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CASE LAW UPDATE

Manuel Ramirez v. Action Roofing, (W.C.C.A. June 8, 2010)

FACTS:

The employee sustained an admitted work-related lower extremity fracture in July of 2008. He later developed deep vein thrombosis as a result of the orthopedic injury. The employee underwent orthopedic and hematology treatment into 2009. On April 2, 2009, the employee was released to return to work without restrictions, by the treating orthopedic physician. On April 23, 2009, the employee was released to return to work without restrictions by his hematologist. Around the same time, the employee underwent an independent orthopedic medical evaluation at the request of the employer and insurer. The IME indicated no ongoing work restrictions were necessary as a result of the orthopedic injury.

The employer and insurer filed a Notice of Intention to Discontinue Benefits on the basis that the employee no longer required work restrictions relying upon the opinions of the treating orthopedic physician, hematologist, and the IME. At the conference, the employee relied upon restrictions put into place by his primary care physician from the Native American Community Clinic.

The employer and insurer prevailed at the administrative conference.

The employee filed an Objection to Discontinuance and the matter was scheduled for a formal hearing before Judge Peggy Brenden. By the time the case reached the hearing, the employer and insurer had obtained an IME report from a hematologist who concurred with the treating hematologist regarding a full duty release. At the hearing, Judge Brenden held that the employee required restrictions and awarded temporary total disability benefits. The employer and insurer appealed.

ISSUE:

The issue on appeal was whether or not the restrictions put into place by the primary care physician were supported by adequate foundation when all treating specialists provided a full duty release.

ANALYSIS:

The Court rejected the employer's foundational attack on the primary care physician. In doing so, it noted that, "sufficient knowledge of the subject matter may be obtained by personal knowledge and experience, review of medical records, a hypothetical question or testimony at hearing." Scott v. Southview Chevrolet Co., 267 N.W. 2d 185 (Minn. 1983)

The Court held that the primary care physician from the Native American Community Clinic had followed the employee's care since the original date of injury which was sufficient to establish foundation for ongoing restrictions. The Court noted that the determination of whether the employee requires

restrictions does not require the formal restrictions of a physician, and employee's testimony may provide evidentiary support for a determination that restrictions are required. Al-Hameed v. Bailey Construction, No.Wco9-144 (W.C.C.A. August 3, 2009)

Edward Mewhorter v. Morrell Services, et al., (W.C.C.A. June 1, 2010)

FACTS:

The employee sustained three admitted work-related injuries to the cervical spine in July 1997, February 2000, and March 2007. The insurers for the first injury dates paid temporary total disability benefits, respectively, but not the full 104 week entitlement. The insurer for the 2007 injury date paid 104 weeks of temporary total disability benefits. Subsequently, the employers and insurers entered into an apportionment agreement on the employee's cervical spine condition.

In 2009, the employee filed a Claim Petition alleging entitlement to temporary total disability benefits as a result of all three dates of injury. The first two carriers filed a Motion to Dismiss based upon the fact that all of the work-related injuries were a substantial contributing factor to the employee's disability and that the employee had been paid a full 104 weeks by the last insurer on the risk for the 2007 date of injury. The matter proceeded before Judge Peggy Brenden at a formal hearing. Judge Brenden concluded that the 2007 injury was the controlling event for the employee's disability, citing the Joyce v. Lewis Bolt & Nut Co., 412 N.W. 2d 304, 40 W.C.D. 209 (Minn. 1987). Judge Brenden held that the employee's disability in 2009 during the disputed disability period was a result of the combined effects of all three injuries and determined that the employee was not entitled to more than 104 weeks of temporary total disability compensation. The employee appealed.

ISSUE:

Whether or not the employee was entitled to 104 weeks of temporary total disability for each injury date after receiving 104 weeks of temporary total disability benefits paid by the insurer on the risk for the last date of injury.

ANALYSIS:

The WCCA begins its opinion with a discussion as to why the Joyce case does not apply to the pending case. Under Joyce and its predecessor, Busch v. Advanced Maintenance, 659 N.W. 2d 722, 63 W.C.D. 277 (Minn. 2003), where there has been an amendment to the Workers' Compensation Statute that changes the rights and obligations of the parties, and there are two or more injuries on either side of that amendment, the last date of injury is the controlling event, and the law in that date of injury is to be applied. The Court distinguished Joyce and Busch from this case because there was no change in the law between 1997 and 2007 as to the maximum period of temporary total disability compensation.

The WCCA held that the employee's disability during the time period claimed was due to the combined effects of all three work-related injuries. There is no evidence that the first two injuries alone could be considered the sole cause of the temporary total disability period claimed. The employee is disabled from the cumulative effect of the three injuries, but seeks to oppose consecutive liability on each of the injuries. The WCCA found such an award on benefits to be contrary to the Statute. The employee did not become temporarily and totally disabled from all three injuries until after the third or 2007 injury date. That

Statute provides for temporary total disability benefits of up to 104 weeks for an injury. The employee is this case was paid 104 weeks for the 2007 date of injury. The fact that the earlier injuries were a substantial contributing factor in that disability is a question of contribution and not an issue of an additional compensation owed to the employee. While the Court concluded that Joyce and related cases do not provide a rationale for Judge Brenden's decision, the WCCA essentially ruled in accordance with Joyce and found Judge Brenden's decision to be supported by law and affirmed the decision denying the period of temporary total disability against the first two carriers.

Lynne Dorr v. National Marrow Donor Program and CNA Insurance Co. (W.C.C.A. July 7, 2010)

FACTS:

The employee in this case was employed as a senior search strategy specialist who primarily developed procedures and provided expertise to network members. As part of her job, she conducted education and training for staff and network members. Almost all of her work, including education and training activity, was done on her computer at her office location, using the internet.

As a salaried, exempt employee, she did not punch a timecard, but was expected to keep what her supervisor referred to as "core hours" working Monday through Friday from 9 a.m. to 5 p.m. With two exceptions, the employee performed all of her work activities at the employer's office and worked only during her core hours. The employee commuted to work in her personal vehicle.

The two exceptions in her work schedule and work location were due to conferences sponsored by her employer in the spring and fall of every year. The conferences consisted primarily of educational seminars aimed at network members and included some incidental social activities. Attendance at the conferences was not mandatory. The employee had attended some, but not all of the conferences since her date of hire. The spring conference was typically held outside of Minnesota and the fall conference took place in downtown Minneapolis, typically in banquet or convention space.

The pending claim arose out of the fall 2008 conference that took place at the Hilton Hotel in downtown Minneapolis. The fall conference started on a Friday, and was scheduled to go through Sunday. Meals and parking for the fall conference were paid for by the employer. If employees chose to stay at the hotel for the conference, that cost would be covered by the employer as well. The employer did not reimburse employees for mileage to and from the hotel where the conference was held. Because much of the fall conference took place outside of usual working hours, employees were entitled to "comp time" if they attended the Saturday or Sunday session.

The employee in this case arrived at the conference on Saturday morning at 8 a.m. and was scheduled to present. The employee left her home and traveled directly to the Hilton Hotel. She did not stop at the employer office site on the way to the conference. She brought along her notes, the flash drive needed for her power point presentation, and copies of the materials.

Shortly after leaving her home, a deer ran into the road and collided into Ms. Dorr's car. Ms. Dorr sustained severe injuries which have rendered her a quadriplegic.

A Claim Petition was filed seeking workers' compensation benefits arising out of the November 2008 personal injury. The employer and insurer denied primary liability, alleging that the employee was not in the course and scope of her employment at the time of her injury.

A hearing took place before Compensation Judge LeClair-Sommer. The Judge LeClair-Sommer held that the employee's injury did not arise out of her employment and denied the claim. The employee appealed.

ISSUE:

Whether or not the employee's injuries arose out of and in the course and scope of her employment when traveling from her home to a location other than the employer's premises?

ANALYSIS:

The WCCA reversed Judge LeClair-Sommer's decision, finding that the employee was in fact in the course and scope of her employment. The Court's decision was based upon a number of facts and case law including analysis on special errand cases.

The Court cited the Reese v. National Surety Co. of New York, 162 Minn. 493, 203 N.W. 2d 442, 3 W.C.D. 66 (Minn. 1925) in its ruling that because the employee's trip was occasioned solely by her employment relationship, "the employee was where her duties called her."

In the Reese case, the employee worked in an office in downtown Minneapolis and lived in St. Paul. The employee was asked by his supervisor to take a statement from an individual outside of the office setting after normal working hours. While returning from the statement, the employee was injured when a car struck him. The Court considering a Statute which was essentially the same as Minn. Stat. §176.011, Subd. 16, held the employee's injury to be compensable, stating the "claimant, was at the time of his injury, where his duties called him." 203 N.W. 2d 433.

The Court goes on to cite a string of special errand cases finding coverage for individuals injured while in commute from a special errand on behalf of the employer. The Court further held that this case was consistent with several special errand decisions in that:

(1) There was an express or implied request that the service be performed after working hours by an employee with fixed hours of employment;

(2) The trip involved on the errand was an integral part of the services performed;

(3) The work performed, although related to the employment, was special in the sense that the task requested was not one which was regular and reoccurring during the normal hours of employment.

Factually, the Court held that the employee's injury had occurred outside of her normal work day and work hours and that modification of her schedule required approval from her supervisor. The Court refused to address several arguments presented regarding whether or not the employee was a traveling employee, whether or not payment for mileage was a determinative, or portal to portal rule, or use of the employee's personal vehicle as a factor in reaching its decision.

FACTS:

In each of the cases, employees sustained admitted work-related injuries and various benefits were paid by the employers and insurers. Each employee was referred for surgical intervention by the treating physician. Both employers and insurers responded to the surgical request within 7 days by deferring approval of the surgery pending an independent medical evaluation to address whether or not the surgeries were reasonable and necessary and causally related to the work-related injuries.

In each of the claims, the employee filed a Claim Petition requesting surgery as recommended by the treating physicians. The cases vary slightly in the procedure posture.

In both claims, the employees underwent independent medical evaluations. Both examiners opined the surgeries were reasonable and necessary and causally related to the work-related injuries. In each case, the insurers responded to the surgical request upon receipt of the IME opinions authorizing surgery.

In each case, counsel for the employees claimed Roraff fees. Each employer and insurer contested the employee's entitlement to fees indicating that there had been no genuine dispute with regard to the surgical requests and that counsel for the employees had not been instrumental in obtaining approval of the surgical procedures. In each case, the compensation judge awarded attorney fees and the employers and insurers appealed.

ISSUE:

Whether or not the employee's attorney is entitled to Roraff fees where an employer and insurer respond to a request for surgery with scheduling an independent medical evaluation?

ANALYSIS:

The WCCA reversed both decisions and denied the award of Roraff attorney fees providing that the Rules allow an employer and insurer to request an independent medical evaluation. The Court held that an insurer's request for an independent medical examination is not the same as a denial. The employers and insurers have 45 days under Minn. Rule 5221.6050, Subp. 9.c.(6) to schedule an independent medical exam, receive the doctor's opinion, and then make its decision to approve or deny authorization for the requested procedure. An insurer's request for an independent medical exam is one of the several specified alternatives to a denial under this Rule.

In each of the cases, the employers and insurers responded to the request for authorization of surgery within the required 7 working days, indicating that an independent medical evaluation would be scheduled to address the surgical request. The cases differ somewhat factually with the timing of the authorization of surgery. Under the Rules, the insurer's have 45 days to provide a response. In one of the cases, a response was issued within 45 days. In the other, it was not. The WCCA did consider the reason for delay in meeting the 45 day deadline considering factors outside of the employer's and insurer's control such as the employee's objection to the examination.

In summary, upon receipt of a request for surgical authorization, an insured should respond within 7 working days, indicating that an independent medical evaluation will be scheduled to address the reasonableness and necessity of the surgery. Efforts by the employer and insurer should then be made to schedule an IME at the first opportunity, and in good faith, attempt to comply with the 45 day deadline. This should prevent the employee's attorney from successfully establishing entitlement to Roraff fees, barring any other factual or procedure issues.