A review of workers' compensation cases from the Minnesota Workers' Compensation Court of Appeals and Minnesota Supreme Court
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OCCUPATIONAL DISEASE – WORKPLACE EXPOSURE AND MEDICAL BENEFITS SETTLEMENT – *PIERRINGER* RELEASE

***Sershen v. Met. Council* (Minn. May 11, 2022)**

Background: Metropolitan Council ("Met Council") appealed the compensation judge's and the Workers' Compensation Court of Appeals' (WCCA) decisions holding that the employee sustained an occupational disease of hearing loss. In addition, Met Council argued the compensation judge and the WCCA improperly found them liable for medical benefits and erred by failing to consider the liability of the prior employers who settled with the employee pursuant to a *Pierringer* release.

The employee worked for several decades as a safety manager spending between 5 to 15 hours per week in surrounded by high levels of noise. He first noticed hearing loss in 1994. The employee retired in 2017 and shortly thereafter filed a workers' compensation claim against several of his former employers. Met Council was his last employer from 2008 to 2017. Two of the employers and one intervenor settled with the employee and a stipulation was filed dismissing those parties.

The compensation judge found the employee sustained an occupational disease of hearing loss. The compensation judge further found the employee was exposed to the hazard of workplace noise at all five employers. The judge found an employer, other than Met Council, was the "last significant exposure." The employer was one of the parties in the *Pierringer* settlement. Despite finding that Met Council, the last-exposure employer, did not contribute substantially to the employee's hearing loss, the compensation judge ordered Met Council to pay medical benefits based on the plain language of § 176.135, subd. 5). The compensation judge summarily concluded that all other issues, including the employee's claim for PPD, were moot. Met Council appealed to the WCCA and challenged the finding that the employee had sustained an occupational disease, as well as liability for his medical expenses. In addition, Met Council argued that the compensation judge did not properly consider the liability of the employers that settled pursuant to the *Pierringer* release. The WCCA affirmed and the decision of the compensation judge. The WCCA clarified the PPD issue was moot because of the *Pierringer* settlement between the employee and his other employers. Met Council appealed to the Minnesota Supreme Court.

Holding: The Minnesota Supreme Court affirmed in part, reversed in part, and remanded to the compensation judge. First, the MN Supreme Court held that the employee established a workplace exposure to hazard and occupational disease and that, consistent with Minn. Stat. § 176.135, subd, 5 (2020), it was not an error to order payment of medical benefits by the employer where the employee was last exposed. Met Council had argued that medical benefits should be awarded against the last-significant-exposure employer under the occupational disease statute (Minn. Stat. § 176.66, subd. 10), not the last-exposure employer under the medical benefits statute (Minn. Stat. § 176.135, subd. 5). In agreeing with the compensation judge, the MN Supreme Court found the plain language of the medical benefits statute (§ 176.135,

subd. 5) clearly states that the last-exposure employer is liable for medical expenses arising from an occupation disease, despite the alternative framework in the occupation disease statute (§ 176.66, subd. 10) which requires the exposure to be a substantial contributing factor.

In addition, the MN Supreme Court held that the compensation judge erred by concluding that all issues, other than medical benefits, are moot and by not determining whether the last-exposure employer has a right to reimbursement against the last-significant-exposure employer under Minn. Stat. § 176.135, subd. 5, and Minn. Stat. § 176.66, subd. 10 (2020).

First, without deciding, the court assumed the parties appropriately used a *Pierringer* settlement in the context of workers' compensation laws. Next, the court determined that consistent with *Pierringer* agreements, the settling defendants should be dismissed, but their liability should nevertheless be considered against the liability of the remaining defendant, that way the remaining party does not pay more than their fair share of verdict. Here, the compensation judge determined that Met Council was not entitled to reimbursement from the settling parties and declared all issues other than medical benefits moot. According to the MN Supreme Court, however, the compensation judge should have resolved whether Met Council has a right to reimbursement by the last-significant-exposure employer per Minn. Stat. §176.135, subd. 5, which requires a disablement determination. Therefore, the compensation judge erred by declaring all issues other than medical benefits moot. The MN Supreme Court remanded the matter to the compensation judge for determination of whether the Council was entitled to reimbursement and how that reimbursement is to be made consistent with the *Pierringer* principles.

ARISING OUT OF AND IN THE COURSE OF – ASSAULT
EVIDENCE – UNDISCLOSED EVIDENCE

***Profit v. HRT Holdings* (W.C.C.A April 14, 2022)**

Background: While in the employ of Doubletree Suites Hotel, Deangelo Profit, the employee, was violently attacked by an assailant. The employee had known the assailant for a few years prior to the attack. On the day of the attack, the employee was at work as a houseman for the employer. The assailant came to the hotel, checked in and received a room card. He told hotel staff he was looking for employee. Profit, aware that that the assailant was looking for him, described him as "my guy, Bill."

Soon after the assailant checked in and received his room key, the staff discovered that his credit card was declined. The staff attempted to lock out assailant's room on the sixth floor. During this time, the employee was working in a room on the second floor when he saw the assailant standing at the open door of the room. The employee turned his back and felt something cold. He put his hand to his head and realized he was bleeding. The assailant continued to attack the employee as the employee attempted to seek shelter. Within minutes the assailant was wrestled to the floor by a coworker and a

hotel guest. The coworker heard the assailant saying that the employee killed the assailant's uncle. The police arrived and arrested the assailant. The assailant continually repeated to the police that the employee had "killed my uncle."

At the hearing, the employee argued in his written closing argument that the employer failed to provide surveillance video of the assailant at check-in, and that this omission constituted spoliation. The compensation judge did not make a finding pertaining to spoliation of evidence and found that the employee's injuries did not arise out of the course and scope of employment because the employees injuries were caused by a third person who intended to injure the employee because of personal reasons, not because of the employment or directed at him as an employee. The employee appealed.

Holding: The WCCA affirmed the compensation judge's decision. First the WCCA determined that the compensation judge did not err by not considering the spoliation issue because, based on the employee's brief, apparently the employee's theory of the potential relevance of the video was that it may have documented negligence. Because the Minnesota Workers' Compensation Act established a no-fault system in which negligence is not a factor, the video would not be relevant to the application of the intentional act exclusion. Furthermore, the appropriate remedy would have been to bring a motion to compel the evidence, which the petitioner failed to do.

The WCCA also affirmed the compensation judge's finding that employee's claim was barred by the intentional act exclusion under Minn. Stat. § 176.011, subd. 16. The WCCA affirmed that the intentional act exclusion cases fall into three groups. Relevant here are cases where the assailant is motivated by personal animosity toward the victim arising from circumstances wholly unconnected with employment. In such cases, the resulting injuries are not compensable. (However, where the attack is motivated against the employee for their role as an employee or where the motivation is neither personal nor work-related, the injury is compensable.)

Here, the employee argued that because the assailant's motivation lacked a rational basis, the injury is compensable because it was not directed against him for personal reasons or as an employee. The WCCA disagreed and determined that the assailant tracked down the employee based on personal animosity against him (i.e., seeking vengeance driven by a false and paranoid belief that the employee harmed his uncle). In doing so, the Court affirmed the compensation judge's finding that there is no exception to the assault exclusion where the motivation arises from mental illness. As such the employee's injuries are not compensable because the attack was motived by personal animosity toward the victim arising from circumstances wholly unconnected with employment.

On May 9, the petitioner appealed the WCCA's decision to the Minnesota Supreme Court.

ARISING OUT OF AND IN THE COURSE OF – PERSONAL COMFORT

Tomah v. Good Samaritan Soc'y **(W.C.C.A. March 31, 2022)**

Background: The employee, who worked as a nursing assistant, injured her right knee while using the bathroom facilities during her shift. At the time the employee was approximately 28 weeks pregnant. The employee testified that she slipped on water and fell as she walked to the sink. Contrarily, one of her supervisors testified that she prepared the employee's occurrence report following the accident and that the employee did not mention slipping on water. Additionally, the same supervisor testified she did not see any water absorbed into employee's clothing on the date of the injury. Another supervisor confirmed the testimony of the first supervisor. Furthermore, the employee was seen in the emergency department that evening and described falling from a standing position after her right knee "gave out." The compensation judge relied upon the testimony of witnesses, buttressed by the initial medical records, to determine that the employee did not slip on water and there was no evidence of any risk or hazard in the bathroom. The judge also explained that while a twisting or turning mechanism can be an increased risk causing a work injury, there was no such evidence in this case. Therefore, the compensation judge concluded the employee's injury did not arise out of her employment and denied her claim. The employee appealed the compensation judge's determination that her right knee injury did not arise out of her employment.

Holding: The WCCA affirmed the compensation judge's decision. On appeal, the employee did not dispute the compensation judge's finding that she failed to prove she slipped on water. Rather, the employee argued that her injury was compensable because it fell under the personal comfort doctrine. The WCCA noted the personal comfort doctrine applies when determining whether an injury occurred "in the course of" employment and is not applicable to the analysis of whether the employee's injury "arose out of" employment. To prove her accident "arose out of" employment, the employee needed to prove causation under the "increased risk" analysis, i.e., she must demonstrate that she faced a hazard that originated on the premises as part of the working environment that increased her risk of injury. The Court found that the employee had not met her burden. The Court held that in the absence of extenuating circumstances creating an increased risk of injury, the employee's fall is unexplained and her injury is not compensable. Therefore, employee's act of standing up from a seated position with no other extenuating circumstances did not involve an increased risk of a neutral condition and was not a compensable injury.

EMPLOYMENT RELATIONSHIP – INDEPENDENT CONTRACTOR EXCLUSIONS FROM COVERAGE

Hopp v. Advanced Contractors and Remodelers **(W.C.C.A. May 4, 2022)**

Background: The claimant had his own home siding business, HTI. It had no employees other than the claimant. After he incorporated HTI, he contacted an insurance agent to obtain workers' compensation insurance and liability insurance for

personal and corporate coverage. In the spring of 2015, the claimant began performing construction work for ACR. ACR had full time employees and also used subcontractors to "fill in" on jobs as needed. Employees of ACR received paychecks from a payroll service. The claimant, like other ACR subcontractors, received hourly pay and ACR did not withhold taxes. He reported his 2015 taxes with a 1090 and schedule C.

ACR expected subcontractors to have their own WC and liability insurance. While working on the ACR project in 2015, ACR asked him several times for verification of his WC insurance. The claimant contacted his insurance agent and testified he believed he was covered under a policy issued to HTI as of August 2015.

On September 30, 2015, the claimant sustained significant injuries to his lower extremities when scaffolding erected by an ACR employee collapsed and the claimant fell 25 feet, landing feet first.

The claimant reported his injury to HTI's insurer, but they denied coverage under the policy because it was a "shell" policy that did not provide personal coverage. He also submitted a workers' compensation claim to ACR's insurer, who denied the claim because he was not an employee of ACR. The claimant did not contest the denial by ACR's insurer at that time.

In February 2016, the claimant filed a civil suit against ACR alleging his injuries were caused by the negligence of an ACR employee. In his suit seeking damages, he alleged he was an independent contractor at the time of the injury. The civil lawsuit settled. In October 2017, the claimant sued his former insurance agent, alleging the agent negligently failed to provide him with a WC policy that covered him personally. That suit also settled.

In September 2018, the claimant filed a claim petition against ACR and its insurer alleging he was an employee of ACR and entitled to workers' compensation benefits. The compensation judge concluded the claimant was not an employee of ACR and that he could not pursue a claim against ACR because he made an election of remedies when he chose to pursue a civil claim against ACR based on the negligence of its employee; thus, she denied his claim. Mr. Hopp appealed to the WCCA.

Holdings: The WCCA affirmed the compensation judge's decision that the claimant was not employee of ACR. The WCCA noted that there was substantial evidence to conclude that the claimant was an independent contractor under Minn. Stat. §181.723, subd. 4 or under the WC administrative rules for independent contractors. Finally the WCCA rejected the claimant's argument that he should be awarded benefits pursuant to Minn. Stat. §176.215, subd. 1, concluding the claimant was not an employee of a subcontractor.

Finally, the WCCA affirmed the compensation judge's conclusion that the employee, by pursuing a negligence action against ACR in district court, made an election of remedies and could not pursue a workers compensation claim against ACR.

JOB OFFER – PHYSICAL SUITABILITY AND REFUSAL

***Hedner v. Per Mar Sec.* (W.C.C.A. March 16, 2022)**

Background: The employee, born on April 29, 1946, began working for the employer in 2016 as a security guard at a Menards store in Alexandria. In this job, the employee worked outdoors 80 percent of the time, where he would check trucks in and out of the lumber yard, lift lumber, walk the perimeter of the yard and open gates. He often needed assistance completing his job requirements. In the evening of September 8, 2018, while patrolling a poorly lit area of the outside yard, he tripped over a railroad tie, falling with his left arm extended. The fall resulted in a severe dislocation of his left shoulder. He underwent left shoulder repair surgery performed by Dr. Eric Nelson. Dr. Nelson opined that it would be at least a year post surgery before the employee reached MMI.

On February 15, 2020, the employer made the employee a written job offer to resume working as a security guard at the Alexandria Menards store. Eleven days later the employee refused the job offer, stating that he could no longer tolerate working in the cold weather and that the workplace had "poor working conditions." The employee's QRC testified that she explained to the employee that refusal or the job could have negative consequences. The employer and insurer discontinued paying TTD benefits as of March 4, 2020, due to the employee's refusal to accept a job. The employee filed a claim petition seeking various benefits, including TTD from and after the date of discontinuance. The sole question at the hearing was whether the employee had unreasonably refused a suitable job offer so as to lose entitlement to TTD. The compensation judge found that the job was suitable and within the work restrictions and that the employee's refusal of the job offer was unreasonable. The employee appealed.

Holdings: The WCCA affirmed the compensation judge's decision. The employee argued that the court committed *an error of law* by failing adopt the employee's testimony that he felt he could not perform the job. The WCCA noted that prior cases only stand for the proposition that the employee's own testimony *may* form the basis of a judge's findings on job refusal, not that it must do so.

The WCCA also affirmed the compensation judge's finding that the job offer was consistent with the rehabilitation plan. The WCCA pointed out that when the employee declined the job, he only stated that he did not want to work outdoors and that he felt that the employer had poor work conditions and neither of those conditions related to restrictions arising from the work injury. Furthermore, the employee did not try the job, but instead refused it out of hand and sought alternative employment. Accordingly, the WCCA found that substantial evidence supported the compensation judge's finding that the employee unreasonably refused a suitable job offer consistent with his rehabilitation plan and consistent with his work restrictions.

NOTICE OF INJURY – GILLETTE INJURY
TEMPORARY PARTIAL DISABILITY – WITHDRAWAL FROM LABOR MARKET

Schmidt v. Walmart **(W.C.C.A. May 16, 2022)**

Background: The employer and insurer appealed the compensation judge's finding that the employee gave the employer proper notice of the alleged Gillette-type injury to her left knee. They also challenged the judge's conclusion that they failed to prove the employee voluntarily withdrew from the labor market.

The employee had surgery to relieve chronic pain in her left knee in 1993. She testified she was symptom-free following the surgery and able to work without restrictions. In 2005, she began working for Walmart full-time in a variety of roles which required extensive standing, walking, lifting up to 50 pounds and squatting on a repetitive basis. In 2006, she sought medical care for left knee pain. She never claimed a specific work injury but told her doctor she was climbing ladders and carrying products weighing 50 pounds. In April 2011 she sought additional medical care for left knee pain, reporting she was constantly aggravating her left knee at work.

In May 2015 her left knee pain became constant and she found walking difficult. She sought treatment with Dr. Ghose. She did not provide any history of a knee injury, but told him her knee pain was recurring, chronic and worse with walking and standing. He diagnosed left knee arthritis and recommended a total knee replacement. He stated her condition was not due to an injury. In October 2015, after completing her work shifts, she experienced significant left knee pain. She told her manager her left knee condition prevented her from working on ladders. Her manager offered to move her to a less strenuous job. Her employer did not file a first report. She underwent a total left knee replacement on October 27, 2015.

After surgery she returned to work for the employer in a position within her restrictions. She continued to have symptoms and needed fluid drained from her knee. Her doctor recommended revision surgery which she underwent in January 2019. The employee again returned to work for the employer but found it physically difficult to continue working. On March 1, 2019 she met with an attorney. The attorney provided the employer with formal notice that the employee suffered a work-related Gillette injury.

In September 2019, the employee quit her position with the employer and began working part-time as a school bus driver. In January 2020, the Social Security Administration awarded her disability benefits retroactive to June 1, 2018. She resigned from the bus company in March 2020 because of the Covid shutdown and because she could not physically tolerate working due to continued left knee pain.

She subsequently filed a claim petition alleging that she sustained a Gillette injury culminating on October 15, 2015 and/or January 16, 2019 and seeking various workers' compensation benefits. The employer and insurer denied the Gillette injury claim and affirmatively alleged the employee failed to provide statutory notice, that she voluntarily

withdrew from the labor market and that she left a job within her restrictions and therefore did not suffer a loss of earning capacity. Dr. Wicklund performed an IME and concluded the claimant had pre-existing osteoarthritis in her left knee and her employment activities with Walmart did not cause or aggravated it. He gave her permanent restrictions. The employee's new physician subsequently opined that her pre-existing osteoarthritis was accelerated by her repetitive work activities with the employer.

The compensation judge concluded, among other things, that the employee sustained a Gillette injury to her left knee culminating on October 27, 2015, when her work activities aggravated her left knee condition to the point she could not walk or perform her job duties and she needed surgery. The judge also concluded the employee provided timely notice of the occurrence of her injury. The judge found the claimant had a diminished earning capacity due to her physical inability to continue with her job with the employer and her reduced earnings in her job as a bus driver represented her post-injury capacity. The employer and insurer appealed.

Holding: On appeal, the WCCA affirmed the compensation judge's rulings on the Gillette injury, notice and entitlement to temporary partial disability benefits. The Court rejected the employer and insurer's position that the notice period started running on September 22, 2011, when the compensation judge found that the employee knew her work activities were causing left knee symptoms. The WCCA concluded that it was reasonable for the compensation judge to conclude that the Gillette injury culminated on October 27, 2015, when her work activities aggravated her left knee condition to the point where she could not walk, perform her job duties and needed surgery, and that the notice period did not begin running until March 1, 2019, when he met with her attorney and she learned that repetitive minute trauma culminating in an injury could represent a compensable work related injury. The WCCA noted that Dr. Ghose, who did the total knee replacement surgery in October 2015, specifically recorded that her left knee condition was not work-related. The court concluded this opinion "may influence the employee's understanding of her left knee complaints". The WCCA concluded that under these facts, ***the judge could reasonably conclude that although the employee knew her work activities were causing her left knee pain, she did not understand she had a compensable injury until she met with an attorney***.

Walmart also appealed the compensation judge's conclusion that she had a diminished earning capacity due to the restrictions from her Gillette injury and the reduced earnings in her job as a bus driver reflected her earning capacity. The judge concluded she did not withdraw from the labor market when she left Walmart because she got a job with the bus company. Her bus driver earnings were presumed to represent her earning capacity, and Walmart did not offer evidence to suggest she could earn more than what she did working for the bus company.

PERMANENT PARTIAL DISABILITY – LUMBAR SPINE; RULES CONSTRUED

***Larson v. State of Minn., Dep't of MNSCU* (W.C.C.A. March 16, 2022)**

Background: The employee began working as a janitor and truck driver in the summer of 2015. On January 13, 2017, he sustained an admitted low back injury during a motor vehicle accident that occurred in the course and scope of his work activities. He sought treatment. X-rays failed to show acute trauma but indicated mild multilevel degenerative disc disease and mild disc space narrowing throughout the lumbar spine. His doctor released him to work without restrictions on February 2, 2017. He was later placed back on restrictions but continued working his pre-injury job within those restrictions. On March 14, 2017, he went to the emergency department for right-sided low back pain. On March 21, 2017, an MRI was performed which showed disc bulges at several levels.

Dr. Wengler examined the employee at the suggestion of his attorney. Dr. Wengler noted that he had documented disc herniations and considered the employee to be a candidate for surgical decompression. He rated the employee with 21 percent PPD pursuant to Minn. R. 5223.0390, subps. 4D, 4D(1) and 4D(4). A repeat MRI was performed on October 14, 2019, and showed multilevel small disc bulges with no impingement of the descending nerves.

Dr. Wicklund completed an IME on February 9, 2021. Dr. Wicklund diagnosed multilevel degenerative disc disease along with a small right-sided disc herniation. He opined the employee reached MMI following a radiofrequency procedure on December 20, 2019. He rated the employee with zero percent permanency under Minn. R. 5223.0390, subp. 3A. He disagreed with Dr. Wengler's rating on the basis that such a rating required a disc herniation accompanied by "persistent" objective clinical findings, which he did not consider present in the employee's case.

In an addendum to his report, Dr. Wengler continued to rate the employee's PPD at 21 percent because of the prior MRI evidence of herniation with impingement at two levels, despite improvement to those conditions. Dr. Wicklund issued a supplemental report in which he discussed reasons he disagreed with Dr. Wengler's rating. *The compensation judge adopted the views of Dr. Wicklund over those of Dr. Wengler and found that the employee failed to show that his work injury resulted in ratable permanency*. The employee appealed the compensation judge's denial of his claim for permanent partial disability benefits for his admitted low back injury.

Holding: The WCCA affirmed the compensation judge's decision denying the PPD claim. As a preliminary matter the WCCA declined to consider the employee's claim that the compensation judge violated his due process rights by failing to write a memorandum discussing in detail the arguments raised in the employee's trial brief and which provided a fuller explanation of the judge's reasons for her decision. The WCCA does not have jurisdiction over questions of constitutional interpretation, including due process claims.

Next, the WCCA considered the employee's claim that the compensation judge incorrectly accepted Dr. Wicklund's 0% rating instead of Dr. Wengler's PPD ratings totaling 21%. The WCCA noted that subpart 4D requires three elements and that all three elements must be met. They agreed with the compensation judge's finding that the employee failed to meet the first element requiring objective radicular findings. The WCCA relied not only on Dr. Wicklund's opinion but also on the records of other providers and experts which noted an absence of radiculopathy. Furthermore, the court reiterated that a compensation judge's choice of expert opinion is generally affirmed unless the opinion relied on lacked adequate foundation; here, the objective medical records sufficiently substantiated Dr. Wicklund's opinion. The employee contended that the language of the rule should be interpreted to require nerve impingement on a nerve root only for a herniated disc, and the mere presence of a disc bulge or protrusion is sufficient to apply the rule even in the absence of nerve root impingement. The WCCA disagreed based on the fact that innumerable cases interpreting the rule found otherwise.

PRACTICE & PROCEDURE – IME AND MATTERS AT ISSUE
CAUSATION – TEMPORARY INJURY
PENALTIES – SUBSTANTIAL EVIDENCE

***Herron v. Franklin St. Bakery* (W.C.C.A. March 29, 2022)**

Background: The employee, Dennis Herron, had an extensive history of injuries, prior to the work incident at issue in this claim, including a motor vehicle accident that kept him off of work for two months. On June 15, 2020, the employee was unloading a semi-trailer at work when its raised door suddenly fell, causing him to twist his body to avoid contact, and he fell to the ground. He was unsure whether the door struck his head. After the incident, he experienced pain in his neck and low back and in his legs. The employee was seen at Fairview Southdale Hospital. On June 17, 2020, the claims adjuster contacted the employee for an interview about his claim. When the adjuster started to review the first report of injury with him, the employee stopped the interview, told the adjuster to speak to his attorney, and ended the call. The adjuster then filed a NOPLD based on the information in the Fairview work ability report, accepting primary liability but denying wage loss benefits on the basis that the injury "did not cause lost time from work beyond the three-calendar day waiting period." The employee continued to seek treatment and the adjuster continued to deny benefits based on the fact that new providers did not indicate that the continued work restrictions were related to the work injury.

The employee's attorney filed a claim petition on July 15, 2020, seeking temporary total disability compensation from June 15, 2020, and continuing and also seeking rehabilitation and payment of medical expenses. The employee returned to work with the employer on July 20, 2020, with restrictions. In August of 2020 the employee began working a second, full-time job, although he did not disclose this second job to the

employer at the time. The employee's last day of work for the employer was November 30, 2020, when he walked off the job.
Dr. David Carlson saw the employee for an IME on March 4, 2021. Dr. Carlson opined that the work incident could temporarily have manifested symptoms of longstanding pre-existing chronic neck and back complaints relating to prior incidents and injuries but he concluded the employee did not sustain a new acute or structural injury.

A hearing on the employee's claims was held on April 21 and June 30, 2021. At issue were the nature and extent of the work injury, entitlement to wage loss benefits for various periods and to permanent partial disability, the admissibility of the report of Dr. Carlson, and the employee's claim for penalties based on the alleged failure by the insurer to perform a reasonably diligent investigation of the employee's claims. The compensation judge initially declined to receive the IME report because it was filed more than 120 days after the filing of the claim petition. However, on the second day of the hearing the judge ruled that an extension of the 120-day requirement was appropriate and allowed the report into evidence.

Following the hearing, the compensation judge denied the employee's penalty claim. The judge also found that the employee was capable of working with restrictions from and after June 17, 2020, and that the employee's work injury was temporary in nature and had fully resolved by August 12, 2020, without further need for restrictions or treatment. Accordingly, the judge denied the employee's claim for wage loss benefits. The employee appealed.

Holding: The WCCA affirmed the compensation judge's decision.

The employee suggested Minn. Stat. § 176.155 should be interpreted to require that any extension by granted prior to the expiration of 120 days, or certainly prior to a hearing. The WCCA relied on Minnesota Supreme Court precedent to hold that Minn. Stat. § 176.155 does not require application for an extension to be made prior to the expiration of the time of serving and filing the report. Furthermore, in this instance, good cause had been shown to justify an extension.

Additionally, the employee argued that the claims adjuster should have performed a more comprehensive investigation before denying the employee's claim for wage loss benefits and that this justified the imposition of penalties. The WCCA found that it is undisputed that when the claims adjuster contacted the employee for further information about his claim, the employee refused to speak to the adjuster and directed the adjuster to speak to his attorney, even though he did not have one yet. Accordingly, the WCCA found that the compensation judge's determination denial of penalties was supported by substantial evidence in the record, and was not an abuse of discretion.

PRACTICE & PROCEDURE – DISMISSAL

Whitaker v. Walmart, Inc. **(W.C.C.A. March 23, 2022)**

Background: The employee claimed entitlement to workers' compensation benefits arising out of an injury to her left knee on April 17, 2008. Nearly four years after the date of injury, on February 9, 2012, the employee filed a claim petition seeking benefits. At her request, the case was stricken from the active trial calendar for two years, when in March 2014, she requested reinstatement. One year later, she requested it be stricken again. In March of 2016, the employee requested reinstatement of her claim. Six months later, the employee requested that the case again be stricken. Discovery disputes were ongoing and the matter remained stricken for over a year upon repeated requests from employee's counsel.

On May 16, 2018, more than ten years after the date of injury, the claim was dismissed without prejudice. Approximately eight months later, the employee filed a new claim petition seeking various benefits related to her April 17, 2008, date of injury. For nearly two years after, the employee refused to provide medical authorizations resulting in numerous motions to compel discovery responses. The court entered several orders to compel discovery. The employee continued to refuse to submit to a deposition or for medical and vocational expert examinations. The employer and insurer then filed a motion seeking dismissal of the employee's claims with prejudice. No response was submitted by employee. A special term conference was held on the record, at which the employee was represented by counsel. Through her counsel, the employee refused to execute requested medical authorizations. On July 23, 2021, the compensation judge granted the employer and insurer's motion and dismissed the petition with prejudice. The employee appealed.

Holding: The WCCA affirmed the compensation judge's decision. The court noted that litigation in this case is governed by the rules promulgated by the Office of Administrative Hearings in Chapter 1420 of the Minnesota Rules. Discovery is addressed in rule 1420.2200, and subpart 1 requires that an employee provide information relevant to the claim. The Minnesota Rules also waive medical privilege and require the employee submit to a physical and verbal examination with the employer and insurer's expert. As such, the WCCA has affirmed orders to dismiss with prejudice where, as here, the employee repeatedly and without justification refused to comply with discovery requests or court orders. Here, the employee did not dispute the facts regarding her past behavior, nor did she argue that the rules required anything other than the non-cooperation she has demonstrated. Instead, facing dismissal, she asserted that she would begin cooperating in these matters. The court found that the record showed that the employee, through her attorney, had made these assertions in the past, but consistently failed to follow through with her promises. Accordingly, the WCCA affirmed the compensation judge's decision by finding that the compensation judge reasonably concluded that the employee's delays and refusals have prejudiced the ability of the employer and insurer to defend the matter.

PTSD – PERSONAL INJURY STATUTE CONSTRUED

Chrz v. Mower County (W.C.C.A. May 9, 2022)

Background: Chrz, a lifelong Mower County resident, began working for the County as a deputy sheriff in 2007 at age 22. He underwent a pre-employment psychological assessment which showed no substance abuse, depression, anxiety, anger issues, career or family problems. While performing his duties as a deputy sheriff between 2011 and January 2019, he personally witnessed several traumatic events involving co-workers and people he knew. He began drinking heavily in January 2017 to self-medicate and to sleep. In January 2019, he responded to a call involving an out-of-control youth at a restaurant. He used physical force to control the youth and was subsequently charged with misdemeanor assault and officer misconduct. In February 2019 he was placed on administrative leave because of the incident. He experienced suicidal ideation and sought psychiatric care at the Mayo Clinic at the end of April 2019. His psychiatrist diagnosed PTSD, moderate to severe alcohol use disorder and major depression. He prescribed medication referred the claimant to a trauma-focused therapist. Another doctor recommended outpatient addiction treatment. The claimant reported some improvement in his symptoms from medication, but he did not seek alcohol counseling her psychotherapy.

In September 2019 his attorney sent him to Dr. Slavik for a medical-legal exam. Using the DSM-V, she diagnosed PTSD, major depressive disorder in partial remission and mild alcohol use disorder in early remission. She recommended he attend outpatient mental health treatment with a provider experienced in treating trauma and PTSD. Dr. Slavik directly attributed the PTSD to his exposure to traumatic events while performing his duties as a deputy sheriff for the County.

Unfortunately, the claimant's condition worsened and in December 2019, his treating psychiatrist completed a report of work ability indicating he could not work as of April 30, 2019. Dr. Slavik also indicated he could not perform law enforcement duties because of his work-related PTSD. Effective March 31, 2020, Chrz received duty-related disability benefits from the county, which included monthly income and ongoing health insurance, and he retired from his position.

He filed a claim petition in May 2020 alleging entitlement to workers' compensation benefits, including wage loss, beginning April 1, 2020. The employer sent him to Dr. Arbisi, a licensed psychologist, for an IME. Dr. Arbisi concluded: the employee did not meet the criteria for PTSD under the DSM-V; and the claimant had an unspecified adjustment disorder and alcohol use disorder related to his pending criminal charges. Dr. Arbisi later testified in his deposition that the employee did not follow the standard treatment protocol for PTSD, including psychotherapy or trauma focused treatment, and instead relied on medication. In his deposition, Dr. Arbisi explained that PTSD symptoms can fluctuate over time, be treated, and ultimately resolve. He also opined the employee would no longer have PTSD if he did not meet the criteria of the DSM-5.

Both the claimant's treating psychiatrist and Dr. Slavik concluded he had chronic PTSD caused by his employment activities as a deputy sheriff which had not resolved. Dr. Slavik testified that while the claimant had met all the criteria for PTSD in the past, his current symptoms had improved and were considered "subthreshold" for a current PTSD diagnosis. She concluded he had reached MMI and assigned a 20% PPD rating per Weber.

The case went to hearing and the compensation judge concluded the claimant had sustained a work-related PTSD on April 30, 2019, and that the statutory presumption under Minn. Stat. §176.011, subd. 15(e), applied. The judge also concluded that Dr. Slavik diagnosed PTSD from April 19, 2019 through March 30, 2021, but after that date the diagnosis was "other specified trauma-and distress are-related disorder." The compensation judge awarded wage loss benefits from April 1, 2020 to the present and continuing, but noted the claimant had reached MMI and service of MMI occurred on May 18, 2021. She also awarded 20% PPD. The employer appealed.

Holdings: In a 2-1 decision, the WCCA reversed the award of permanent partial disability, vocational benefits and medical expenses for treatment after March 30, 2021 and modified the award of TTD benefits to allow TTD only to March 30, 2021.

The WCCA in effect, found that the employee had sufficiently recovered from his PTSD diagnosis to the point where he no longer met the criteria for PTSD under the DSM-V. The court majority noted "the intent of the legislature is that a DSM-V diagnosis is necessary for continuing PTSD treatment in workers' compensation cases." Because an employer's liability for worker's compensation benefits under Chapter 176 ends when an employee is no longer disabled, and the employee was no longer disabled by PTSD as of March 30, 2021, he was not entitled to worker's compensation benefits after that date.

In reaching its conclusion, the panel majority rejected the employee's argument that PTSD is an occupational disease which continues to be compensable as long as the employee remains disabled. The court majority noted that PTSD was different than other occupational diseases because the statutory limits existing for PTSD do not exist for other occupational diseases. The Court also rejected the employee's attempt to analogize PTSD to cancer, which improves then goes into remission. The majority also rejected this argument, noting that PTSD "is not like any physical disease. It is a stand-alone mental injury which was historically noncompensable and was only recently recognized as a personal injury with restrictive language."

The dissent contended that the majority's opinion resulted from a "narrow interpretation" of the PTSD statute and that their holding was "problematic and unworkable".

On June 6, the petitioner appealed the WCCA's decision to the Minnesota Supreme Court.

TEMPORARY TOTAL DISABILITY – RECOMMENCEMENT
EVIDENCE – EXPERT MEDICAL OPINION

Tsotsang v. Hennepin Healthcare Sys., Inc. **(W.C.C.A. March 16, 2022)**

Background: The employee began working for the employer, Hennepin Healthcare System, Inc. in April of 2001. On December 4, 2015, the employee was cleaning a locker room at the employer's facility and lifted a bag of wet linens. She felt pain on the right side of her neck and into her right shoulder. The employer admitted liability and began paying various workers' compensation benefits. The employee was initially taken off of work but returned to work in April of 2016 on a part-time basis. By December 2016, the employee began working for the employer on a full-time basis, albeit with restrictions. Approximately one month later, the employee was limited to part-time employment again until November 23, 2019, at which point the employer determined that it no longer had work available within the employee's permanent restrictions.

The employer paid employee TTD benefits while she was off work completely, TPD benefits while the employer had work available within employee's restrictions, and recommenced TTD benefits when they no longer had work available. The employer also paid PPD for a 7% rating. On September 3, 2019, Dr. Asmussen, who had been treating the employee since 2016, completed a health care provider report where he stated the employee reached MMI. On December 9, 2019, the employer served a copy of that MMI report and notice of discontinuance of TTD benefits. On March 5, 2020, 90 days after the service of the MMI report, the employer discontinued payment of TTD benefits.

The employee also treated with Dr. Mullaney, an orthopedic surgeon, who recommended a three-level cervical fusion. Before approving the surgery, the employer had the employee examined by Dr. Garner. Dr. Garner opined that the employee suffered a neck injury on December 4, 2015, but that it was primarily a muscle strain injury to her right shoulder and neck that had since resolved. While he agreed with Dr. Mullaney's suggestion that the employee should have a three-level cervical fusion, he concluded the need for surgery was not related to the December 4, 2015, work injury, but rather a degenerative condition that pre-existed the work injury. Dr. Mullaney performed the three-level cervical fusion on December 14, 2020.

The employee filed a claim petition seeking permanent total disability benefits. She later amended her claim petition, withdrawing the claim for PTD benefits and instead seeking TTD benefits following the December 2020 surgery performed by Dr. Mullaney and payment for that surgery. At the request of her attorney, the employee underwent a remote video history and examination by Dr. William Schneider. Dr. Schneider concluded the surgery was reasonable and necessary and related to the work injury.

The compensation judge found Dr. Schneider's opinion more persuasive than Dr. Garner's in light of the employee's testimony. The compensation judge awarded TTD benefits following the surgery. The self-insured employer appealed the compensation judge's finding that the employee's medical expenses, including her December 2020

cervical spine surgery, were compensable and that she is entitled to recommencement of temporary total disability benefits following surgery.

Holding: The WCCA affirmed in part, vacated in part, and remanded for further findings. The employer argued that Dr. Schneider's opinion lacked credibility for various reasons, many pertaining to the fact that the examination was done virtually. The WCCA was not persuaded by the employer's arguments and held that the issues regarding Dr. Schneider's opinion raised by the employer went to the weight of the evidence as determined by the compensation judge. As the trier of fact, the compensation judge has the discretion to choose between competing experts. The WCCA pointed out that employee had only a single doctor visit before her work injury where she complained of neck and shoulder symptoms. At that visit she was instructed to take ibuprofen and was not given work restrictions. On the other hand, since her work injury, she has had ongoing and continuous care for years. Therefore, Dr. Schneider's opinion was consistent with the other medical evidence and the employee's testimony and the compensation judge's decision to adopt it had sufficient evidentiary support.

The employer also argued that because the employee was 90 days post-MMI and was not working at the time she became medically unable to work, she was not entitled to recommencement of TTD benefits. Minn. Stat. § 176.101, subd. 1(j) provides that once TTD benefits cease under that subdivision, they may not recommence unless the employee returns to work and while working becomes medically unable to continue working due to her work injury. The WCCA acknowledged that the employee was not working at the time she became medically unable to work following her surgery in December 2020. The employer argued that the employee effectively agreed that she was at MMI. The employee disagreed and argued that the employer did not raise MMI as an issue before the compensation judge. The WCCA stated the compensation judge did not address the underlying factual issue of whether the employee was in fact at MMI. Therefore, the WCCA vacated that part of the compensation judge's order and remanded for a finding on whether the employee is entitled to recommencement of TTD benefits.