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CASE LAW UPDATE

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DECEMBER 2011 THROUGH MARCH 2012

JURISDICTION

Lann v. Stan Koch & Sons Trucking, (W.C.C.A. December 12, 2011)

ISSUE:

Whether the self-insured employer is entitled to a credit for proceeds from the employee's third party suit and settlement when the third party's suit and resulting settlement took place in Georgia and the employee elected to receive Minnesota workers' compensation benefits.

FACTS:

Georgia resident working as a truck driver for Minnesota based Stan Koch & Sons Trucking sustained a neck injury in a work-related motor vehicle accident in the state of Georgia. The employee elected to receive Minnesota workers' compensation benefits.

The employee brought a third party liability claim in Georgia against at fault driver, seeking damages for his accident-related injuries. A settlement agreement was reached in Georgia with the third party.

The employee filed a Minnesota Claim Petition seeking permanent total disability benefits. Issues scheduled for hearing included whether the employer was entitled to a credit for the employee's recovery in the third party action, and, if so, in what amount, and whether the compensation judge had jurisdiction to decide the credit issue.

DECISION:

The compensation judge held the employer was entitled to a credit pursuant to Minnesota Statutes, but the amount of the credit could not yet be determined, ruling that the credit issue would need to be resolved in a later proceeding. Both parties appealed. The employee appealed the finding that the employer was entitled to a credit pursuant to Minn. Stat. § 176.061, subd. 5. The employer cross appealed from the judge's finding that she lacked the information necessary to perform the calculations required by Minn. Stat. §176.061, subd. 6.

The W.C.C.A. held that the employee elected to receive Minnesota workers' compensation benefits. As such, Minnesota workers' compensation laws apply, and pursuant to Minn. Stat. § 176.061, an employer is entitled to a credit for the employee's recovery and third party action arising out of the same injury for which the employer made payment of workers' compensation benefits.

JURISDICTION

Connell v. Strom Engineering Corporation (W.C.C.A. January 2, 2012)

ISSUE:

Whether the employee was hired within the state of Minnesota under the meaning of Minn. Stat. § 176.041, subd. 3, giving rise to Minnesota jurisdiction.

FACTS:

Strom Engineering Corporation is a Minnesota corporation that provides temporary workers to businesses with short-term labor needs throughout the United States. The employer's recruitment, payroll, and human resource functions are run out of its corporate headquarters in Minnesota.

Connell, an Oklahoma resident, worked on and off for the employer in a temporary capacity. He was contacted by a recruiting manager for the employer who called from Minnesota to the employee's residence in Oklahoma. The employee was offered a temporary job to work as a bus driver in the State of Texas. During the conversation, the recruiting manager described the job duties, rate of pay, hours per week, who the employee would report to, and where to report. The job offer was extended over the phone contingent upon the employee passing a drug test upon his arrival at the Texas job site. The employee accepted the offer while on the phone at his home in Oklahoma.

The employee reported to an assignment in Texas. At the assignment, he signed an agreement, agreed to a drug test, and completed a W4 form.

Approximately two months into his temporary position, the employee sustained an admitted work-related injury in Texas. He was paid Texas workers' compensation benefits.

The employee later filed a Claim Petition in Minnesota, seeking Minnesota workers' compensation benefits. The matter proceeded to a hearing in which the judge determined that all three of the requirements under Minn. Stat. § 176.041, subd. 3, for Minnesota extra-territorial jurisdiction had not been satisfied, and the employee's claim was denied on that basis.

DECISION:

Minn. Stat. § 176.041, subd. 3, provides,

> **Temporary out of state employment**. "If an employee hired in this State by a Minnesota employer, receives an injury while temporally employed out of this State, such injury shall be subject to the provisions of this Chapter."

The compensation judge held the employee had not been hired in the State of Minnesota, citing case law that applied contract theory in determining where a hire occurs. The judge concluded the employee had been hired in Oklahoma, where he was offered and accepted the job.

The employee argued his case was a first impression at that the W.C.C.A. must determine "whether the location of hire is dictated by where the prospective employee is located or the location of the employer representative offering the job."

The W.C.C.A. relied upon the *Summers v. Northern Industrial Erectors, Inc. (W.C.C.A. September 15, 2010)* holding that a contract is deemed to be made at the place where final assent is given.

In the Connell case, the W.C.C.A. held that the employee was in Oklahoma when he accepted the employer's offer of employment. The Court also added that the employee was not, nor had he ever been, a Minnesota resident. His sole connection to Minnesota was that he was hired by a business that happened to be headquartered in Minnesota.

The W.C.C.A. affirmed the compensation judge's conclusion that Minnesota jurisdiction was not appropriate.

HOME NURSING SERVICES BY A FAMILY MEMBER

Rezaie v. Walmart (W.C.C.A. January 20, 2012)

ISSUE:

Whether an employee is entitled to additional professional nursing home services when the employee receives assistance by kin.

FACTS:

The employee sustained admitted injuries to her right foot and ankle, resulting in RSD to her right lower extremity. The employee filed a Claim Petition seeking permanent total disability benefits, permanent partial disability benefits, and professional in home nursing services.

A QRC met with the employee to evaluate the extent of nursing services required. The QRC reported the employee lived in a two story home together with three adult sons. The employee was not able to walk on her right foot, so she often crawled when moving around within her home and used a wheelchair outside of the home. The employee reported the family primarily heated up frozen dinners for meals because she was unable to tolerate the standing required for food preparation and clean up. The employee relied upon her sons to bring her frozen food from the basement freezer and assist her with cooking and meal clean up.

The QRC concluded the employee needed assistance one hour per day, seven days per week for cooking and cleaning after meals.

The employee stated she was independent in bathing, grooming, and toileting. She stated housecleaning was very difficult because of her lack of mobility and that her sons generally performed most of the housecleaning. The QRC concluded the employee required housecleaning assistance for up to three hours per week.

The employee was unable to do laundry because she could not go up and down the stairs. The QRC opined that doing laundry for a family of four took an average of two hours per week.

The QRC further concluded that the employee needed three hours of assistance per week for shopping, errands, banking, and doctor's appointments. The QRC also concluded yard work took one hour per week and was performed by the employee's sons.

The QRC recommended a total of sixteen hours per week in professional nursing services.

At the request of the employer, an independent evaluation was performed to the asses the need for professional nursing services. The employee reported to this agent that she cooked while sitting on a stool and did some housecleaning, including dusting and cleaning the floor on her hands and knees. The agent concluded that no home care was needed for cooking or clean up. She further noted some cooking and clean up was performed by the employee's sons, but stated this should be considered part of their household production. The agent opined one hour of homecare service was appropriate for laundry, and one hour for heavy cleaning.

The employee stated she used a taxi for shopping and errands in the community and did some shopping online. The agent concluded the employee could order groceries online and use metro mobility for shopping and medical appointments. She opined the employee would need some assistance for errands in the community in pushing her wheelchair over long distances. The agent stated one hour a week was reasonable for completion of these tasks.

In conclusion, three hours a week of nursing services were recommended, one hour for cleaning, one hour for laundry, and one hour for shopping.

The compensation judge found the employee unable to perform many life activities as a result of her work-related injury, including laundry, housekeeping, running errands, and yard work. The judge found the employee's three sons regularly performed and assisted in performance of these services for which they are entitled a fee. The judge further found the evaluation and the opinions of the independent vocational agent most accurately reflected the amount of assistance the employee needed and awarded three house of service per week.

DECISION:

On appeal, the employee argued the opinions of the independent agent unreasonable and inconsistent with the employee's disability. The employee further argued the independent agent's conclusions were based upon what the agent considered the employee's sons should be performing as members of the household.

Minn. Stat. § 176.135, subd. 1(a), requires the employer to furnish any medical treatment, including nursing services, as may be reasonably required to cure or relieve the employee from the effects of the injury. In the case of permanent total disability, the employer shall also pay "the reasonable value of nursing services provided by a family member of the employee's family". Id. subd. 1(b) If a permanently totally disabled employee is receiving services and assistance from a family member, "the compensation judge must carefully consider whether personal services and household tasks which may well have been performed out of affection prior to the injury may, at some point, become compensable when performed –

and performed more frequently – out of necessity." *Sorcan v. USX Corp., 58 W.C.D. 159, 172 (W.C.C.A. 1997)*, summarily aff'd (Minn. Apr. 7, 1998).

The W.C.C.A. held while several of the household tasks may be performed by the employee's sons out of affection for the mother, they are also performed out of necessity due to her disability. The W.C.C.A. modified the compensation judge's award on nursing services to include seven hours per week for cooking and cleaning and three hours per week for shopping and errands.

PENALTIES

Kriesel v. University of Minnesota (W.C.C.A. January 31, 2012)

ISSUE:

Whether the employer was guilty of inexcusable delay when making payment pursuant to an Award on Stipulation giving rise to penalties under Minn. Stat. § 176.225, subd. 5.

FACTS:

The parties reached a settlement that was the subject of an Award on Stipulation served and filed on January 6, 2010; payment of the amount owed under the Stipulation was due within fourteen days of the date of the Award, or by February 9, 2010.

At the time of the Award, the claims examiner who had primary responsibility for the claim went off work for surgery and medical leave. It was anticipated the claims representative would be absent for about two weeks. The claims supervisor took over an additional 150 file caseload in addition to her own caseload.

The claims supervisor became aware that the Award had been issued as of January 29th, a Friday. On Monday and Tuesday of the following week, the claims supervisor was working on a large project and also was in mandatory management meetings. The claims supervisor sat down at her computer on February 8th to issue payment pursuant to the Award.

The actual settlement check was not issued out of the Minnesota claims office, but in an office located in Oregon. If the request for payment was entered into the computer before 11 a.m., the check would be issued that day. If the check request was issued after 11 a.m., the check was issued the next day.

In this case, three checks needed to be issued for settlement; one to the employee, one to her attorney, and one to a medical provider. The claims supervisor entered all payment requests in at one time on February 8th. The request went in before 11 a.m. The checks to the medical provider and attorney fees were issued on February 9th and sent that day. Because of the amount in the check issued to the employee, a second signature was required. The check was sent by overnight delivery from Oregon to Memphis where the second signature was obtained. It was then sent by overnight delivery to the employee. The check was issued out of Memphis on February 10th and received by the employee on February 11th.

The employee filed a Claim Petition seeking penalty under Minn. Stat. § 176.225, subd. 5 in the amount of 25% of the delayed payment. The case proceeded to hearing and the compensation judge denied the employee's claim. She determined that the delay by the employer in making payment was not an "inexcusable" delay, but that the evidence demonstrated a "reasonable and colorable" excuse for the delay. The employee appealed.

DECISION:

The question was whether the employer's delay of one day in making payment to the employee was "inexcusable". The W.C.C.A. evaluated several cases citing claims for penalties were assessed for improper withholds for overpayment as well as no excuse for delay. The W.C.C.A. held that in the present case, the compensation judge discussed the evidence she relied upon in her determination that the employer was not guilty of inexcusable delay. Specifically, the claims adjuster who had primary responsibility for the file was on medical leave and the claims supervisor reasonably concluded it was not feasible to train a temporary adjuster in for the limited period of time. The claims supervisor testified at the formal hearing to the caseload she was handling as well as the additional 150 files from the absent claims representative and how it had adversely impacted her ability to make prompt payment. The supervisor made significant effort to expedite payment including having the check sent by overnight delivery. Finally, the check was only one day late.

The W.C.C.A. further held that determination of a penalty is generally a question of fact for the compensation judge. The W.C.C.A. affirmed the judge's denial of penalty.

RESIDENTIAL REMODELING

Washek v. New Dimensions Home Health (W.C.C.A. February 7, 2012)

ISSUE:

Whether the cost of structural changes to an employee's home necessary to the installation of a ceiling mounted track lift system is compensable as a medical expense or constitute remodeling of the employee's residence.

FACTS:

The employee sustained injuries out of her employment with New Dimensions Home Health, rendering her a paraplegic. Under Minn. Stat. § 176.137, employees are entitled to up to $60,000.00 for alteration of remodeling of a residence of a permanently disabled employee. In this case, the employee is confined to a wheelchair and her primary residence had been remodeled to accommodate her disability. The employer previously paid $58,000.00 in remodeling expenses.

Subsequently, an access specialist met with the employee to assess safety issues pertaining to the employee's use of her shower and toilet to explore access solutions. The specialist determined the employee could not independently propel her rolling shower commode chair into the shower without assistance, which was identified as a safety concern that prevented the employee from living

independently. The outside area of the shower provided insufficient space for the employee to move her wheelchair into the shower commode or to maneuver the wheelchair.

The specialist recommended installation of a ceiling mounted lift system which would extend over the employee's bed into the bathroom to over the toilet and shower. This would reduce the employee's need for an aide to assist her in transfers and showering and would provide greater general independence. Installation of the ceiling required several permanent changes in the employee's residence. Because the track would be mounted in the ceiling, the frames or headers over several doors would have to be raised. Structural supports were needed in the ceiling requiring removal and replacement of the ceiling after installation of the track. In addition, certain lights and fixtures would need to be moved, requiring rewiring.

The specialist categorized the purchase and installation of the ceiling track as a medical expense and the necessary structural changes as a remodeling expense.

The cost of the system itself, delivered and installed, was estimated at $15,414.00. The employer admitted the cost was a reasonable and necessary medical expense under Minn. Stat. § 176.135. However, installation of the lift track requires structural modifications to the home that fell under the remodeling statute, Minn. Stat. § 176.137, which provides a cap at $60,000.00. Having already paid approximately $58,000.00 in structural remodeling expenses, the employee argued liability under this section was no more than the balance of approximately $2,000.00.

The employee filed a Medical Request for the costs associated with the lift system and installation. The compensation judge found installation of the lift system involved permanent structural changes to the employee's home, including partial removal of the ceiling, relocation of electrical wires and fixtures, raising all door headers along the path of the ceiling track, and installation of support trusses. The compensation judge concluded the structural changes necessary to install the track were compensable medical expenses under Minn. Stat. § 176.135 and ordered payment of all costs associated with track installation including construction modifications. The employer appealed.

DECISION:

The W.C.C.A. reversed the decision, holding that installation of the lift system would require major structural changes to the employee's home and that the structural changes constitute "alteration or remodeling" within the common usage, citing Black's Law Dictionary and the plain meaning of Minn. Stat. §176.137. The W.C.C.A. held that the fact the lift system is a medial apparatus does not automatically mean that remodeling required for installation is also a medical expense. The W.C.C.A. compared the structural changes at issue to those required to widen doorways or install ramps in use of a wheelchair. The fact that the wheelchair may be unusable with the employee without remodeling the residence does not convert remodeling into a medical expense.

The W.C.C.A. denied the remodeling charges above and beyond the $60,000.00 cap.

TEMPORARY PARTIAL DISABILITY

Peterson v. Ariel, Inc. (W.C.C.A. December 8, 2011)

ISSUE:

Whether or not the employee was entitled to temporary partial disability benefits where his employment resulted in earnings no more than $15.00 per week.

FACTS:

The employee reported an injury after falling from a scissors lift, resulting in a back injury requiring fusion surgery. He received the maximum temporary total disability entitlement for his injury date. The employee was eventually released to return to work with a lifting limitation of ten to fifteen pounds and restrictions on bending, twisting, kneeling, squatting, and overhead reaching. The employee needed to change positions as needed and was not to drive more than fifteen miles one way. He began job search efforts.

The employee secured part-time employment at an auto body shop owned by a friend. The employee's job was to do sweeping and cleaning up in the shop. He averaged 1.5 hours on one day each week and earned $10.00 per hour or $15.00 per week. Approximately six to eight weeks after the employee secured this employment, the treating surgeon restricted the employee to a 20 hour work week.

The employed filed a Claim Petition seeking temporary partial disability benefits based upon his earnings. The compensation judge denied the employee's claim for temporary partial disability benefits, finding his earnings were too insubstantial to qualify as gainful employment. The employee appealed.

DECISION:

On appeal, the W.C.C.A. stated the compensation judge appropriately determined the question of what constitutes gainful employment is unique to each situation and must be decided on the evidence presented at the time of the hearing.

In this case, the employee was employed by a friend. He works no more or no less than 1.5 hours on one day each week. He is paid $15.00 per week and his work consists of sweeping, dusting, and cleaning work benches. While the employee was initially released to return to work by his treating surgeon without any restrictions on the number of hours he could work, the treating surgeon subsequently limited his work week to 20 hours without any explanation. The employee's job search consisted of checking the same three websites on a periodic basis.

The W.C.C.A. held substantial evidence supports the decision of the compensation judge, indicating that no one factor is determinative in a case, the W.C.C.A. was unable to see how earnings of $15.00 per week could be considered as anything or than insubstantial income.

SOCIAL SECURITY OFFSET

Grubessich v. Allina Health Systems (W.C.C.A. December 22, 2011)

ISSUE:

Whether the employer is entitled to an offset from permanent total disability benefits under Minn. Stat. § 176.101, subd. 4, for social security retirement benefits that commenced before the employee was permanently and totally disabled when the eligibility for retirement is not occasioned by the work injury, resulting in eligibility for permanent total disability benefits.

FACTS:

In 1990, the employee sustained an admitted injury to her low back while working for Allina Health Systems. The employer paid various workers' compensation benefits and the employee returned to work for Allina. In 1994, four years after her injury, the employee turned 65 years of age and began receiving social security retirement benefits. The employee continued to work part-time for the employer. She subsequently sustained a second work-related injury while working for the employer. Liability was accepted and workers' compensation benefits were paid.

In 2008, the employee was laid off by Allina due to lack of work. Since the layoff, permanent total disability benefits have been paid. The parties stipulated that both work injuries are a substantial contributing factor to the employee's permanent and total disability. As of August 1, 2009, the employer had paid $25,000.00 in permanent total disability benefits. After that date, the employer reduced the employee's permanent total disability benefits by the amount of her social security retirement benefits, citing Minn. Stat. § 176.101, subd. 4, as the basis of the offset.

The employee filed a Claim Petition for underpayment of permanent total disability benefits, arguing the employer was not entitled to an offset of her permanent total disability benefits. The matter proceeded to hearing. At the time of hearing, the employee was 82 years old. The compensation judge held the employer was entitled to take an offset of the employee's permanent total disability benefits and denied the underpayment claimed. The employee appealed.

DECISION:

The issue on appeal was whether the employer was entitled to reduce the employee's permanent total disability benefits after $25,000.00 has been paid by the amount of the social security retirement benefits when receipt of retirement benefits began prior to the permanent total disability benefits and the retirement benefits are not related to the work-related injuries.

Under Minn. Stat. § 176.101, subd. 4, an offset is allowed for permanent total disability benefits to an employee who concurrently receives additional benefits specified in the Statute. Specifically, Minn. Stat. § 176.101, subd. 4 provides that:

> Compensation shall be paid during the permanent total disability of the injured employee, but after a total of $25,000.00 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision. The reduction shall also apply to any old agent survivor insurance benefits.

The employee contends there is ambiguity in the structure and language of subd. 4, that reasonably allows for more than one interpretation. The employee argued the contingency requirement in subd. 4, which restricts the offset to a reduction of permanent total disability benefits only if social security disability benefits are being paid because of the exact same injuries which necessitated the permanent total disability benefits, also applies to old age benefits.

The employee further contends the correct interpretation requires a causal connection between the work-related injuries, the payment of permanent total disability benefits and the receipt of old age benefits, and that the causal connection is not present in this case.

Therefore, the employee argued that Statute does not permit a reduction in her permanent total disability benefits since the social security retirement benefits were not occasioned by the same injuries which give rise to payment of permanent total disability benefits.

The employer argued on appeal the meaning of the Statute is clear and supports only one conclusion: the Legislature intended for the offset to apply to social security retirement benefits regardless of when those benefits commenced. The employer argued that the clause pertaining to old age and survivor benefits as written does not relate to the limitation in the preceding sentence and there is no ambiguity in the Statute that allows for two interpretations. The employer claimed that if the employee's argument was adopted, the Court would either add terms to the Statute the Legislature omitted, or ignore the fact that the Legislature could have left off the last cause and written the Statute differently.

The W.C.C.A. reviewed the prior statutory language from 1949, and repealed in 1953. The previous version of Minn. Stat. § 176.101, subd. 4, did not mention old age or survivor benefits. The offset language was added in 1953. The W.C.C.A. went on to cite *Jones v. Metropolitan Waste Control* and *Adamski v. Kenneth Setter Holm's Farm*, both cases that allowed for an offset of old age benefits without requiring the eligibility for old age benefits to be occasioned by the same work injury or injuries which resulted in the ineligibility for permanent total disability benefits.

The W.C.C.A. allowed the employer to take the reduction of social security retirement benefits without consideration of the commencement date and without a causal connection to the work injury. The offset is considered a dollar for dollar reduction for benefits in the month it was received and is not based upon the date of commencement or whether it was an occasioned by the same injury.