthur Chapman Workers Compensation Group

Meet Beth A. Butler and Ken J. Kucinski

Beth's practice focuses on workers' compensation law. She's been practicing in workers' compensation, employment law, and personal injury since 2017. Beth actively participates in hearings and has written several appellate briefs to the Workers' Compensation Court of Appeals and the Minnesota Supreme Court. Clients appreciate the energy and passion Beth brings and her focus to exceed client goals in all stages of litigation. Her strong communication skills and strategic thinking allow her to effectively resolve disputes. You can reach Beth at BAButler@arthurchapman.com or (612) 375-5987.

Ken's practice focuses on workers' compensation claims. He has spent the last eight years in this area and is licensed in both Minnesota and Wisconsin. He previously clerked for Judges William C. Stewart, Jr. and Rod W. Smeltzer. Ken graduated from the University of Wisconsin Law School in 2013. He is a board member for the St. Croix Valley Bar Association and a member of the Wisconsin Association of Worker's Compensation Attorneys. You can reach Ken at KJKucinski@arthurchapman.com or (612) 375-5993.

About Our Attorneys

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

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Decisions of the Minnesota Supreme Court

Interveners

Koehnen v. Flagship Marine Company, 947 N.W.2d 448 (Minn. August 12, 2020). The employee sustained a work injury on May 30, 2017. He received chiropractic treatment from Dr. Johnson, who submitted the bills to the insurer. At that time, the insurer had denied primary liability for the injury, and since the employee had no other insurance, the bills were not paid. The employee filed a Claim Petition seeking benefits and payment of the bills. His attorney placed Dr. Johnson on notice of his right to intervene pursuant to Minn. Stat. §176.361. Dr. Johnson received the notice but "chose to exercise his right to *not* intervene." Dr. Johnson conceded that the notice was timely and adequate as a matter of law. The employee subsequently settled his claims, including the interests of interveners, and extinguished the claims of potential interveners which had not intervened, including Dr. Johnson. The Award on Stipulation extinguished Dr. Johnson's potential claim. Eight months later, Dr. Johnson filed a Petition for Payment of Medical Expenses pursuant to Minn. Stat. §§176.271 and 176.291 and Minn. Rule 1420.1850, Subp. 3B, alleging that the parties had failed to comply with Minn. Stat. §176.521 and asserting that because he was completely excluded from all settlement negotiations, he was entitled to automatic reimbursement of his charges pursuant to the *Brooks* case. Dr. Johnson also asserted that the compensation judge lacked the authority to extinguish his interest and, alternatively, that any statute purporting to grant the judge such authority was invalid and unenforceable. The employee and employer filed motions to dismiss Dr. Johnson's petition, and the compensation judge granted those motions, finding that Dr. Johnson lacked standing to assert the claim for payment. The WCCA affirmed. The Supreme Court (Justice McKeig) affirmed. The issue was whether a potential intervener, which did not intervene after receiving adequate notice of an employee's pending workers' compensation proceeding, can initiate a proceeding to collaterally attack the validity of a final award on stipulation pursuant to Minn. Stat. §§176.271 and 176.291 and Minn. Rule 1420.1850, Subp. 3B. The Supreme Court noted that the Workers' Compensation Act provides numerous mechanisms for interveners to protect their interests and pursue payment, even when an employee chooses to settle a claim. The plain language of the statutes and rules does not allow a potential intervener to pursue a collateral attack on an award on stipulation when the potential intervener was placed on adequate notice of its right to intervene, but chose not to intervene in the case.

Comment: It is important to note that in this case, it was stipulated that the notice of intervention rights was adequate. The Supreme Court emphasized that the notice provided to potential interveners must strictly comply with Minn. Stat. §176.361 and Minn. Rule 1415.1100. Future challenges by extinguished potential interveners may be successful if they are able to show that the intervention notice failed to comply with the requirements for proper and timely notice.

Medical Issue

Leuthard v. Independent School District 912 – Milaca, 958 N.W.2d 640 (Minn. April 28, 2021). The employee sustained a Gillette injury to her neck and upper spine due to her work activities. Following the injury she received treatment, which ultimately included quarterly facet joint injections over a period of eight years and which provided her between one week and three months of relief. The employer and insurer obtained an independent medical examination by Dr. Gedan, who opined that continued use of facet joint injections was not reasonable, necessary, or an indicated treatment plan from a medical perspective, as the injections were not designed for long-term repeated use and there was no indication that there was any objective change in the employee's condition from the injections. The employer and insurer subsequently began denying ongoing facet joint injections based on Dr. Gedan's opinions and based on the treatment parameters, Minn. R. 5221.6200, subp. 5(A)(3), which places a three injection limit on facet joint injections to any one site. The employee filed a medical request for additional facet joint injections. The compensation judge determined that the ongoing facet joint injections did not meet the applicable treatment parameter. The judge also found that the employee did not meet her burden of proof that a departure from the treatment parameters under Minn. R. 5221.6050, subp. 8 was warranted. In making this decision, the judge relied on the employee's testimony and medical records which showed little to no reduction in her subjective pain levels, limited improvement in the objective clinical findings, and no

change in her functional status. The judge also found that the ongoing injections were not reasonable or necessary because the treatment did not provide significant or lasting relief and the symptoms instead continued to worsen. The WCCA reversed, agreeing that the employee was not entitled to a departure from the treatment parameters on facet joint injections, but finding that the judge should have considered whether this case warranted a rare case exception for departure from the treatment parameters. *See Jacka*. The employee argued for a rare case exception departure for the first time in her brief on appeal to the WCCA. The Supreme Court (Justice Moore) reversed. The issues on appeal to the Supreme Court were whether the WCCA erred in vacating the compensation judge's factual findings regarding the reasonableness and necessity of the employee's continued facet joint injections and whether the WCCA erred in remanding the case for consideration of whether the employee's case warrants a rare case exception to the treatment parameters. The Supreme Court concluded that the compensation judge's decision was based on substantially more than just Dr. Gedan's opinions, and that there is no contradiction between the judge's findings that the employee's testimony was credible and the conclusion the judge reached from the evidence that the employee received mixed or variable relief from the injections. Therefore, the Supreme Court concluded that the compensation judge's decision was supported by substantial evidence and that the WCCA erred in concluding that it was not. The Supreme Court also concluded that the employee forfeited her claim that her case presents a rare case exception, as she did not assert it before the compensation judge, and the WCCA erred as a matter of law in remanding the case to address the rare case exception. ✦

Register!

2021 Schedule of Workers Compensation Summer Games

Thursday, August 5, 2021 | 11:30am - 12:30pm
Settlements and MSAs: How to Best Take Down a Claim | Register here

August 19, 2021 | 11:30am - 12:30pm
FOUL! How to Avoid and Defend Penalties and Bad Faith Claims in Minnesota and Wisconsin Workers Compensation Matters | Register here

Tuesday, August 24, 2021 | 11:30am - 12:30pm
Get Your Kicks: Wisconsin Worker's Compensation Case Law Update | Register here

Thursday, September 2, 2021 | 11:30am - 12:30pm
The Twists and Turns of Defending Medical Marijuana Claims | Register here

Tuesday, September 14, 2021 | 11:30am - 12:30pm
Decathlon: Round Table Discussion of Hot Topics in Minnesota and Wisconsin Workers Compensation | Register here

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

Decisions of the Minnesota Court of Appeals

Constitutional Law

Keith Johnson, D.C. v. Office of Administrative Hearings, Case No. A20-1192, MN Ct. App. April 5, 2021 (unpublished). This case stems out of the Koehnen v. Flagship Marine Company case, discussed in the Supreme Court section. Mr. Koehnen was injured and Dr. Johnson provided chiropractic treatment, submitting his charges to the workers' compensation insurer. The insurer denied liability for the injury, and Dr. Johnson's bills were not paid. Mr. Koehnen filed a claim, including payment for Dr. Johnson's treatment. Dr. Johnson was given notice of his right to intervene, but he chose not to intervene and did not move to intervene pursuant to Minn. Stat. §176.361, Subd. 2. The case proceeded without Dr. Johnson. The parties entered into a settlement, which extinguished the claims of potential interveners, including Dr. Johnson. The Award on Stipulation indicated that Dr. Johnson's potential intervention interest was extinguished. Dr. Johnson commenced a petition pursuant to Minn. Stat. §14.44, asking the court to declare Minn. Rule 1420.1850 invalid on the basis that it exceeds the scope of statutory rulemaking authority by the OAH and because it is unconstitutional. He asserted that the rule injured him because it authorized the judge to extinguish his potential intervention interest. The Minnesota Court of Appeals (Judge Worke) dismissed the petition on the basis that Dr. Johnson lacked standing to challenge the rule. The validity of the rule can only be questioned when it appears that the rule interferes with or impairs the legal rights or privileges of the petitioner. When the injury asserted derives from a statute, and not a rule, the petitioner lacks standing. The OAH asserts that Dr. Johnson lacks standing because the injury he alleges derives from the statutory mandate that when "a motion to intervene is not timely filed … the potential intervener interest shall be extinguished." See Minn. Stat. §176.361, Subd. 2a. The court explored the language of both the statute and the rule. The unambiguous language of the statute and rule demonstrate that the extinguishment of a potential intervener's interest under the circumstances is attributable to the statute, which mandates that a potential intervener's interest "shall" be extinguished when the potential intervener does not file a timely motion to intervene. The rule acknowledges that mandate and provides that a compensation judge may extinguish a potential intervener's interest if the potential intervener, who has proper notice of his right to intervene, does not file a motion to intervene pursuant to the statute. Dr. Johnson asserted that the statute does not mandate the extinguishment of a potential intervener's interest in a matter when the potential intervener chooses not to intervene. He maintains that extinguishment is only required under the statute when a potential intervener files an "untimely" motion to intervene. The court rejected that argument. The clause in the statute indicating that "where a motion to intervene is not timely filed" encompasses instances when an untimely motion is filed and instances when no motion is filed at all. While potential interveners may choose not to intervene, the consequence of that choice, under this statute, is that the potential intervener's interest will be extinguished. The statute requires a non-intervening potential intervener's interest to be extinguished, and the rule merely effectuates what is required under the statute. Dr. Johnson's interest would have been extinguished by operation of the statute even if the rule did not exist. Therefore, he lacks standing to bring the petition. ✦

Decisions of the Minnesota Workers' Compensation Court of Appeals

Arising Out Of

Aguilar-Prado v. W. Zintl Construction, Inc., File No. WC19-6311, Served and Filed May 15, 2020. The employee worked as a union construction drywall/taper when he was injured while leaving a worksite in March 2016. He was struck by a car leaving the worksite as he stepped into the street abutting the worksite. The employee filed a claim petition for benefits in March 2017 seeking benefits for his left shoulder, low back, and neck, which included a surgery for the left shoulder. Per the union agreement, the dispute was heard before an Arbitrator acting as the compensation judge. UCWCP Arbitrator Crowley determined that the employee suffered a work-related injury during his egress from work, and therefore, the left shoulder was a compensable injury. The decision further went on to determine that the neck and low back were not related to the work injury based on the opinion of Dr. Larkin. The Arbitrator also denied the recommended left shoulder surgery. Dr. Becker was the only provider to opine on the employee's need for shoulder surgery; the doctor determined the employee needed surgery. The Arbitrator determined that as Dr. Becker was not an approved doctor under the "Exclusive Provider Organization list" (EPO), his opinion could not be considered. The WCCA (*en banc* with Judge Quinn writing the opinion) affirmed parts and reversed parts of the Arbitrator's decision. The WCCA affirmed the finding that the employee's left shoulder injury was work-related and resulted during a reasonable egress of the employee from work. The court cited J*ohannsen v. Action Construction Company*, 264 Minn. 540, 119 N.W.2d 826 (Minn. 1963) for the proposition that the rationale of the rule covering reasonable ingress and egress from the job site is that, "if the employee, in going to or leaving the working premises, is exposed to a hazard causally connected with the employment and sustains injury while doing so, the injury arises out of and in the course of employment…" This does not mean that the protection will continue when he has entered the avenues of travel where he is exposed to no work-connected hazard or any hazard greater than that to which all others not so employed are exposed." In the case of *Fossum v. Egan & Sons Air Conditioning*, 39 W.C.D. 926 (WCCA 1987), the employee exited the jobsite while using a gate that all of the employees used and which led directly into the street. While walking from the jobsite to his vehicle parked approximately one block away, the employee was injured in the street. The Fossum court concluded that the injury occurred during the reasonable time and place of safe egress. The WCCA also affirmed the denial of the low back and neck injury based on the opinion of Dr. Larkin. The WCCA reversed the determination in regard to the left shoulder surgery. It opined that Dr. Becker's opinion was unopposed and the only opinion in the case regarding the left shoulder surgery. It also noted that the Arbitrator incorrectly excluded the opinion of Dr. Becker as the Arbitrator has the ability to review a wide variety of evidence even outside of the EPO. This case was summarily affirmed by the Minnesota Supreme Court on January 15, 2021.

Bank v. Minnesota Department of Human Services, File No. WC19-6328, Served and Filed October 20, 2020. The employee worked as a physician for the employer, which required her to complete 50 hours of continuing medical education each year. To meet the certification requirement, the employee traveled to Nashville, TN in June 2018 to attend a two-day seminar at the Nashville Hilton, where she and her husband stayed. She attended the first day of the seminar. She was not experiencing dizziness, vertigo, or any other physical problems. She regularly took medications to treat for prediabetic and thyroid conditions, but she experienced no side effects from either medication. On the morning of the second day, she ate breakfast with her husband in their hotel room before attending the second day of the seminar. She walked from her room to the elevator bank. She stood with two other people while she waited for the elevator. She testified that after an elevator door to her left opened, she "pivoted to go to the entrance of the elevator, and somehow my shoe caught on the rug. And I tried to catch myself, but I lost my balance; and I just fell flat on my back really hard." She eventually required fusion surgery in the cervical spine. She commenced a workers' compensation claim. The parties stipulated that she was a traveling employee and in the course of her employment at the time of her injury, and that the only issue was whether the injury arose out of the employment. Compensation Judge Pearson concluded that the employee failed to show that her injury was the result of a hazard on the employment premises and she denied the claim based on *Dykhoff*. The WCCA (Judges Stofferahn, Milun, Hall, Sundquist, and Quinn) reversed. The

employee has the burden of showing that an injury arose out of and in the course of the employment. Since the parties agreed that she was a traveling employee, she enjoyed portal to portal coverage and was in the course of her employment. *See Voigt*. In *Dykhoff*, the Minnesota Supreme Court held that the employee failed to show that her employment put her at an increased risk of injury beyond that to which the general public is exposed. In doing so, the Court cited to well-established precedent, and "did not change the landscape." Traveling employees have been afforded "sui generis status" [of its own kind or class] under Minnesota law for decades. The employee in this case was injured while away from the employment premises. She was exposed to the same risks as the general public. The historical rule in such cases is that a causal connection is established so long as the traveling employee is engaged in a reasonable activity at the time of injury. The risk inherent in a reasonable activity is considered an incident of the employment. *See Epp*. A traveling employee who is exposed to such a risk incident to her employment and is injured as a result has satisfied the requisite causal connection. *See Nelson*. The activities engaged in by the employee at the time of her injury were pivoting and walking to gain entrance to a hotel elevator in order to attend a seminar. A reasonable activity is an activity that "may normally be expected of a traveling employee as opposed to those which are clearly unanticipated, unforeseeable, and extraordinary." *See Voigt*. Examples of reasonable activities include sleeping in a hotel, crossing the road, dining, and drinking. Injuries sustained as the result of these activities have historically been considered compensable. The employee's activities were also reasonable in this case. The *Dykhoff* decision cannot be interpreted as having overruled *Voigt*. The case was remanded to award benefits to the employee.

This case was appealed to the Minnesota Supreme Court. In filing the appeal, the appellant failed to serve the Writ of Certiorari directly on the WCCA in a timely manner. On motion by the respondent, the Supreme Court (Justice Gildea) granted dismissal of the appeal and discharge of the Writ of Certiorari on January 13, 2021.

Jaeger v. Children's Hospital and Clinics of Minnesota, File No. WC20-6352, Served and Filed January 20, 2021. The employee worked for the employer, which had campuses in Minneapolis and St. Paul. She worked primarily at the St. Paul campus, but would occasionally drive between the campuses, for which she was paid mileage. As a salaried employee, she typically worked from 7 AM to 4:30 PM, but occasionally stayed late until 8:00 PM to complete her work. She would occasionally do charting at home, but not often. On the date of injury, she had completed her rounds and checked with the other nurses to make sure that all of the patients' needs were satisfied. She decided to leave for the day at 2:00 PM, indicating that she intended to complete her charting at home. While walking to her car, she received a phone call from the Minneapolis campus that a patient needed assistance, and that the nurse on staff was occupied. The employee responded that she would telephone that nurse to see if the nurse could attend to the patient's needs, and if not, then the employee planned to go to the Minneapolis campus. The employee decided not to make the phone call to the other nurse right away. Instead, she drove away from the St. Paul campus, heading towards her home. Her route took her on to St. Anthony Boulevard, and at the corner of Lexington Avenue, she could turn one way to go home or the other way to go to the Minneapolis campus. Her intent was to stop and park on St. Anthony Boulevard to call the Minneapolis nurse and decide if she should continue home or go to the Minneapolis campus. Before arriving at St. Anthony Boulevard, she was involved in an automobile collision and sustained an injury. She brought a workers' compensation claim, but the employer denied primary liability, asserting that the car crash occurred after the employee had left her employment for the day and was en route to her home. She commenced a civil action against the at-fault driver, settled that claim, and then made a claim for UIM benefits against her own insurer, which was also settled. As part of that litigation, the employee testified that the car crash had occurred as she was driving home from work. She never told either automobile insurer that she believed she was engaged in work activities at the time of the car crash, and she did not inform the employer about the civil litigation as required by Minn. Stat. §176.061, Subd. 8a. Following the settlements, she then filed a claim petition seeking workers' compensation benefits. Compensation Judge Bouman determined that the employee was not working at the time of the car crash and denied the employee's claim.

The WCCA (Judges Quinn, Milun, and Hall) affirmed. Generally, injuries incurred in commuting to and from home and the workplace are not compensable. *See Kahn*. There are several exceptions, and the employee argued that those exceptions applied in this case. First, she argued that she was a traveling employee and covered portal to portal from work to home. To be covered by the "traveling employee" doctrine, an employee must show that she traveled for her job as a regular or substantial part of her employment. The doctrine has generally been applied to employees who either have no fixed jobsite, e.g., traveling salespersons, or whose injuries occurred away from the locations of their regular job sites while on a trip away that was taken in furtherance of their work

duties. An injury sustained during a trip between two jobsites is generally compensable, but that situation is not what is contemplated under the traveling employee doctrine. The employee here did not regularly travel for work and was not traveling away from her regular employment locations at the time of injury.

Second, the employee argued that an exception to the commuting rule exists when the employee is going between two portions of her work premises. In *Kahn*, compensation was awarded to an employee injured on her way home where her home was regularly used as a secondary worksite. The employee contends that even if she was on the way to her home at the time of the car crash, her stated intention to complete her charting there reflects the status of the home as a secondary worksite. Pursuant to *Kahn*, there are two types of circumstances where travel from the employee's work premises to the employee's home can be covered under the Workers' Compensation Act. Home as a business situs can be demonstrated by showing a clear business use of the home at the end of the specific journey during which the accident occurred. Alternatively, the employee can show that the regularity of work at home and other factors endowed the home with the continuing status of a workplace, so that any going and coming journey is covered. In this case, there was no evidence that the employee regularly worked at home. She admitted that she did her charting infrequently at home. On this occasion, she testified that she had clearly indicated she was going to do her charting at home. However, there was also evidence showing that she often claimed she planned to chart at home but in fact did not do so. There was no evidence that she did any charting over the course of the entire weekend following her car crash. Further, she testified in the civil litigation, and there was no indication that she thought of her trip that day as involving any work purpose. She testified that she was simply going home after work. The judge did not commit clear error in concluding that the employee failed to prove a clear business purpose for her trip to home.

Third, the employee argued that the "dual-purpose" doctrine applied because her destination after leaving the St. Paul campus had not yet been determined. Under this doctrine, an injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. If the trip is undertaken for personal reasons and would have taken place even if the business aspect had been canceled, then the trip is not work-related. *See Rau*. The employee testified that she started her trip with the intention of going home and that the injury occurred while she was still on the same route she always took to go home. The mere fact that she might later potentially have changed her plans to go to the Minneapolis campus did not make the trip work-related at the time the injury took place. The employee had the burden of showing not only that a work purpose had been added, but that the addition of that purpose played a significant role in bringing about the injury. Whatever the employee might have intended to do by way of interrupting her commute home to pull over and call the nurse had not occurred and she was still on her intended route home when the car crash occurred. This case was summarily affirmed by the Minnesota Supreme Court on June 29, 2021.

Attorney Fees

Vukelich v. Rise, Inc., File No. WC19-6320, Served and Filed June 12, 2020. The employee was seriously injured in a motor vehicle accident on July 20, 2017, while traveling to a work meeting. The employer denied liability. During the pendency of the workers' compensation claim, the employee also filed a claim for No-Fault benefits with State Farm. State Farm paid the policy limits of $20,000 for wage loss benefits and $20,000 for medical expenses and intervened in the employee's pending workers' compensation matter. The employee settled her workers' compensation claim, but State Farm as an intervener did not settle and pursued a *Parker/Lindberg* hearing. At the hearing State Farm hired its own attorney to argue its case. The employee's attorney was present, but asked no questions and did not participate in the hearing. After State Farm prevailed in the hearing the employee's attorney sought *Edquist* fees from the amount awarded to State Farm. Compensation Judge William Marshall awarded *Edquist* fees to the employee's attorney. State Farm appealed. The WCCA (Judges Stofferahn, Sundquist, and Quinn) reversed. It noted that this case is not a typical *Edquist* fee scenario. The WCCA determined that State Farm's attorney put forth the effort to establish the case and took the financial risk to contest the issue. Under these circumstances, the employee's attorney was not entitled to an *Edquist* fee.

Ansello v. Wisconsin Central, Ltd., File No. WC20-6333, Served and Filed June 19, 2020. The employee suffered a low back injury on January 9, 2006, while working as a longshoreman. Indemnity and medical expenses, including two back surgeries, were paid pursuant to the federal Longshore and Harbor Workers' Compensation Act (LHWCA). The employee suffered an aggravation to his back in 2014 and wage loss benefits

were again paid pursuant to the LHWCA, however, medical expenses related to a back surgery were denied. The employee and his attorney litigated the claim through both the LHWCA and Minnesota workers' compensation systems. The employee was awarded benefits and his attorney was awarded fees in both forums. In June 2019 the employee's attorney filed a statement of attorney's fees claiming an additional $59,025 in attorney's fees for medical expenses recovered. Compensation Judge Baumgarth awarded $12,000 in *Irwin* fees. The employee appealed the amount of *Irwin* fees awarded. The WCCA (Judges Milun, Stofferahn, and Hall) affirmed. The WCCA noted that the compensation judge had concluded that the amount of fees awarded under the LHWCA sufficiently compensated the attorney for work done in that forum and excluded those fees in his calculation of the *Irwin* fees. The employee argued that the judge did not properly apply the *Irwin* factors which resulted in an inadequate award of excess fees. The WCCA held that the compensation judge's award of fees did not violate the underlying principle of Minnesota workers' compensation law to avoid double recovery of benefits. The compensation judge considered all of the *Irwin* factors, and therefore, did not abuse his discretion.

Grace v. Smith Foundry Company, File No. WC20-6368, Served and Filed January 12, 2021. The employee sustained an admitted left upper extremity injury in 2015. He sought workers' compensation benefits, and also tried to establish a cervical spine injury. The case went to hearing and it was determined that there was no cervical spine injury. Subsequently, the employee claimed additional benefits and also alleged a thoracic outlet syndrome condition. Compensation Judge Grove found that the thoracic outlet syndrome was compensable. The employee was working at a lower wage at a casino, so she awarded temporary partial disability benefits. She also awarded a period of temporary total disability benefits and a rehabilitation consultation, and she approved the requested change in physicians. The claim for permanent partial disability was denied. Certain medical benefits were awarded related to the thoracic outlet syndrome. There was no appeal. Following the decision, the employee was furloughed at the casino due to the executive order to address the Covid-19 pandemic. The employee's TPD benefits were discontinued. The employee's attorney then filed a statement of attorney's fees claiming over $8,700 in contingency fees which had been withheld, $26,000 in *Roraff* fees, Subd. 7 fee reimbursement, and $11,000 in taxable costs. Judge Grove awarded the contingency fee, a *Roraff* fee of $17,213.89, a portion of the Subd. 7 fees, and $8,000 in costs. On appeal by both parties, the WCCA (Judges Milun, Sundquist, and Quinn) affirmed in part and reversed in part. The employer argued that the award of *Roraff* fees was premature, asserting that the suspension of TPD was only temporary, it was going to restart, and there would be additional contingency fees awarded. The court held that as of the date of the hearing, there was no ongoing stream of benefits from which the employee's attorney could collect fees, and it was unknown whether the employee would be called back to work and in what capacity. Therefore, it was not premature for the judge to make a determination as to the adequacy of the contingency fee. The employer also argued that the award of *Roraff* fees was based, in part, on benefits obtained on behalf of, but not actually recovered by, the employee. The judge also noted in her rationale that the results obtained by the employee's attorney included the possibility of additional medical treatment and future wage loss related to thoracic outlet syndrome. An award of *Roraff* fees on medical treatment yet to be provided is premature. The award of *Roraff* fees was reversed and the case remanded to the compensation judge for an application of the *Irwin* factors without consideration of benefits not yet recovered by the employee. With regard to taxable costs, the judge denied costs to obtain three expert reports, as those reports were obtained to try and prove up the cervical spine condition in prior litigation. In the current litigation, new experts commented on the three earlier reports, but the three prior reports did not relate to thoracic outlet syndrome. There is no indication that the judge abused her discretion in denying these costs.

Average Weekly Wage

Boyum v. Dvorak Tree Service, File No. WC20-6350, Served and Filed December 15, 2020. The employee was injured while working as a tree trimmer at Dvorak Tree Service (Dvorak), which was uninsured for workers' compensation liability at the time. Dvorak denied liability for the injury on the basis that the employee was an independent contractor. Evidence showed that the employee worked for Dvorak sporadically from 2005 to 2012, June 2016 to June 2018, and August 2018 to the date of injury in September 2018. In addition, the testimony was that the employee initially earned $30.00 per hour and later earned $40.00 per hour for his work. Neither the employee nor Dvorak kept any record of the employee's actual wages. The case went to a hearing before Compensation Judge Baumgarth on the issues of whether the employee was an independent contractor versus an employee, whether he was entitled to temporary total disability benefits, and the average weekly wage. Judge Baumgarth held that the employee was an employee of Dvorak and awarded TTD benefits at the minimum compensation rate, finding there was insufficient

evidence to establish the average weekly wage at the time of the injury. The WCCA (Judges Hall, Stofferahn, and Sundquist) vacated the decision and remanded for additional consideration. The WCCA found that although the employee claimed at the hearing that he was a seasonal worker and that his weekly wage should be calculated as five times his daily wage under Minn. Stat. §176.011, subd. 8a, the judge did not make any findings on this issue other than to state in his memorandum that tree climbing would not be done in certain weather conditions, although tree trimming is a year round business. The WCCA also acknowledged that although there was no evidence of the breakdown of the employee's work, the judge could have used the information available to approximate the employee's daily and weekly wage as a seasonal employee. Therefore, the WCCA remanded the case to the judge for further consideration of whether the employee was a seasonal worker "in an industry where the hours of work are affected by seasonal conditions" pursuant to Minn. Stat. §176.011, subd. 8a and the average weekly wage.

Causal Connection

Schallock v. Battle Lake Good Samaritan Center, File No. WC19-6318, Served and Filed June 8, 2020. The employee suffered a low back injury arising out of her employment on July 14, 2016. She later began to experience severe back pain and left leg numbness. Testing and imaging studies did not reveal any objective findings to explain her left leg radicular symptoms. Dr. Bushara performed a neutral medical examination and opined that the employee had suffered a minor sprain/strain injury and her left leg symptoms were likely caused by multiple sclerosis. On February 21, 2017, the employer filed a NOID to discontinue temporary total disability benefits. The discontinuance was not allowed, and the employer filed a petition to discontinue benefits. Compensation Judge Hartman held that the employer did not meet its burden of proof that the work injury was a temporary low back strain and denied the petition. The employer appealed and the WCCA held that the compensation judge had erroneously placed the burden on the employer. On remand, the judge again found that the work injury was a substantial contributing to the employee's disability. The WCCA (Judges Hall, Milun, and Stofferahn) affirmed. The employer argued that the judge's findings were not supported by substantial evidence and did not properly explain his decision. The WCCA concluded that while the evidence may support a different conclusion, the issue was whether the findings of the judge are supported by evidence that a reasonable mind might accept as adequate. This case was summarily affirmed by the Minnesota Supreme Court on January 15, 2021.

Collective Bargaining Agreements

Aguilar-Prado v. W. Zintl Construction, Inc., File No. WC19-6311, Served and Filed May 15, 2020. For a description of this case, please refer to the Arising Out Of category. This case was summarily affirmed by the Minnesota Supreme Court on January 15, 2021.

Costs

Grace v. Smith Foundry Company, File No. WC20-6368, Served and Filed January 12, 2021. For a summary of this case, please refer to the Attorney's Fees category.

Fraud

Kinde v. Healtheast/Fairview Health Services, WC19-6327, Served and Filed May 15, 2020. The employee worked as a phlebotomist. On September 26, 2018, she sustained a work injury when she slipped and fell and hit her head on the floor. She alleged headaches, vision problems and back pain resulting from the fall. She attended three independent medical examinations at the employer's request. Dr. Wicklund diagnosed her with subjective pain and a closed head injury with residual vision problems. Dr. Allen opined that she had some post-concussion symptoms and a soft tissue strain of the neck. The employer placed the employee under surveillance which revealed her outside in the sunshine without sunglasses and showing no ill effects from the bright light. On April 15, 2019, the employer offered the employee light duty work within her restrictions, minimizing bright lights and allowing her to wear tinted glasses while working. The employee refused the offer. The employer filed a petition to discontinue benefits. Compensation Judge Lund approved the discontinuance, adopting the opinions of Drs. Allen, Wicklund and Weingarden as persuasive. Judge Lund also noted that the surveillance video showed the employee functioning asymptomatically in bright sunlight. The employee appealed, alleging that the judge's decision was procured by fraud on the part of the employer, and she petitioned the WCCA to vacate the Findings and Order, also on the basis of fraud. The WCCA (Judges Quinn, Milun, and Hall) affirmed. The employee based her fraud allegation on statements made by the employer after the Findings and Order were issued. She alleged that the employer stated that it did not believe the findings of the independent medical examiners. The WCCA concluded that the employee failed to make a showing of fraud to warrant a vacation of the

Findings and Order. The WCCA noted that the employer made no representations to the judge and that the subjective opinions of the employer constituted lay opinions and would not have been evidence on the issues at hearing.

Gillette Injury

Senftner v. Bimbo Bakeries USA, Inc., File No. WC20-6385, Served and Filed May 4, 2021. The employee started working for the employer in 1990. His job duties included taking orders from customers and delivering bakery products to those customers. He typically worked ten hours per day, five days per week. When making deliveries, he brought new products to the store, removed stale products, and stocked shelves, which involved kneeling and squatting for up to 15 minutes at a time. He eventually began to develop knee pain for which he started intermittently treating in 2010. In 2016 he began treating more consistently with Dr. Diekmann. In September 2018 Dr. Diekmann wrote in his report that the employee "is going to explore the possibility of his knee arthritis being at [sic] *Gillette* type injury related to his years of truck driving activity." The employee also testified that he mentioned a *Gillette* injury to Dr. Diekmann at that time because his wife, who worked as a safety director, told him about such injuries. In June 2019 the employee treated with Dr. Diekmann again and decided to proceed with total knee replacements. At that time Dr. Diekmann stated that it was his opinion that the employee's work was a substantial factor in causing the employee's knee condition. Shortly thereafter, the employee reported the work injury to his employer. The employer and insurer denied primary liability for the injury. The employee underwent right total knee replacement on August 19, 2019, which is the first date the employee lost time related to his knee. At hearing the issues included whether the employee sustained a work injury on or about August 19, 2019, the date of injury claimed by the employee, and whether the employee provided proper notice of the injury. Compensation Judge Kulseth found that the employee sustained a *Gillette* injury culminating on September 6, 2018, the date the employee discussed a *Gillette* injury with Dr. Diekmann. He denied the employee's claims on the basis that the employee failed to provide timely statutory notice pursuant to Minn. Stat. §176.141. The WCCA (Judges Quinn, Milun, and Stofferahn) affirmed. The date a *Gillette* injury culminates is a factual question for the compensation judge, which should be affirmed if supported by substantial evidence. The date a *Gillette* injury culminates is when the cumulative effect of the employee's work duties is sufficiently serious to disable the employee from working. *See Carlson*. However, the "ascertainable event" that is sufficient to trigger the culmination of a Gillette injury does not have to be the first date of lost time from work due to the injury. *See Schnurrer*. Instead, the determination of which ascertainable event triggers the culmination of a *Gillette* injury is also a question of fact for the compensation judge. The WCCA affirmed the judge's decision that the *Gillette* injury culminated on September 6, 2018, holding that although alternative culmination dates could have been chosen, substantial evidence supports the judge's choice of dates. Beyond the culmination date, pursuant to Minn. Stat. §176.141, an employee must give notice of a work injury to the employer within 180 days of the injury or the claim will be denied. The notice period begins to run when the employee, as a reasonable person, should have recognized the nature and seriousness of the injury and its probable compensability. *See Anderson*. The date the employee has sufficient knowledge to trigger the time period for notice is a question of fact and does not necessarily need to coincide with the culmination date of injury. In *Gillette* injury cases, the date the employee has knowledge of probable compensability is often not clear. The WCCA noted that in this case, the employee specifically raised the issue of a *Gillette* injury to his doctor on September 6, 2018. Therefore, the WCCA found that the compensation judge's determination that the employee had sufficient knowledge to trigger his obligation to report his injury to his employer as of September 6, 2018, was supported by substantial evidence. The WCCA also found that a definitive medical causation opinion is not necessary before notice must be given. This case has been appealed to the Supreme Court.

Independent Contractors

Schultz v. Andy & Steve's Lawn & Landscape, File No. WC20-6361, Served and Filed January 5, 2021. The alleged employee, Schultz, was injured in 2017 while performing tree trimming services on the alleged employer's, Dick's, premises. Due to requests for tree trimming services by customers, starting in 2013, Dick placed an advertisement for a tree trimmer, which Schultz answered. Through text messages, the parties agreed that Schultz would work on an as-needed basis as a subcontractor. There were no assigned work hours. An Independent Contractor Release was signed by Schultz, in which he certified that he had adequate insurance coverage for injuries he sustained. However, Schultz did not obtain insurance. For work, Dick would text Schultz whenever customers asked for tree trimming services. Schultz was able to refuse the work if he was unavailable. When he finished the work, Schultz would text Dick, who would pay him in cash without deducting payroll or other taxes. Schultz carried business cards, but testified that he did not hand out his cards or advertise independently. After initially starting with Dick, for

approximately one year, Schultz took a break from tree trimming for Dick, but did not notify Dick in advance of this choice. During that year, Dick found others to trim trees for his business. Dick subsequently advertised for a tree trimmer again. Schultz again responded to the advertisement. Schultz did trim trees for others while working for Dick, but testified that in 2017, he only performed work for Dick. Dick did have regular employees. Unlike the regular employees, Schultz drove his own truck to and from the jobsite, did not punch a clock, and provided his own tools and safety equipment. In addition, Dick did not inspect Schultz's work due to the latter's expertise. Schultz did not bring his own assistants to the job, but Dick testified that he would not have objected to it. On the date of injury, Schultz was working on a project located on Dick's property, which he was told he could do "whenever you want." The injury occurred while removing a tree from that property. Following the injury, Schultz filed a claim, which was denied by Dick on the basis that no employment relationship existed and that Schultz was an independent contractor. The matter went to a hearing before Compensation Judge Pearson, who determined that Schultz was an independent contractor. Schultz appealed to the WCCA arguing that the compensation judge failed to analyze the work under the safe harbor provisions of Minn. Rule 5224.0110, subps. 2 and 3, relating to laborers. The WCCA remanded for additional consideration of the safe harbor provisions at the time of the 2017 injury. On remand, the compensation judge made specific findings on each of the safe harbor provisions, determined that Schultz did not substantially meet the safe harbor provisions as either an independent contactor or employee, and again concluded that he was an independent contractor. The WCCA (Judges Sundquist, Milun, and Quinn) affirmed. The Minnesota Workers' Compensation Act applies to work injuries sustained by employees, but excludes injuries sustained by independent contractors. The rules defining independent contractors include safe harbor criteria for determining whether an individual is an employee versus an independent contractor for more than 30 occupations outlined in Minn. Rules 5224.0020 to 5224.0312. In this case, as is usually the case, all of the safe harbor elements were not met either way. Therefore, the analysis then shifts to a determination as outlined in Minn. Rules 5224.0330 (relating to control of the means and manner of performance) and 5224.0340 (relating to other factors to be analyzed beyond the safe harbor criteria). Following the judge's detailed analysis of each of the safe harbor criteria, the WCCA affirmed the compensation judge's decision that Schultz was an independent contractor under the latter two rules, holding that although there is evidence that supports factors either way, substantial evidence supported the judge's decision.

Medical Issues

Leuthard v. Independent School District 912 - Milaca, File No. WC19-6290, Served and Filed May 26, 2020. The employee suffered an admitted work injury to her neck on April 14, 2004, while working for ISD 912. Conservative care did not resolve her ongoing neck pain. The employee had repeated medial branch block injections on multiple levels with no relief. The employer and insurer denied her treatment for additional medial branch blocks. Compensation Judge Lund held that the facet joint injections were not reasonable and necessary treatment as they exceeded the treatment parameters and the condition did not support a departure from the parameters. The WCCA (Judges Hall and Milun) held the judge did not review for the rare case exception from the treatment parameters and remanded the case back to the judge. *See Jacka*. Judge Stofferahn dissented. He would have upheld the compensation judge's decision denying treatment. This decision was reversed by the Minnesota Supreme Court, and that decision is summarized above in the Minnesota Supreme Court section.

Johnson, William v. Darchuks Fabrication, Inc., File No. WC19-6325, Served and Filed June 18, 2020. The employee sustained a work-related injury on September 4, 2002. After receiving some initial treatment, he has been treating for his ongoing symptoms with a medication regimen that has included opioid medications since 2005. In May 2016, the employee underwent an independent medical examination with Dr. Wojciehoski, who opined that the opioid medications were not prescribed properly under the treatment parameters. The employer and insurer sent a letter to the employee's treating physician requesting compliance with the treatment parameter on long-term use of opioid analgesics, Minn. R. 5221.6110. The treating physician subsequently continued to prescribe the employee the same medications due to the employee's report of ongoing symptoms of CRPS. The employee ultimately filed a medical request, requesting payment for various medications, including the opioid medications. The case went to an initial hearing in July 2017, after which the compensation judge found that the employee's CRPS condition had not resolved and that the treatment parameters were not applicable. The employer and insurer appealed to the WCCA and ultimately to the Minnesota Supreme Court on the issue of whether the treatment parameters applied to the employee's claim. After the Minnesota Supreme Court found that the treatment parameters did apply, the case was remanded to the compensation judge for application of the treatment parameters. At the

hearing on remand, Compensation Judge Hartman found that the employee had not complied with the applicable treatment parameter, that a departure from that parameter had not been demonstrated, but that the rare case exception pursuant to *Jacka* applied. In finding a rare case exception, the judge noted that the use of opioid medications reduced the employee's pain by half and allowed him to engage in activities of daily living and that when he did not use the medications he had unbearable pain, stress, and anxiety. The judge also noted that the treatment parameters were "onerous, cumbersome, and extremely difficult." The employer and insurer appealed arguing that the compensation judge committed an error of law in awarding the opioid medications as a rare case exception. The employer and insurer also argued that the compensation judge committed an error of law because he based his decision on the fact that the treatment parameters were "onerous." The WCCA (Judges Milun, Stofferahn, and Sundquist) affirmed. The WCCA found that application of the rare case exception standard is reviewed under the *Hengemuhle* or substantial evidence standard, and that substantial evidence supported the compensation judge's award of the opioid medications where the employee had long-term intractable pain, showed no evidence of abusing opioids, was carefully monitored by his treating physician, and experienced a reduction in his pain with use of the opioid medications. The WCCA also found that the compensation judge's statement that the treatment parameters are "onerous, cumbersome, and extremely difficult" was merely an expression of sympathy and not an error of law. This case was appealed to the Minnesota Supreme Court and argued on April 12, 2021.

Bierbach v. Digger's Polaris, File No. WC19-6314, Served and Filed November 10, 2020. The employee sustained an admitted injury in 2004, when an ATV he was operating rolled and landed on his ankle. In 2013, he filed a claim for a consequential neck and back injury. In 2014 the parties settled the employee's claims for workers' compensation benefits, including closing out some medical expenses such as opioids/narcotic therapy, psychiatric and psychological treatment, mental health, health clubs, implantable stimulators, and future chronic pain management. Following the settlement, the employee continued to seek treatment. Ultimately, in 2018, the employee's provider opined that he was a candidate for medical cannabis to help with his intractable pain and to wean him off narcotic medications. The employee's application for the Minnesota medical cannabis registry was accepted, and he began to obtain medical cannabis at Leafline. His doctor opined that the treatment appeared to be effective in reducing complaints of intractable pain. The employee had a history of drug use, including the use of recreational marijuana for years. He had actually weaned himself off of narcotics in 2004. Since he started the medical cannabis program in 2018, his dosage had doubled, and he was incurring monthly costs in the amount of $1,800. He filed a claim, seeking reimbursement for his out-of-pocket costs. At the hearing, the issues presented included whether the compensation judge has jurisdiction under Minn. Stat. §§152.22-.37 (2018) to order reimbursement of costs incurred for medical cannabis and whether the medical cannabis was reasonable, necessary and causally related to the work injury. Compensation Judge William Marshall awarded reimbursement, finding that he had authority to reimburse the costs for medical cannabis and that the medical cannabis was reasonable, necessary, and causally related to the work injury. The employer and insurer appealed. The issues on appeal were whether the compensation judge improperly relied on medical opinions which lacked foundation, whether the judge erred in finding that the use of medical cannabis was reasonable and necessary, whether the compensation judge had jurisdiction to order the employer and insurer to finance the employee's medical cannabis, and whether federal law which makes it illegal to possess, distribute, or manufacture cannabis preempts the state's medical cannabis law, making it a crime for the employer and insurer to reimburse out-of-pocket expenses of the employee for medical cannabis. The WCCA (*en banc* with Judge Sundquist writing the unanimous opinion) affirmed the judge's decision in its entirety. The WCCA found that substantial evidence, including medical records, expert medical opinion which was supported by adequate foundation, and lay testimony supported the award of costs incurred by the employee for medical cannabis as reasonable and necessary treatment for intractable pain caused by his condition. The WCCA specifically found that the reimbursement for medical cannabis was reasonable and treatment on the basis that the employee was diagnosed with a qualifying condition under the Medical Cannabis Therapeutic Research Act (MCTRA), complied with the requirements of the MCTRA, and he credibly testified that the medical cannabis decreased his pain and increased his functional abilities. The WCCA also found that the judge had subject matter jurisdiction under Minnesota law to determine whether the employee was entitled to reimbursement for medical cannabis. The WCCA specifically declined to rule on the question of whether the Minnesota medical cannabis laws are preempted by federal criminal statutes

since the WCCA has no jurisdiction in "any case that does not arise under the workers' compensation laws" or "in any criminal case" pursuant to Minn. Stat. §175A.01, subd. 5. This case was appealed to the Minnesota Supreme Court and oral argument occurred on May 3, 2021.

Musta v. Mendota Heights Dental Center, File No. WC19-6330, Served and Filed November 10, 2020. The employee sustained an injury on February 11, 2003. Following the injury, she underwent a number of treatment modalities including the use of long-term opioids for a period. In 2018 a compensation judge found that long-term opioids were not reasonable and necessary. The employee was subsequently certified as having intractable pain, which qualified her for medical cannabis under the Minnesota Medical Cannabis Therapeutic Research Act (MCTRA), Minn. Stat. §152.21, *et. seq.* (2018). She started obtaining medical cannabis from a state authorized distributor, paying out of her own pocket, and filed a claim requesting reimbursement for her out-of-pocket expenses from the employer and insurer. The employer and insurer denied this request, arguing that federal law preempts the MCTRA and precludes them from reimbursing the employee for her out-of-pocket expenses. At the hearing, the parties stipulated that the employee's use of medical cannabis was reasonable, necessary, and causally related to her work injury and that she properly followed the procedures outlined in the MCTRA. Therefore, the only issue before the compensation judge was whether an order requiring reimbursement of out-of-pocket expenses for medical cannabis would be in violation of federal law. Before Compensation Judge Kirsten Marshall issued her decision, the Office of Administrative Hearings certified the preemption question to the Minnesota Supreme Court. However, the Supreme Court declined to accept the certified question on the basis that this issue was best addressed through the legislative process. The compensation judge subsequently ordered the employer and insurer to reimburse the employee for her out-of-pocket expenses for her medical cannabis, finding that there was no federal preemption of state medical cannabis laws, as the United States Congress made the decision not to appropriate funds to the Department of Justice for the prosecution of any violations of the Controlled Substance Act, 21 U.S.C. §801 *et seq.* The WCCA (*en banc* with Judge Quinn writing the unanimous opinion) affirmed the state law portion of the decision. The WCCA determined that since the parties stipulated that the medical marijuana dispensed to the employee was reasonable, necessary, and causally related to the work injury, her claim for reimbursement for out-of-pocket expenses is compensable pursuant to Minn. Stat.§176.135. However, the WCCA struck the judge's findings related to the federal preemption question under the Controlled Substance Act because the judge and the WCCA have no subject matter jurisdiction to consider that issue. This case was appealed to the Minnesota Supreme Court and oral argument occurred on May 3, 2021.

Hilpert v. Maid Pro, File No. WC20-6348, Served and Filed December 23, 2020. The employee sustained an injury to her low back in July 2010. Since the injury she continued to experience low back and left lower extremity pain despite treatment. Three physicians recommended fusion surgery, but the employee did not pursue the surgery. Ultimately, in 2019, her treating provider recommended a spinal cord stimulator and referred her for psychological testing. The employee subsequently filed a medical request seeking approval of the psychological or psychiatric consultation to assess whether she had any comorbidities that would preclude the implantation of a spinal cord stimulator so that she might qualify for a spinal cord stimulator trial and potentially permanent implantation. The case went to a hearing in front of Compensation Judge Behounek. At the hearing, the employer and insurer argued that the spinal cord stimulator was not reasonable and necessary based on their expert opinions and that the employee did not meet the qualification requirements for a spinal cord stimulator under the medical treatment parameters. The compensation judge found that the employee did not meet the requirements of the applicable treatment parameters and denied the requested psychological consultation. The WCCA (Judges Milun, Hall, and Sundquist) affirmed, finding that substantial evidence, including expert medical opinions, supports the compensation judge's findings. Minn. R. 5221.6200, subp. 6(C) provides that spinal cord stimulators are only indicated if the treating health care provider has determined that a trial screening period of a spinal cord stimulator is indicated because the employee: (a) has intractable pain; (b) is not a candidate for another surgical therapy; and (c) has no untreatable major psychological or psychiatric comorbidity that would prevent the employee from the treatment. In this case, the WCCA found that substantial evidence supported the judge's determination that the employee had intractable pain but that she did not qualify because she was a candidate for another surgical procedure which had been recommended by three of her treating providers. Therefore, the WCCA found that since

the compensation judge reasonably concluded that the employee failed to meet subpart (b) of the rule, there was no basis for the employer and insurer to pay for a psychological consultation to determine whether she met the requirements of subpart (c) of the rule.

Notice

Senftner v. Bimbo Bakeries USA, Inc., File No. WC20-6385, Served and Filed May 4, 2021. For a summary of this case, please refer to the *Gillette* Injury category.

Occupational Disease

Hanley v. Cretex Company, Inc., File No. WC20-6389, Served and Filed May 10, 2021. The employee worked in a large facility containing approximately 1000 machines, including lathes. He operated the lathe machines, which cut metal. To reduce the friction from the cutting, high-pressure lightweight oil was applied to the metal part as it spun in the lathe. In the process, the oil was aerosolized into a fine mist. Fans above the machines would draw the air upwards, but nevertheless, residual aerosolized oil escaped into the vicinity of the lathe. The employee testified that some days he would go home coated in oil, noticing it on his clothes and skin. Air quality testing was performed between 2012 and 2018 on five occasions, and on each occasion, the aerosolized oil was approximately 30 times below the permissible amount according to federal regulations. The employee began to experience respiratory symptoms in 2009. He became more sensitive as more exposure occurred. He commenced treatment for respiratory symptoms in 2017, at which time a diagnosis of occupational asthma was made. It was suggested that the employee try different employment. He switched to a different department with the employer, but was still working near the lathe machines. He left the employer in March 2017. He noted that his symptoms improved almost immediately. He worked for a second employer doing the same type of work, his symptoms returned, and he left work after 12 months. The employee then returned to work for the employer in 2019 at a different shop with fewer machines. His doctor advised him to wear a P-100 respirator. The employer had the employee examined by Dr. Mann, who diagnosed occupational asthma and concluded that a respirator mask was insufficient to treat the symptoms. He concluded that the employee needed to be kept away from the metalworking fluids, and he permanently removed the employee from the work environment. The employee ultimately became a commercial truck driver, where he had no exposure to cutting oils and exhibited minimal respiratory symptoms. Dr. Kipp performed an independent medical evaluation, opining that the employee did not have occupational asthma. He suspected a vocal cord dysfunction. He concluded that the employee could not have occupational asthma because the oil exposures were far below OSHA standards. Dr. Arndt performed an IME at the request of the employee, and he diagnosed occupational asthma likely due to exposure to metalworking fluids. Compensation Judge William Marshall determined that the employee had occupational asthma related to exposure to metalworking fluids with the employer. The WCCA (Judges Quinn, Stofferahn, and Hall) affirmed. The court rejected the employer and insurer's argument that because the industrial hygiene testing showed air quality that was far below the amounts allowed under OSHA guidelines, the employee could not have developed occupational asthma. Meeting governmental safety standards does not preclude the employee from developing occupational asthma. The employer and insurer argued that Dr. Arndt's opinions were not based on adequate foundation, as he assumed high exposures to aerosolized oils, which was contrary to the industrial hygiene testing. The WCCA rejected the argument. The employee was exposed to the point that his clothes and skin were covered with oil at the end of the work shift. As every person is unique, exposure to even minimal amounts of aerosolized oils may cause occupational asthma. While the chances of any given employee developing such a disease may be substantially less due to the employer's excellent ventilation system, the chances are not zero for every employee. It was also noted that the air quality tests did not measure the employee's specific exposure. Substantial evidence supported the judge's determination.

Vacating Award

Sayler v. Bethany Home, File No. WC19-6323, Served and Filed October 15, 2020. The employee injured her right foot on January 19, 1997. Benefits were paid. She was subsequently diagnosed with reflex sympathetic dystrophy, and an inpatient pain program was recommended. Thereafter, an implantable stimulator was recommended. The RSD had spread up the right leg to the knee. A settlement was reached in December 1998 for $27,000 on a full, final, and complete basis, leaving future medical treatment open, but closing out chiropractic treatment, psychological treatment, pain clinic treatment, and rehabilitation. She had claimed entitlement to TTD, TPD, and 13% PPD. Immediately after the settlement, she applied for and was awarded Social Security disability income benefits. Thereafter, her RSD spread into the low back and left leg. In 2001, following additional litigation, a spinal

cord stimulator was implanted. Over the years, she had numerous procedures, including replacements, modifications, and adjustments of the stimulator. The insurer paid more than $278,000 in medical expenses. The employee had a pre-existing history of depression and anxiety, and she had been diagnosed with those conditions before the settlement. She began treating for depression and anxiety again in May 2015, and in 2019 was assigned a 40% PPD rating. She petitioned to vacate the Award on Stipulation based on a substantial change in medical condition. The WCCA (Judges Sundquist, Milun, and Quinn) denied the petition. The court applied the factors set forth in the *Fodness* case. It found that there had been no change in diagnosis, although there had been worsening of previously diagnosed conditions leading to additional treatment. It found that there had been no change in her ability to work. She had applied for SSDI benefits at the time of the settlement. Although an award of SSDI may weigh in favor of a change in ability to work, it is not determinative. *See Tudahl*. Implantation of a spinal cord stimulator had been recommended prior to the settlement, and following the settlement, the stimulator was implanted, with complications thereafter. All of the medical expenses were paid under the terms of the settlement. More costly and extensive medical care is a less significant factor when medical benefits are left open as part of the settlement sought to be vacated. *See Burke*. The court concluded that the employee had not met her burden that medical care was not anticipated at the time of settlement. Although the PPD had increased for the RSD condition, that condition had already been spreading at the time of the settlement, so the employee has not met her burden of proving that the additional PPD was unanticipated. The court further found that the 40% PPD rating for moderate emotional disturbance lacked foundation and was not accurate. The court concluded that the evidence presented did not establish good cause under the statute to set aside the award on stipulation. This case was summarily affirmed by the Minnesota Supreme Court on June 11, 2021. ✦

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