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Case Law Update

By: Douglas J. Brown
Brown & Carlson, P.A.

December 4, 2009

DOUGLAS J. BROWN
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- **Born:**
  Norfolk, Nebraska

- **Admitted to bar:**
  Minnesota, 1985

- **Education:**
  Nebraska Wesleyan University (B.S., 1982);
  Hamline University School of Law (J.D., *Cum Laude*, 1985).

- **Professional Memberships:**
  Hennepin County Bar Association;
  Minnesota State Bar Association;
  American Bar Association;
  Minnesota Defense Lawyers Association.

- **Professional Experience:**
  Workers' Compensation Medical Services Review Board and Rehabilitation Review Panel, Law Clerk (January, 1984 to October, 1985);
  Workers' Compensation Medical Services Review Board and Rehabilitation Review Panel, Attorney (October, 1985 to April, 1986);
  Cousineau, McGuire, Shaughnessy & Anderson, Associate, Workers' Compensation Defense (April, 1986 to November, 1990);
  Hill Law Office, Attorney, Workers' Compensation Defense (November, 1990 to May, 1992);
  Brown & Holman, P.A., Attorney - Founding Shareholder, Workers' Compensation Defense (May, 1992 to February, 1997);
  Brown & Carlson, P.A., Managing Shareholder, Workers' Compensation Defense (February, 1997 to present).

- **Martindale Hubbell Rating:** AV.

- Selected as "Super Lawyer" 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009 by *Mpls. St. Paul Magazine, Twin Cities Business Monthly,* and *Minnesota Law & Politics.*
- Selected as "Minnesota's Top 40 Workers' Compensation Attorneys" 2007, 2008 and 2009 by *Minnesota Law & Politics.*
- Co-Chair of the Minnesota Defense Lawyers Association's Workers' Compensation Committee 2007 - present.

ATTORNEY'S FEES

Roggeman v. Model Stone Company, File No. WC09-4972 (W.C.C.A. November 4, 2009)

In Roggeman, the Compensation Judge denied the employee's attorney's request for Roraff fees on the grounds that no genuine dispute existed over payment of the medical bills. The employee's attorney appealed.

The employee's attorney claimed $6,615.00 in Roraff fees, alleging that he had recovered $92,128.93 in medical benefits for his client. The employer and insurer objected to the Roraff fee, claiming that there was no genuine dispute triggering entitlement to fees pursuant to Minn. Stat. §176.081.

At hearing, the defense attorney argued that medical bills were being submitted to the insurer in ways that made it impossible to interpret what was and was not outstanding. The insurer then had to request bills on their own, determine if the bills had been previously paid, and pay any balances.

On appeal, the W.C.C.A. went to great lengths in scouring the record for some evidence that the employer and insurer had not paid certain medical bills or had not done so in a timely fashion. Since the W.C.C.A. was able to determine that not all bills were paid in a timely fashion, the W.C.C.A. concluded that there was "a genuine dispute."

However, rather than remanding the case to the Compensation Judge for further findings, the W.C.C.A. simply awarded $4,000.00 in Roraff fees.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Denais v. Minnesota Mining & Manufacturing, File No. WC08-234 (W.C.C.A. June 15, 2009)

In Denais, the employee was the managing director of 3M's Venezuela Division. The employee was set to move from Caracas, Venezuela, back to St. Paul, to take on a new job. On May 24, 2004, a meeting was held to honor the employee's service and bring in the new managing director.

At approximately 2:00 p.m., the employee left the meeting to go to his office. At some unknown point, the employee entered his private bathroom in his office and locked the door. At approximately 6:00 p.m., 3M's Human Resource Manager was informed that the employee had been in his bathroom for hours. Attempts to communicate with the employee inside the bathroom were unsuccessful and security was summoned to open the door. Upon opening the door, the employee was observed lying on his back, face up, with a pool of blood around his head.

The employee sustained significant injuries.

At hearing, the employer denied both notice and that the injury arose out of employment. The employer took the position that the injury was caused by an idiopathic injury.

The compensation judge denied the claim, finding both that the employee failed to give notice of the injury and also that the injury did not arise out of employment.
In an unusual move, the W.C.C.A. reversed the judge's findings on notice, determining

that the employer was well aware the employee had fallen in his private bathroom and sustained a serious injury. This was sufficient notice of an injury.

However, the W.C.C.A. goes on to evaluate the question of an idiopathic fall. The W.C.C.A. finds that the employee had sustained an idiopathic fall and the judge's denial of benefits was affirmed.

The W.C.C.A. compares and contrasts a number of Supreme Court decisions on the issue, concluding that some of them are difficult to reconcile.

However, in the end, because the judge found that the employee's injury was caused by an idiopathic fall onto a flat floor, the injury did not arise out of employment. Had the injury resulted from striking a sharp stationary object placed in the way of the employee's fall by his employment, the injury may have been compensable. For instance, if the employee had struck the corner of the sink or the toilet, the result would have likely been different.

Moe v. University of Minnesota, File No. WC08-208 (W.C.C.A. April 27, 2009)

In Moe, the employee worked as a word processor for University of Minnesota. On the date of injury, she drove to work and parked her car on a surface parking lot owned by the University.

In order to get to her work site, however, the employee was required to walk on public sidewalks and across public streets. While walking on a public sidewalk to the building where she worked, the employee slipped and fell and injured her right arm and wrist.

The employer and insurer denied primary liability, alleging that the employee slipped and fell on a public sidewalk and, therefore, the injury was not compensable.

The compensation judge awarded the claim and the self-insured employer appeals.

The W.C.C.A. performs an analysis of the various case law regarding this issue. Citing Starrett v. Pier Foundry, 488 N.W.2d 273, 47 W.C.D. 176 (Minn. 1992), the W.C.C.A. affirms the determination that this was a work-related injury. The W.C.C.A. quotes the Supreme Court in Starrett as follows:

> Parking lots owned or maintained by the employer for employees are considered part of the work "premises;" and travel between the employee's parking lot and the main premises is considered to arise out of and in the course or [sic] employment.

The W.C.C.A. goes on to quote its own case in Weiss v. State, Bemidji State Univ., 55 W.C.D. 663 (W.C.C.A. 1996), as follows:

> An injury sustained in reaching the main premises from the employer's parking lot remains compensable despite its occurrence on a public way or on other property not owned by the employer, where traversing that property was reasonable or was the customary route between the employer's parking lot and the main premises.

The W.C.C.A. states:

> This was a difficult decision and we affirm the compensation judge's decision with some reluctance. There are a number of disturbing facts in this case. As the employee points out in his brief, the employer engaged in numerous inappropriate contacts with the employee's health care providers, apparently primarily to undercut the employee's credibility as to the pain he was experiencing. The health care providers at Rice Memorial Hospital abetted this conduct, demonstrating more concern over the question of whether the employee had as much pain as he claimed than in the question of the efficacy of the employee's care. Dr. Doyle's release of the employee to return to work appears to have been based on improvement from physical therapy that lacks any support in the actual records and was made after consulting with the company nurse.

EARNING CAPACITY - ECONOMIC CONDITIONS

Norum v. Northwest Airlines Corporation, File No. WC08-225 (W.C.C.A. May 5, 2009)

In Norum, the employee worked as an airline mechanic for Northwest Airlines. He sustained an injury on March 30, 2004 in the nature of a fracture of his left distal radius.

While recovering from his fracture, the employer's Mechanics Union was involved in a labor dispute. In August of 2005, the treating physician released the employee to return to work with limitations and the employer offered the employee one-handed light duty work. However, between the date the employee was released to return to work and the date the work was to start, the employee's Union went on strike. The employer and insurer discontinued benefits at that point. Shortly thereafter, the employer then imposed new terms and conditions of employment regarding mechanics and reduced pay for mechanics.

While the employee was on strike, he obtained a temporary job as a bus mechanic for the South Washington County Public Schools.

The employee then formally resigned from his job with Northwest Airlines in the spring of 2006 after which he found another job as a bus mechanic. By that time, the employee was not on any formal restrictions, but he continued to experience physical symptoms.

Ultimately, the employee filed a claim for temporary partial disability benefits for the period that the employee was working as a bus mechanic at a lower wage.

The compensation judge awarded benefits and the employer and insurer appeal.

The employer and insurer's only argument on appeal is the fact that the employee's wage loss is exclusively the result of a change in market conditions and that his current earnings reflect his earning capacity regardless of work restrictions.

In rejecting this argument, the W.C.C.A. points to testimony by the employee's employment expert who indicates the employee was still physically precluded from returning to work as an aircraft mechanic. Furthermore, aircraft mechanics, regardless of market conditions, still earn $2.00 to $4.00 per hour more than the employee is earning in his current job as a bus mechanic.

The W.C.C.A. goes on to state:

> We acknowledge that the problem of wage loss caused partly by economic conditions and partly by disability is complicated. In the present case, there is clear evidence that aircraft mechanics simply are not earning wages at the level of those they earned before August 2005. That being said, the Judge's finding that the employee's loss of earning capacity is also causally related to the disability sustained on March 30, 2004, is supported by substantial evidence in the record.

IME

Ollikkala v. RFI, Inc., File No. WC 09-144
(W.C.C.A. August 11, 2009)

In Ollikkala, the self-insured employer appealed from the compensation judge's Order denying the self-insured employer's Motion to Compel Attendance at an IME and the compensation judge's subsequent Findings and Order approving surgery.

The self-insured employer previously had the employee see Dr. Ghose for an IME. The employee then filed a claim for surgery and the self-insured employer set up an IME with sought to have the employee examined by Dr. Hood.

The employee objected to Dr. Hood's examination and the self-insured employer filed a Motion to Compel. The Motion to Compel was denied and the case went to hearing. The compensation judge awarded the surgery. The self-insured employer appeals.

On appeal, the W.C.C.A. indicates that the self-insured employer were entitled to have Dr. Hood conduct an examination. In a very favorable decision, the W.C.C.A. states:

> The employer is entitled to fully explore its defenses to the employee's claim for surgery with a medical expert of its choice. Whether Dr. Ghose is qualified to analyze the employee's surgical request is irrelevant. Surgery had not been recommended or claimed until after Dr. Ghose's exams...the employee's argument that the employer engaged in "doctor shopping" may be of some relevance

Tollefsrud v. Minnesota Diversified Industries, File No. WC09-153 (W.C.C.A. September 22, 2009)

In Tollefsrud, the employee filed a claim for retraining leading to a Bachelors Degree of Science in Applied Psychology: Human Services, to be completed within three years.

The self-insured employer objected to the retraining plan, arguing the factors listed in Poole v. Farmstead Foods, Inc., 42 W.C.D. 970 (W.C.C.A. 1989) which include the following:

1. The employee's ability and interest to succeed in the proposed course of study;

2. The economic status upon completion of the retraining;

3. The reasonableness of retraining as compared with job placement activities;

4. The likelihood the proposed retraining will result in reasonably obtainable employment.

While the self-insured employer argued all four Poole factors, the self-insured employer's best argument pertained to the fourth factor: the likelihood the employee would obtain employment upon completion of the program.

The self-insured employer argued that the employee will be in her late 50's when she completes the program. Furthermore, the employee resides near Bear River, Minnesota, 20 miles from Cook, Minnesota and 37 miles from Hibbing.

The self-insured employer argued that the QRC failed to identify any jobs which would be reasonably obtainable by the employee within her geographic area upon completion of the program.

In rejecting this argument, the W.C.C.A. points out that the QRC had testified about 12 potential jobs in the labor market, six of which were in Duluth. The employee indicated at trial that she would be willing to extend her job search to include Duluth and would be willing to commute to Duluth if she obtained a job there. Further, the QRC testified: "there is a broad spectrum of jobs potentially available with an Applied Psychology Degree...."

VACATION OF SETTLEMENTS

Budke v. St. Francis Medical Center, File No. WC09-159 (W.C.C.A. October 14, 2009)

In Budke, the employee had filed a Claim Petition in 2002 for permanent partial disability as a result of RSD. In denying the employee's claims, the Compensation Judge determined that the employee had failed to establish that she met the requirements of the permanent partial disability rule.

In 2004, the W.C.C.A. issued its decision in Stone v. Harold Chevrolet which determined that an employee does not need to establish that the employee has met the criteria set forth in the permanent partial disability

schedule before receiving permanent partial disability for an objectively established functional impairment.

In Budke, the employee filed a Petition to Vacate the previous Findings and Order on the grounds that the Stone decision changed the applicable law on RSD and, therefore, the Compensation Judge's previous Findings and Order should be vacated.

The W.C.C.A. disagrees with the employee for two reasons. First, the W.C.C.A. explains that Stone is not a change in the law. The W.C.C.A. interprets the Stone decision to be consistent with the law as set out in the Weber case and in Minn. Stat. §176.105, Subd. 1(c), essentially a codification of Weber. In other words, "an employee...who has significant functional impairment demonstrated by objective findings is entitled to an award of permanent partial disability under Minn. Stat. §176.105, Subd. 1(c), regardless of what diagnosis may be used."

Basically, the W.C.C.A. is stating that their rationale in Stone can be extended to any condition resulting in a functional impairment demonstrated by objective findings. If an employee has a functional impairment demonstrated by objective findings that does not neatly fit into the criteria of the permanent partial disability schedule, they may, nevertheless, be entitled to a permanent partial disability rating.

Secondly, the W.C.C.A. correctly points out that a change in the law is not a cause for vacating an Award or Findings and Order.