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CASE LAW UPDATE

Beukes v. Divine Health Care, (W.C.C.A. August 5, 2010)

The Employee worked as a home health aide and, as such, was deemed to be a traveling employee accorded portal-to-portal coverage. While traveling from one patient's home to another, taking an indirect route, she stopped at a service station to use a restroom. While waiting to use the restroom, she walked over to an ATM machine to withdraw cash when she tripped and fell, injuring her knee. The compensation judge found that the injury was not work-related, as he concluded that while her trip to the gas station to use a restroom was not a deviation from employment, her "personal errand' to use the ATM took her out of the course of employment. The WCCA reversed and held that the use of the ATM was a reasonable personal activity by a traveling employee and, therefore, remained within the scope of her employment. The Employee had also testified that she was getting cash from the ATM so that she could put gas in the rental car she was driving before she returned it at the end of the day. The WCCA noted that when an employee, as part of her job, is required to bring her own vehicle for use during the working day, an injury which occurs during the use of that vehicle is compensable.

Albert v. Dungarvin Minnesota (W.C.C.A. August 10, 2010)

In Albert v. Dungarvin Minnesota, the Employee was employed as a program counselor. He claimed that on December 4, 2005 he sustained a work-related injury. In December of 2005, the Insurer filed a First Report and a NOPLD denying liability for the claimed injuries. About three and a half years later, the Employee filed a Claim Petition. The Employer and Insurer filed a Motion to Dismiss, contending that the Employee's claim was filed more than three years after the Employer had made written report of the injury and was therefore barred by Minn. Stat. § 176.151. Attached to the Motion was an Affidavit completed by the Insurer's claims adjuster in which she indicated that the Employer and Insurer had paid no benefits to or on behalf of the Employee related to his claimed injury of December 4, 2005. Pursuant to an Order Dismissing Claim Petition, the compensation judge granted the Motion to Dismiss on statute of limitations grounds. The Employee appealed.

Minn. Stat. § 176.151, Subd.1, provides that an employee must begin an action to recover workers' compensation benefits no later than three years after the Employer has made a written report of the injury to DOLI (or six years after the alleged injury if no First Report is filed). The Employee did not begin an action until his Claim Petition was filed more than three years after the filing of the First Report. The WCCA ruled that the compensation judge's conclusion that filing for benefits in Minnesota must satisfy

both the three-year and the six-year limits of the statute is correct; however, the WCCA further ruled that the Employee's other contention, that his delay in filing was due to actions by the Employer and Insurer, warranted an evidentiary hearing. Where an Employer's misrepresentations are primarily responsible for an Employee's failure to file a Claim Petition within the time specified by statute, the Employer may be estopped from asserting as a defense that the claim was time-barred. The WCCA remanded for an evidentiary hearing on the Motion to Dismiss.

LaFountain v. M.A. Gedney Corporation, (W.C.C.A. August 16, 2010)

In LaFountain v. M.A. Gedney Corporation, the WCCA reversed an award of Roraff attorney fees granted by the compensation judge. Employee LaFountain sustained a low back injury on April 12, 1993 resulting in five low back surgeries. His treating surgeon, Dr. Pinto, recommended another surgery in the nature of a revision of hardware at L4-S1. The insurer set a second surgical opinion with Dr. Charles Burton. Two weeks later, the Employee's attorney objected, claiming that the Employee's choice of Dr. Burton was "Doctor shopping" since a previous IME was with Dr. Mark Engasser. A Claim Petition was filed requesting approval of the surgery. DOLI issued a Certification of Dispute. The claims representative objected claiming that she was simply seeking a second surgical opinion and not necessarily denying the surgery. Subsequently, Dr. Pinto withdrew his request for the first surgery he recommended and submitted a request for another surgical procedure in the nature of an anterior interbody fusion. The claims representative reset the surgical consultation with Dr. Engasser and after the evaluation was completed the surgery was approved. A compensation judge awarded Roraff attorney fees.

The WCCA reversed the award of fees. They pointed out that the claims representative had requested a second surgical opinion as allowed under Rule 5221.6050, Subp. 9C. Although the examination wasn't complete with 45 days as contemplated by the rules, the treating physician changed his recommendation on the nature of the surgery. Also, the Employee's attorney didn't object to the choice of physician for the surgical consultation for two weeks. Furthermore, the Claim Petition and the Certification of Dispute were in regards to the first surgery recommended, as opposed to the surgery eventually performed.

Budke v. St. Francis Medical Center, (W.C.C.A. August 26, 2010)

In Budke, the Employee was a registered nurse with a two-year nursing degree. On November 14, 1996 the Employee sustained a work injury to her cervical spine, thoracic spine and left arm which resulted in chronic pain syndrome and reflex sympathetic dystrophy of the left upper extremity. In March of 2006, the Employee's QRC prepared a Retraining Plan proposing that the Employee be provided with four years of retraining at the Minnesota State University at Moorhead to complete a B.S.N. degree and a M.S. degree in nursing in order to qualify the Employee to work as a certified nurse practitioner. In a Findings and Order dated November 28, 2006 a compensation judge ruled that the Employee had failed to establish that the Retraining Plan would result in a reasonably obtainable employment or that retraining would provide an economic status greater than what was available through the Employee's current position.

Subsequently, the Employee's employment ended, and placement was provided. In August of 2009 the treating physician modified the Employee's restrictions to permit her to work full eight-hour shifts. The QRC recommended that the Retraining Plan be amended to include exploration of retraining as a certified nurse practitioner. A Rehabilitation Request was filed objecting to the plan and the amendment to the plan was denied in an Administrative Conference decision. The Employee filed a Request for Formal Hearing

to appeal. A compensation judge ruled that it was reasonable for the Retraining Plan to be amended to permit the QRC to perform a labor market survey and explore whether retraining as a nurse practitioner would be reasonable. The Employer and Insurer appealed to the WCCA.

The WCCA affirmed the findings of the compensation judge. They rejected the Employer and Insurer's argument that the exploration of retraining was barred by the doctrine of res judicata as a result of the November of 2006 Findings and Order. According to the WCCA, res judicata is essentially a doctrine in which "a final judgment on the merits bars a second suit for the same claim by the parties". However, the court pointed out that doctrine of res judicata applies in workers' compensation cases only with respect to issues and claims that were in fact decided in an earlier decision. Where the question at a later hearing is one of benefit eligibility which depends on factual circumstances subsequent to the prior decision, the prior determination is res judicata only with respect to the period considered in the former hearing. The 2006 determination was based on factual findings that reflected the circumstances then present concerning the Employee's post-injury employment and labor market. The factors on which the determination was based in 2006 did not have res judicata effect if the Employee's circumstances changed since that time. The compensation judge found that the Employee's situation had changed in material respects in the 3-1/2 years since the 2006 Findings and Order. The job the Employee held in 2006 was no longer available and the Employee has not been able to find work within her restrictions. Furthermore, the labor market for nurse practitioners has improved since 2006.

It should be noted that the WCCA also rejected the Employer and Insurer's argument that the claim for exploration of retraining was barred by the "law of the case". The doctrine of law of the case seeks to maintain uniformity within a case by insuring that a rule of law, once determined in the case, will not be applied differently at subsequent stages of the litigation. The doctrine is inapplicable here as the issues resolved in the 2006 decision were factual and not questions of law.

Finally, the WCCA ruled that the factors to evaluate retraining set forth in Poole v. Farmstead Foods, Inc. were not applicable since the court was not evaluating approval for a Retraining Plan. Rather, the court was evaluating whether or not the exploration for retraining should be approved.

Summers v. Northern Industrial Erectors, Inc. (W.C.C.A. September 15, 2010)

Employee Summers sustained an admitted work-related injury on November 13, 2009 arising out of his employment with Northern Industrial Erectors, Inc., hereinafter NIE. NIE was self-insured through The Builders Group/TBG Claims Services. The Employee's injury occurred in Underwood, North Dakota. At the time of his hiring, the Employee was a resident of Minnesota and a member of the Iron Workers Union Local 512 – Region A in the Twin Cities. NIE was a party to a collective bargaining agreement with the Iron Workers Union.

An employer can make a "open call" to the union to hire an employee, and in this situation the union selects the workers sent to the job. In the alternative, the employer can make a "direct call" to a specific employee, and under those circumstances, the employer selects the worker it wants to hire.

The Employee filed a claim for workers' compensation benefits in Minnesota, and the matter proceeded to arbitration pursuant to the rules of the Union Construction Workers' Compensation Program. The case was heard by an arbitrator. The only issue before the arbitrator was whether the Employee was hired by NIE in Minnesota pursuant to Minn. Stat. § 176.041, Subd. 3. The arbitrator determined the offer of employment by NIE to the Employee occurred when the employer called the Mandan, North Dakota

union office requesting a direct call for the Employee. The arbitrator further held that the employment relationship between NIE and the Employee was unconditionally established when the Employee passed a drug test and executed employment documents at the North Dakota job site. Based on these legal conclusions, the arbitrator found the Employee was not hired within the state of Minnesota and that Minnesota lacked jurisdiction over the workers' compensation claim.

Whether the Employee's injury in North Dakota is compensable under the Minnesota Workers' Compensation Act depends upon whether the circumstances of the Employee's employment and the injury fall within the act's extraterritorial application statute, Minn. Stat. § 176.041. Subdivision 3 of this provision of the workers' compensation statute provides:

> Temporary out of state employment – if an employee hired in the state by a Minnesota employer, receives an injury while temporarily employed outside of the state, such injury shall be subject to the provisions of this chapter.

The parties stipulated that NIE was a Minnesota employer and that the Employee sustained a personal injury while temporarily employed outside the state of Minnesota. Thus, the sole issue before the arbitrator was whether the Employee was hired in Minnesota by NIE within the meaning of Minn. Stat. § 176.041, Subd. 3.

The Workers' Compensation Court of Appeals reversed the findings of the arbitrator, and ruled that the Employee was hired in Minnesota. The WCCA ruled that based upon the evidence, the procedure for a direct call was that NIE notified the union of its decision to hire a specific employee by making a direct call for that employee. The evidence established that the individual contacting the Employee by telephone had authority to hire workers for NIE at that job site, that he told the Employee he had work for him in North Dakota and would make a direct call for him, and that the Employee, at his home in Minnesota, agreed to go to work for NIE during a telephone conversation with a representative from NIE. Under these circumstances, there was an offer of employment and acceptance over the telephone, sufficient to meet the requirements for a contract for hire in Minnesota. The WCCA ruled that the documents signed in North Dakota, such as the W-4, child support notification, and forms acknowledging the alcohol and drug testing policy, were the type of forms normally filled out on the first day of employment, and were consistent with the performance of a contract for hire already in existence.

<u>Skari v. Aero Systems Engineering</u>, (W.C.C.A. September 21, 2010)

Employee Skari sustained personal injuries in 1987, 1992 and 2000 at Aero Systems. The Employer was insured in 1987 by TransAmerica Insurance Company (TIG), in 1992 by Hartford Insurance Company (Hartford), and in 2000 by Chubb. Chubb petitioned the Office of Administrative Hearings for a Temporary Order in 2000. Thereafter, they sought contribution from the earlier carriers. Pursuant to the 2000 Temporary Order, Chubb paid temporary total disability, and temporary total disability benefits were discontinued when the Employee was 90 days post maximum medical improvement. In 2002 Chubb sought to pay permanent total disability benefits pursuant to a second Temporary Order. In 2005, the Employee, along with Insurers TIG, Hartford and Chubb entered into a Stipulation for Settlement. This Stipulation for Settlement stated that pursuant to an Amended Temporary Order in 2002 the parties stipulated that the Employee was permanently totally disabled retroactive to March 5, 2002.

When the Employee reached the age of 67 years in 2009, Chubb filed a NOID seeking to discontinue permanent total disability pursuant to Minn. Stat. § 176.101, Subd. 4. This provision of the

statute provides for a presumption of retirement at the age of 67 years. The compensation judge at the NOID conference allowed the Employer and Chubb to discontinue permanent total disability payments. The Employee appealed and pursuant to a Findings and Order, a compensation judge ruled that the Court lacked jurisdiction to discontinue permanent total disability benefits because Minn. Stat. § 176.238 and 176.239 do not apply to an employee who has been adjudicated permanently totally disabled. The compensation judge ordered the Employer and Insurer to re-commence payment of permanent total disability benefits. The Employer and Chubb appealed from the Findings and Order to the Workers' Compensation Court of Appeals, and also filed a Petition to Discontinue permanent total disability benefits with the Workers' Compensation Court of Appeals.

According to the WCCA, Minn. Stat. § 176.191, Subd. 1 states that at any time after a Temporary Order is issued, the paying party may request to discontinue benefits based on new evidence that benefits are not payable by following the procedures set forth in Minn. Stat. § 176.238 or 176.239. Both of these statutes, however, contain a subdivision that states:

> This section shall not apply to those employees who have been adjudicated permanently and totally disabled, or to those employees who have been administratively determined pursuant to division rules to be permanently totally disabled.

The Court ruled that the issue in this case was whether the Employee was being paid permanent total disability benefits pursuant to a Stipulation for Settlement or pursuant to a Temporary Order. In the present case, the Stipulation for Settlement contained no language obligating the Insurer to pay permanent total disability benefits to the Employee. Instead, the parties acknowledged that pursuant to a Temporary Order and Amended Temporary Order they stipulated that the Employee was permanently and totally disabled, and that Chubb has been paying permanent total disability benefits pursuant to those Orders. The terms and conditions of the Stipulation for Settlement related solely to the allocation of liability for weekly benefits amongst the Insurers, along with the payment of medical expenses, taxable costs and attorney's fees. Accordingly, the Court ruled there had been no adjudication that the Employee was permanently totally disabled. Minn. Stat. § 176.191 specifically provides that benefits being paid pursuant to a Temporary Order may be discontinued under the provisions of Minn. Stat. § 176.239, which allows for the filing of a NOID. Therefore, the WCCA reversed the findings of the compensation judge who ruled that the Office of Administrative Hearings lacked jurisdiction. The case was remanded to the compensation judge to afford the parties an opportunity to be heard on the issues raised by the NOID regarding the discontinuance of permanent total disability benefits.

<u>Yvonne v. Super One Foods</u>, (W.C.C.A. September 28, 2010)

The Employee sustained an injury to her low back on May 3, 2002. Her average weekly wage was $637.60. The Employee found alternative work in August and September 2009 as a personal care attendant. She earned approximately $456.50 per week. During the period September 17, 2009 – October 6, 2009 the Employee did not continue to work as a personal care attendant because of the death of her client. During the period October 6, 2009 through the date of the hearing the Employee earned $60.50 in one two week period as a personal care attendant and then was paid $20.57 per day for the foster care of her five year old grandson.

The compensation judge denied the Employee's claim for TPD benefits during the period she did not work. He rejected the argument that this was similar to the facts of <u>Jasoch v. Schwab Co.</u> where TPD was awarded during short unpaid holiday breaks. This was affirmed by the WCCA.

The compensation judge also denied the Employee's claim for TPD benefits when she earned only $60.50 as a personal care attendant in two weeks and TPD benefits based upon the payment to her for foster care of her grandson. Citing Schulte v. C.H. Peterson Construction Co., the compensation judge noted that to be eligible for temporary partial disability benefits, an employee must have gainful employment. The compensation judge found that the employment this employee had was not gainful employment and resulted in an insubstantial income. This was also affirmed by the WCCA.

Bellecourt v. Norcraft, (W.C.C.A. September 29, 2010)

Employee Bellecourt sustained a work-related injury on June 12, 2003 to his left hip and knee. The sole issue in dispute on appeal to the Workers' Compensation Court of Appeals was the permanency to the left hip. After his injury, the Employee underwent surgery for a displaced left femoral neck fracture. The surgery involved the reduction of the fracture, capsulotomy of a hematoma and internal fixation with screws. Subsequently, the Employee also underwent a left hip total arthroplasty. The treating physician rated 12% pursuant to Minn Rule 5223.0500, Subp. 3C(1) for a non-union of a hip fracture; 8% pursuant to Minn Rule 5223.0500, Subp. 3B for the arthroplasty; 5% pursuant to Minn Rule 5223.0500, Subp. 4B(3)(d) for reduced adduction/abduction range of motion; and 4% pursuant to Minn Rule 5223.0500, Subp. 4C(4)(b) for reduced range of motion in internal and external hip rotation. The compensation judge awarded this permanency, and the WCCA reversed. They ruled that ratings from Minn Rule 5223.0500, Subp. 3 may not be combined and that the Employee is not entitled to permanency for both the non-union of the hip fracture and the arthroplasty. They awarded the 8% for the arthroplasty rated by Dr. Drogt, the independent medical examiner, plus the permanency rated for the range of motion and a meniscectomy to the knee.

Lunsman v. TN-L Repair and Remodeling, (W.C.C.A September 30, 2010)

The Employee petitioned the WCCA to vacate an Order Dismissing Stricken Pleadings. The WCCA denied this petition.

The Employee's Claim Petition was filed on August 18, 2006 alleging the occurrence of a compensable injury on May 5, 2005. The insurer denied primary liability and filed a First Report of Injury on May 30, 2006 and a Notice of Insurer's Primary Liability Determination on June 1, 2006. Discovery disputes arose. The Compensation Judge issued an Order Striking from the Calendar which included the following language: "The party seeking reinstatement must file a Motion to Reinstate advising the Court that the parties are ready to proceed to trial, that all necessary discovery has been completed, that all medical and vocational examinations have been completed and the report of the same received, that all known necessary parties have been properly joined, that the petitioning party has obtained and attached a calendar with dates the parties are available for hearing for six months after the date of the motion to reinstate, and that settlement discussions have been held but the case cannot be settled. A one sentence statement that the parties want the case reinstated will not be sufficient to place this case back on the trial calendar."

Nine months later, the Employee filed a motion for sanctions against the insurer. The cover letter included a request that the matter be set on the active calendar. No order was issued.

Over a year later, OAH sent a Notice of Pending Dismissal on Stricken Pleadings to the parties. On January 22, 2010 an Order Dismissing Stricken Pleadings was issued. The order included language that the Claim Petition was being dismissed "without prejudice," This order was not appealed.

The WCCA determined that it has authority to vacate an Award pursuant to Minn. Stat. Section 176.461. Because an "Order" is not an "Award" it does not have statutory authority to grant this petition.

<u>Troyer v. Vertlu Management Company</u>, (W.C.C.A October 4, 2010)

The Employee underwent a surgical procedure which included implantation of an IPG spinal stimulator. The parties conceded that this procedure was medically reasonable and necessary. The insurer paid the charges associated with the surgery except paid only part of the charges billed by HealthEast for the surgical implant components. The insurer paid $24,400.00 leaving an unpaid balance (after the 85% fee schedule reduction) of $37,882.00.

The surgical implant components were paid by Advanced Neuromodulation Systems, Inc. HealthEast does not keep these components in stock. The components were delivered to the hospital by personnel from ANS. It is common practice for a representative of ANS to be present in the operating room and, if necessary to consult with the surgeon during the surgical procedure. HealthEast's usual and customary charge for these components is $73,320.00, which includes a mark up on the wholesale price charged by ANS. The charge by ANS to HealthEast for the components is considered by HealthEast to be confidential and proprietary.

The first issue was whether the health care provider was ANS or HealthEast. The insurer argued that ANS was the health care provider and it would be their charges that would be paid per the fee schedule. The insurer also presented evidence that the mark up by HealthEast was $48,888.00. The insurer argued that such a large mark up frustrates the intent of the statute to deliver medical benefits at a reasonable cost. The compensation judge rejected these arguments and this was affirmed by the WCCA. The rationale was that the implant components had no intrinsic value alone and could not cure or relieve the Employee from the effects of his injury until used in surgery.

The second issue raised by the insurer was the argument that the compensation judge erred in determining that he did not have authority to determine the reasonable value of the surgical implant hardware at less than 85% of the hospital's usual and customary charge. The insurer's argument was rejected by the WCCA. Liability for treatment at a large hospital (and this hospital fit that category), is statutorily established at 85% of the usual and customary charge. The compensation judge does not have the discretion to further reduce the charges.

<u>Jennings v. Allina Medical Clinic</u>, (W.C.C.A. October 14, 2010)

In <u>Jennings</u>, the Employee underwent a work-related anterior decompression and fusion at C5-6 and C6-7. The parties stipulated the surgery was reasonable and necessary. The issue in dispute was the medical implant used in the surgical procedure. HealthEast St. Joseph's Hospital claimed that their usual and customary charge for the implant was $18,480.00 and they charged 85% of this amount to the self-insured Employer. They claimed the actual cost of the implant was confidential and proprietary in nature. The self-insured Employer claimed that the reasonable amount of the services should be 50%, as opposed to 85% of $18,480.00. While the WCCA acknowledged that substantial mark-ups on surgical implant

components by large hospitals contribute to the high cost of medical care, they held that the Court could not ignore the Minnesota workers' compensation statute. The liability of an employer for treatment at a large hospital is statutorily established at 85% of either the provider's usual and customary charge or 85% of the prevailing charge. They ruled that the appellant had not sought to establish the prevailing charge and they stipulated to HealthEast's usual and customary charge. The Court held that to the extent a systematic problem may exist relating to mark-ups on surgical implant components, the problem is best addressed by the commissioner through the Department's rule making authority.

Luskey v. Rahr Malting Company, (W.C.C.A. October 14, 2010)

On May 6, 2009 the Employee sustained a work-related vertebral fracture resulting in paraplegia. He was deemed to be permanently and totally disabled. Pursuant to Minn. Stat. § 176.137 an award for remodeling of a permanently totally disabled employee's principal residence is allowed to enable the Employee to "move freely into and throughout the residence and to otherwise adequately accommodate the disability." The award may also be used to purchase or lease a new or different residence if that would better accommodate a disability. The statute requires that a licensed architect certify that the proposed alteration or remodeling of an existing residence, or the building or purchase of a new or different residence, is reasonably required to accommodate the Employee's disabilities. A licensed architect must also supervise the project to determine that construction is in substantial compliance with the approved plan. The award pursuant to Minn. Stat. § 176.137 is limited to $60,000.00. The Employee argued that the architectural fee should not be included in the $60,000.00 limit, and only actual construction costs should be included. The WCCA disagreed. They held that Minn. Stat. § 176.137, Subd. 2 does not exclude an architect's fees from the $60,000.00 limit. They further rejected the Employee's argument that the architect's fees should be included as a rehabilitation expense. In summary, the WCCA ruled that the architectural fees should be included in the $60,000.00 statutory limit set forth in Minn. Stat. § 176.137, Subd. 5.