FITCH, JOHNSON, LARSON & HELD, P.A.

Minnesota Employers Workers Compensation Alliance (MEWCA) Quarterly Case Law Update

June 10, 2021

Presented by Fitch, Johnson, Larson & Held, P.A.

Kelly P. Falsani
kfalsani@fitchjohnson.com
612-746-3464

William R. Moody
wmoody@fitchjohnson.com
612-746-3469

Minnesota Supreme Court Cases

Leuthard v. Indep. Sch. Dist. 912, et. al, No. A20-0893, W.C.C.A. No. WC19-6290 (Minn. April 28, 2021)

The Minnesota Supreme Court reversed a 2020 decision by the W.C.C.A. vacating the Compensation Judge's factual findings and directing the Judge to consider the rare case exception for departure from treatment parameters in Jacka. Since the Employee never raised the rare case exception as an issue at trial and on her Notice of Appeal and only in her W.C.C.A. brief, the Court found that she forfeited that claim.

The Employee suffered an admitted Gillette injury to her neck in 2004. The Employee received physical therapy and medial branch blocks, then began receiving facet joint injections approximately every three months from 2013 onward. She initially described significant benefits from these procedures, both in reduced pain and increased functionality.

In 2017, Dr. Joel Gedan performed an independent medical examination at the request of the Employer and Insurer and concluded that the Employee's facet joint injections were not reasonable or necessary. After receiving the independent medical examination report, the Employee underwent another medial branch block procedure on April 25, 2018. The Employee did not obtain any pain relief from that procedure. The Employer and Insurer denied payment for the procedure, and the Employee filed a Request for Hearing.

The Judge held the facet joint injections were not reasonable and necessary as they exceeded the treatment parameters and the Employee did not demonstrate progressive improvement in her condition to support a departure from the treatment parameters. The Judge did not consider the Employee's claim under the rare case exception.

On appeal, the Employee argued that the finding that facet joint injections were not reasonable and necessary treatment is not based on substantial evidence.

Minn. R. 5221.6205, Subp. 5 governs therapeutic injections for neck pain. Subpart 5.A(2)(c) limits facet joint injections to three discrete injections to any one site. The Employee had received over 20 injections at one site.

The Judge did not consider the rare case exception to the treatment parameters under Jacka v. Coca-Cola, which holds that a compensation judge may depart from the rules *in those rare cases* in which departure is necessary to obtain proper treatment. The W.C.C.A. found that the Compensation Judge should have considered whether the rare case exception applies to permit a departure from the treatment parameters for the Employee's injections, and failure to do so was an error of law.

The Minnesota Supreme Court disagreed and reinstated the Judge's Findings and Orders. The Court said that the Employee forfeited that claim as it was never litigated in front of the Compensation Judge.

Further, the Court held that substantial evidence supported the finding that the treatment exceeded the parameters and was therefore not reasonable and necessary.

Takeaway: Raise any appealable issues at the trial court. Watch out for more rare case exception claims by petitioners to preserve that appeal issue.

Minnesota Workers' Compensation Court of Appeals

Andre Eckberg v. Atlas Roofing, et. al., No. WC20-6374 (W.C.C.A. April 5, 2021).

The Employee appeals the Compensation Judge's finding that he did not sustain a work injury. The Employee began working for Employer in 2005. His job duties consisted of laying down insulation, gluing down materials, pulling nails, replacing wood, working with tar, etc. The Employee alleges that he injured his back on May 7, 2018, working a specific project. However, evidenced showed that the particular project was finished the year prior to the claimed injury date, and that the Employee did not work on the day of the claimed injury.

The Employee began treating for his back in 2018. Throughout 2018 and 2019 he treated with various providers. Throughout these treatment records, the Employee provided numerous explanations for his back pain, and failed to report to the providers that it was work related until summer of 2019. Further, there was conflicting testimony regarding the Employee reporting the injury to the Employer, including testimony from the Employer that they were aware of back pain, but did not know there was a work injury. There was also conflicting testimony regarding whether or not the Employer discouraged reporting work injuries.

The Employee received an expert opinion from Dr. Jack Bert, who found both a specific and Gillette component to the alleged injury. The foundation letter to Dr. Bert was not offered into the record, and there was no other evidence regarding what Dr. Bert knew about the Employee's work activities with the Employer. For all of these reasons, the Compensation Judge found that the Employee failed to show that the Employee suffered a work-related injury on May 7, 2018.

On appeal, the W.C.C.A. highlighted the inconsistencies pointed out by the Compensation Judge, including the failing to discuss the injury to the medical providers, the numerous explanations of his symptoms given to providers, the timeline of the injury not lining up, and the lack of evidence to support a Gillette injury. The W.C.C.A. concluded that substantial evidence supported the Compensation Judge's conclusions that there was no specific or Gillette injury.

Takeaway: The W.C.C.A. will generally affirm the compensation judge's conclusion, as long as those conclusions are supported by substantial evidence, such as the compensation judge outlining the conflicting testimony and conflicting evidence.

Powell v. Masterson Staffing Sols, et. al, No. WC20-6370 (W.C.C.A. April 7, 2021)

Substantial evidence, including an expert opinion and medical records, supported the Compensation Judge's decision that the Employee's 2019 work injury only involved the admitted injury to the Employee's left elbow.

Factual and Procedural Posture

Employee, Anthony Powell, worked for temporary agency Masterson Staffing. He was sent on a work assignment to Worldwide Dispensary. He was to move boxes from a filling machine to a pallet. On January 15, 2019, he tripped over a metal bar and fell, striking his left elbow on a metal box. In his First Report of Injury, he described injuries to his left elbow and left knee. He then did light duty work in the Employer's office shredding old documents. A co-worker testified that the Employee mentioned injuring his left elbow and knee but did not mention any other injuries.

The Employee sought medical care on January 22, 2019, complaining of left shoulder pain and pain in the left later back radiating to the center of his low back. On February 15, 2019, the Employee treated again, complaining of pain in his left hip radiating into his middle and lower back. He also reported that his left arm would lock up. The Employee then saw Dr. Erik Ekstrom of Summit Orthopedics on March 1, 2019, and complained of low back and left lateral hip pain for six weeks after tripping over the bar on the floor. He reported that he fell on his left arm and hip. He also reported a history of a past failed L5-S1 fusion. Dr. Ekstrom diagnosed him with low back pain, facet arthropathy, and foraminal stenosis of the lumbar region. The Employee had physical therapy and a left SI joint injection. He then began complaining of neck problems. A cervical spine MRI was performed on April 27, 2019, and that showed a disc protrusion with probable nerve root impingement at C3-4.

The Employee was evaluated for his left shoulder and elbow pain on May 13, 2019, and had x-rays that showed a healing radial head fracture of the left elbow as well as degenerative changes consistent with a rotator cuff tear in the left shoulder. The physician noted that it was unclear when the rotator cuff tear occurred.

Dr. Mark Thomas evaluated the Employee on June 6, 2019. The Employee stated that he had not had any left shoulder pain or treatment prior to the work injury. Dr. Thomas concluded that the tear was not repairable because of the size and the extent of the muscle atrophy. He stated that the work injury caused a permanent aggravation of the Employee's left shoulder condition but that it was possible that the Employee had a chronic rotator cuff tear prior to that. Dr. Thomas recommended physical therapy and a possible reverse total shoulder arthroplasty. The Employee got a second opinion from Dr. Jonathan Braman. The Employee told Dr. Braman that his symptoms started after the January 2019 work injury. Dr. Braman issued a narrative report stating that the Employee likely had an asymptomatic rotator cuff tear prior to the work injury, and that the injury aggravated the tear to the point where surgery would become necessary and had been a substantial contributing factor to his need for medical treatment.

The Employee saw Dr. Jason Wolff at Interventional Pain Physicians in 2019 for his low back pain and left shoulder pain. He reported the onset of this pain following the work injury. Dr. Wolff eventually issued a narrative report, but he did not review treatment records prior to the work injury. He noted that the date of the Employee's work injury was "the point in time where there was a definable change" in the Employee's symptoms and need for medical care and opined that the work injury was more likely than not a substantial contributing factor to the Employee's medical conditions.

The Employer and Insurer obtained an independent medical examination report from Dr. Mark Friedland. They provided extensive medical records of the Employee's treatment history prior to the January 2019 work injury to Dr. Friedland. Dr. Friedland summarized these records and noted that the medical history showed severe and ongoing low back and left lower extremity symptoms from 2001 to May of 2018 with surgical recommendations, as well as the same modalities of pain management recommended by Dr. Wolff. Dr. Friedland opined that the Employee's lumbar and left lower extremity radicular symptoms were a manifestation of chronic pre-existing conditions and were not aggravated by the fall at work in January 2019. Dr. Friedland also opined that the conditions in his cervical spine and left shoulder would have required years to develop and were not the result of any acute injury or aggravation of January 2019

Dr. Friedland stated that the Employee's hip condition was consistent with a natural progression of chronic osteoarthritis of the hips and there was no evidence of acute traumatic structural pathology. Dr. Friedland stated that the Employee sustained a non-displaced fracture of the left radial head of his left elbow during the fall at work and that x-rays showed that this healed without permanent disability by May 13, 2019, consistent with physical examination. Dr. Friedland stated that this was the only injury the Employee sustained in his January 2019 fall at work.

The Employee filed a Claim Petition. The Employer and Insurer filed a Petition to Discontinue. The Employee filed an Objection to Discontinuance. These issues were consolidated for hearing. At hearing, the Employer and Insurer offered the opinion of Dr. Friedland along with evidence about the Employee's prior medical history showing significant low back and leg pain that had been treated surgically as well as bilateral hip pain since 2013, that he had been awarded Social Security Disability Insurance in 2010 on the bases of his back and leg pain and could only do sedentary work. The Employee relied upon the opinions of Dr. Wolff, Dr. Braman and a treating physician's assistant.

The Compensation Judge found that the Employee had downplayed his previous medical history and did not find his testimony that he had completely recovered from the effects of his prior conditions credible. The Judge accepted the opinion of Dr. Friedland that the Employee sustained only an admitted left elbow fracture as a result of his fall at work. He further found that the Employee reached maximum medical improvement as of May 13, 2019, with no permanent impairment or need for further medical treatment. The Employee appealed pro se.

The W.C.C.A. found that there was substantial evidence to support the Compensation Judge's opinion. The Compensation Judge could choose between conflicting and competing medical

opinions, and this will be upheld unless the facts assumed by the expert are not supported by the evidence. Dr. Friedland's opinions were adequately based on evidence in the record.

Jensen v. Donnelly Custom Mfg. Co., et al., No. WC20-6376 (W.C.C.A. April 8, 2021).

On February 9, 2014, the Employee was injured as a result of a trip and fall while employed as a laborer for the Employer. Primary liability was initially admitted for a right hand sprain and forehead contusion and benefits were paid.

The Employee treated for ongoing right hand pain throughout 2014 which included occupational therapy. In July 2014, the Employee was seen by a Dr. Staiger, a hand specialist, who suspected CRPS and referred the Employee to a pain clinic. The Employee was then seen in September and October 2014 for her left hand overuse symptoms after having worked with right hand restrictions; the Employee was then taken off work.

The Employee filed a Claim Petition in November 2014 seeking benefits for injuries to her head, both hands, wrists, arms, and consequential right upper extremity CRPS. The Employee was seen for an independent medical examination with Dr. Joel Gedan in December 2014. Dr. Gedan found the Employee had no objective findings consistent with CRPS and no permanent partial disability rating.

A hearing was held before Judge Behr in July 2015. Judge Behr denied the Employee's claim that she sustained CRPS as a result of her right hand injury, but that she had restrictions of the right hand that were the result of the work injury. Neither party appealed.

In December 2015, the Employee was seen by Dr. Sena Kihtir for right arm and low back pain. Dr. Kihtir described a mottled appearance of the arm, pitting of the thumbnail, decreased arm and hand hair, decreased range of motion and swelling. The Employee was diagnosed with CRPS that was directly related to the 2014 injury. Dr. Kihtir opined the Employee was permanently and totally disabled secondary to CRPS and persistent right leg weakness in January 2017.

Dr. Gedan again evaluated the Employee in March 2017, and his findings were similar to that in December 2014. He concluded the Employee did not have CRPS and disagreed the Employee was permanently and totally disabled.

In May 2017, the Employee was seen by Dr. Todd Hess who also diagnosed her with CRPS and related it to the 2014 work injury. In July 2017 the Employee was awarded Social Security Disability related to multiple conditions including CRPS. Dr. Hess provided a 44.5% permanent partial disability rating in September 2017.

Dr. Gedan again re-evaluated the Employee in January 2018 and found his findings to be the same and that the Employee did not have CRPS. He also disputed each permanent partial disability rating provided by Dr. Hess and indicated the Employee had a 0% permanent partial disability rating.

The Employee claimed she was permanently and totally disabled based on a low back injury that occurred at the time of the 2014 work injury and based on her right hand CRPS. At the hearing, the Judge found the Employee did not suffer a low back injury in the 2014 fall and the CRPS had been tried and decided in the 2015 hearing. He also stated the Employee's doctors had not indicated these symptoms began after the 2015 hearing and the Employee testified her symptoms remained the same as before that hearing. Based on these findings and principles of res judicata, the Judge denied the CRPS claim.

The Employee appealed, arguing the Judge erred by finding res judicata barred her claim based on the 2015 hearing. On appeal, the W.C.C.A. found res judicata did not bar the Employee from claiming benefits for a time period after 2015, but collateral estoppel could apply, and the Judge had not addressed this issue. This was remanded. The Employer and Insurer then appealed this decision, which the Supreme Court affirmed.

In June 2020, the Compensation Judge stated no evidence or testimony would be considered on remand and ordered submission of written arguments. In the Findings and Order in October 2020, the Judge found the Employee's CRPS claim was barred by the doctrine of collateral estoppel. The Employee now appealed.

The Employee argued the Judge erred in not holding a hearing to allow additional testimony and evidence to consider whether the Employee's condition had changed, which would include new evidence after the 2018 hearing. The W.C.C.A. found that the decision of whether to hold a hearing on remand is within the discretion of the Judge and there was no evidence to indicate the parties had agreed to expand the issues beyond the initial time period between the first 2015 hearing and the 2018 hearing.

The Employee also argued her claim for CRPS is not barred by collateral estoppel. Collateral estoppel applies to matters that were determined in a previous judgement based on the same or different cause of action. The Compensation Judge found the issue in 2015 and 2018 to be the same, whether the Employee had developed CRPS as a result of the work injury. He also found the Employee did not have CRPS based on the opinions of Dr. Gedan.

Substantial evidence supports the Compensation Judge's findings and the Judge's denial of CRPS claims as barred by collateral estoppel. The decision is affirmed by the W.C.C.A.

Warhol v. Corexpo, Inc. et al., No. WC20-6373 (W.C.C.A. April 28, 2021)

The Employee worked as a laborer, carpet room supervisor, and warehouse operations manager. On November 1, 2002, the Employee experienced pain in his neck and lower back while pulling a pallet jack over an obstacle. He suffered from chronic pain thereafter. He eventually underwent a cervical disc replacement surgery in 2012 and a one level fusion surgery in 2016.

In 2016 the Employee's surgeon certified the Employee for medical cannabis. The Employee reported this was helpful in controlling his pain. The Employee could not afford the program, so

he discontinued the use of medical cannabis. In April of 2019, the Employee was certified for intractable pain, and was again eligible for medical cannabis.

On March 5, 2019, the Employee experienced increased neck pain after a long shift at work. He claimed a separate injury to his neck on that date. He eventually underwent a second one-level fusion at C5-6. Travelers was the insurer at the time of the March 5, 2019, injury. They denied the claim.

On August 14, 2019, the Employee underwent an independent medical examination by Dr. Thomas Reiser on behalf of Travelers. He determined the Employee did not suffer a work injury on March 5, 2019, but rather a natural progression from the 2002 work injury and a degenerative condition of the Employee's spine. He also opined the Employee's use of medical marijuana to address the Employee's chronic pain was appropriate.

On October 21, 2019, the Employee underwent an independent medical examination by Dr. Rick Davis, on behalf of Berkley. Dr. Davis concluded the Employee suffered a temporary cervical and lumbar strains in 2002 and that there was no work injury suffered on March 5, 2019. He attributed the Employee's condition to pre-existing degeneration and underlying cervical spondylosis unrelated to any work injury.

On February 12, 2020, Dr. Davis supplemented his report, noting a "lack of general consensus to support the use of medical cannabis," to address pain from degenerative post-surgical spine conditions, and disputed whether the Employee suffered from intractable pain and concluded medical cannabis was not reasonable or necessary to treat the Employee's condition.

The Employee filed a Claim Petition on April 19, 2019, seeking payment for medical cannabis, among numerous other issues. On July 1, 2020, the matter was heard before the Compensation Judge. There were 11 issues before the Court, the most important of which was whether the use of medical cannabis was reasonable and necessary treatment for the Employee's 2002 work injury; and whether the Court had jurisdiction to determine whether claim for medical cannabis is federally preempted.

On August 25, 2020, the Findings and Order was issued. The Compensation Judge determined that medical cannabis was reasonable and necessary and causally related to the November 1, 2002, work injury and that the court had no jurisdiction to consider federal preemption of medical cannabis.

The Employer and Berkley filed an appeal and argued, in part, that the award of medical cannabis is not supported by substantial evidence. The W.C.C.A. determined the Employee's medical records contain numerous references to the Employee's report of pain relief obtained through medical marijuana, the elimination of opioid medications as a modality of pain relief, and the reduction of NSAIDs for pain elimination of pain relief. The Employee also testified the benefits he experiences using medical marijuana, and Dr. Reiser (the independent medical examination physician for Travelers) provided a medical opinion that the Employee's ongoing use of medical marijuana was appropriate treatment. This constitutes substantial evidence supporting the Compensation Judge's decision.

The Employer and Insurer also argued the claim for medical marijuana was preempted by the Federal Controlled Substance Act. However, the Compensation Judge did not consider the claims regarding preemption. The Employer and Insurer argue that because medical care is part of the Workers' Compensation Act, that any issue, even the issue of federal preemption that deals with medical care, is within the jurisdiction of the workers' compensation courts. They further argued that if there is no jurisdiction for this issue, then no medical marijuana benefits can be awarded. The W.C.C.A. felt that this argument did not recognize the limitation jurisdiction of the workers' compensation courts. The W.C.C.A. determined the Compensation Judge did not err in refusing to consider the federal preemption defenses as there are issues that must await the opportunity to be presented to a court with the authority to grant the requested relief. The award of medical marijuana was confirmed.

Anderson v. Menard, Inc., No. WC20-6379 (W.C.C.A. May 3, 2021)

This case was denied by Judge James Baumgarth for claims of permanent aggravations of the Employee's low back and bilateral thumb injuries at Menards. The W.C.C.A. affirmed.

The Employee worked part time at Menards in the receiving department and had a full time job at a circuit board manufacturer. She claimed an unknown date of injury in 2015 when lifting an item from the floor. She did not treat for one and a half months. Menards admitted the injury then denied it after Dr. Nolan Segal opined that her work activities were not a substantial contributing factor to her low back condition.

She also claimed a bilateral thumb injury after that claim was denied by the circuit board company in January 2018. Menards denied and had a supportive independent medical examination with Dr. Jeffrey Husband.

Ultimately, Judge Baumgarth found the medical opinions of Dr. Segal and Dr. Husband persuasive and did not find the Employee particularly credible. The Employee attempted to argue that the Judge did not address if the injuries were permanent aggravations of pre-existing conditions and that Dr. Husband lacked foundation for his opinion.

The W.C.C.A. upheld the Compensation Judge's adoption of the opinions of Dr. Segal and Dr. Husband noting that there was adequate foundation for both and that the Judge considered those reports along with the medical records and Employee's testimony. The biggest dispute on appeal was whether Dr. Husband fully understood her work activities and the potential for having her flexor sheaths pressed down from use of a utility knife when breaking down pallets. The W.C.C.A. pointed out that the Employee's own testimony at deposition and her reports to her own providers and Dr. Husband never mentioned the significance of that utility knife work.

Because it is her burden to prove her claim and because her own doctor did not find causation to her Menards job based on similar reports of her work activity, the W.C.C.A. found that Dr. Husband had adequate foundation and that the Judge's adoption of it would not be disturbed under the substantial evidence rule.

Senfter v. Bimbo Bakeries USA. Inc., No. WC20-6385 (W.C.C.A. May 4, 2021)

The Employee delivered baked goods from Bimbo Bakeries to stores and schools beginning in 1990. This work involved loading and unloading goods and stocking shelves. He would frequently have to crouch for significant periods to stock lower shelves.

By 2010, he began to intermittently treat for knee pain. He reported that his knees had a lot of wear and tear. By 2016, it was determined that he had bone on bone arthritis and needed bilateral knee replacements. He had rounds of cortisone and Synvisc injections.

By September of 2018, the Employee was recommended unloader braces and physical therapy as a way of putting off surgery. He also told his physician that he was going to look into his knee problems being a Gillette claim, mentioning the specific legal term. In June 2019, the Employee was recommended bilateral knee replacements, and the treating physician recorded his opinion that this was a work injury. Shortly thereafter, the Employee reported the injury, a First Report of Injury was filed, and the claim was denied. Subsequently, the Employee had his right knee surgery performed and suffered his first lost time.

At hearing, the Compensation Judge adopted the treating physician's opinions that the Employee had suffered a Gillette injury and utilized the date of injury of September 2018 when the Employee first discussed the possibility of that injury with his physician. However, he denied benefits on the basis that statutory notice was not provided to the Employer and Insurer.

On appeal, the Employee argues that the correct date of injury was either when first lost time took place, or when the treating physician recorded his opinion that this was a work injury. The W.C.C.A. was not persuaded and found that the Compensation Judge had substantial evidence to assign that date of injury. They also found that the Employee had sufficient knowledge to trigger the 180 notice requirement when he raised the issue of a Gillette injury with his doctor.

Price v. Listul Erection Corp., WC21-6394 (W.C.C.A. May 7, 2021)

The Employee fell from 15 feet on August 27, 1999, and suffered a comminuted calcaneal fracture. He then collected 104 weeks of temporary total disability benefits. He secured permanent restrictions for his heel condition. He worked for a few months as a telemarketer shortly thereafter and then never found employment again.

The Employee brought a claim that he was permanently and totally disabled. The Employer and Insurer collected independent medical examination opinions and vocational opinions that his work injury did not render him permanently and totally disabled. The Employee proceeded to hearing Pro Se and failed to offer any exhibits.

The Compensation Judge denied the Employee's permanent total disability claim on the grounds that he had not satisfied the 17% permanent partial disability threshold. As the Employee failed to offer any evidence that he exceeded that threshold, the W.C.C.A. affirmed.

Ronald Brand v. Untied Road Serv. Midwest, WC20-6384 (W.C.C.A. May 12, 2021)

The Employee was an over-the-road truck driver who suffered a motor vehicle accident while driving in Wisconsin. The only employment activity that took place in Minnesota were pre and post trip inspections at his home, and his home terminal was in Indiana. The Employer and Insurer paid workers compensation benefits under Indiana law. The Employee then filed a Claim Petition seeking benefits under Minnesota law. The Employer and Insurer filed a Motion to Dismiss based upon lack of jurisdiction.

The Compensation Judge considered the Motion to Dismiss and issued an Order denying the same without findings of fact, reasoning that inspections were primary duties of employment, and that "dismissal is not appropriate at this time." The Employer and Insurer appealed as a matter of law, arguing that the Compensation Judge determining that the Employee performed primary duties in Minnesota, thereby conferring jurisdiction.

The W.C.C.A. dismissed the appeal on the grounds that this was not a final decision on the merits, by noting that the "case is simply reserved for trial."

Adika v. ABM Janitorial Services, WC20-6388 (W.C.C.A. May 21, 2021)

The Employee suffered an admitted right wrist and shoulder injury on April 17, 2009. Trigger point injections were recommended and denied by the Employer and Insurer. In response, the Employee filed a Medical Request on the issue. The Employee prevailed at the administrative conference, with the Decision and Order served and filed on June 12, 2020. On June 30, 2020, the Employer and Insurer field a Request for Formal Hearing by mail with the Department of Labor and Industry. On November 12, 2020, the Office of Administrative Hearings responded to a letter from the Employer and Insurer's attorney, a Compensation Judge at the Office of Administrative Hearings advised that they would not be taking action on the Medical Request filed with the Department of Labor and Industry.

On November 23, 2020, the Employer and Insurer filed a Request for Formal Hearing with the Office of Administrative Hearings. Two days later, the Compensation Judge filed an Order Denying Request for Formal Hearing.

The Employer and Insurer appealed, arguing that filing their Request with the Department of Labor and Industry conferred jurisdiction on the Office of Administrative Hearings to hear it, relying on Minn. Stat. §176.106. However, the W.C.C.A. affirmed, noting that statute was superseded by a more recent, conflicting statute. Requests for Formal Hearing must be filed with OAH.

Bosquez v. Super America, No. WC20-6382 (W.C.C.A. May 26, 2021)

This case involves a gas station attendant with claims involving an aggravation injury from being struck by a Gatorade case in the head and neck area. The Employee's claims were accepted by

the Employer and benefits paid until Dr. Khalafalla Bushara provided a neurological independent medical examination that the Employee had a temporary myofascial strain of her neck and mild closed head injury. Dr. Thomas Gratzer also provided an independent psychological examination report denying that the July 28, 2018, injury substantially aggravated her pre-existing depression and anxiety.

Judge Kulseth denied the Employee's claims for ongoing benefits after the consolidated hearing on October 2, 2020, by generally adopting opinions of Dr. Bushara and Dr. Gratzer.

An interesting claim made on appeal was that the Judge did not consider the six McClellan factors regarding aggravation injury of a pre-existing condition. However, the Employee never requested that during the hearing. Also, Judge Kulseth went through the medical records, testimony, and expert reports that addressed pre-injury status versus post-injury status in determining the nature and extent of the neck and head injury and in adopting the full denial of the mental health claim.

Finally, the Employee had a diagnosis of convergence insufficiency that was alleged uncontroverted. The W.C.C.A. noted that the Employer never obtained an expert report on that claim but did not need to as the records showed that her ocular health was within normal limits and her prior records showed the same or similar condition. Taking that into consideration along with Dr. Bushara's temporary injury opinion was enough to deny that claim.

Takeaway: TBI claims often require numerous IMEs and result in protracted litigation. Obtaining all prior medical for neurological and mental health treatment is vitally important.

Petrie v. Todd County, WC20-6383 (W.C.C.A. May 28, 2021)

The Employee in this case filed a Claim Petition asserting PTSD stemming from several altercations with inmates while working as a correctional officer. The Employee received a diagnosis from her primary care medical doctor that she "clearly had" PTSD. She also underwent counseling sessions with Greta Kramer, M.S., who diagnosed her with PTSD and depression. The Employee underwent an independent psychiatric examination with Dr. Scott Yarosh who diagnosed her with PTSD, among other conditions. He opined that the psychiatric condition was caused by pre-existing factors, and the work incidents were a temporary aggravation of this condition.

The Compensation Judge found that the Employee had not established a compensable claim for PTSD based on a diagnosis she obtained from a license psychiatrist or psychologist, as required by Minn. Stat. §176.011, Subd. 15(d).

The Employee argued on appeal that the Compensation Judge erred by finding the Employee had not established a compensable claim for PTSD with a diagnosis from a licensed psychiatrist or psychologist pursuant to Minn. Stat. §176.011, Subd. 15(d). She argued that she could rely on Dr. Yarosh's opinion and that it met the statutory requirement set forth in Minn. Stat. §176.011, Subd. 15(d), and that causation for this diagnosis must be considered as a separate element under

Minn. Stat. §176.011, Subds. 15(a) and 16. She argued that the causation element could be established by other evidence presented at hearing.

The W.C.C.A. ultimately agreed with the Employee that Minn. Stat. §176.011, Subd. 15(d), does not require that the diagnosis of PTSD by a licensed psychiatrist or psychologist include an opinion regarding causation for that condition. Therefore, the W.C.C.A. reversed the Compensation Judge's finding that there was no diagnosis established pursuant to Minn. Stat. §176.011, Subd. 15(d) and remanded for a determination on causation.

Before this case was heard by the Compensation Judge again, the Employee acquired an opinion by Ms. Murphy, a licensed psychologist, who opined that the Employee suffered from PTSD and that the work altercations were a substantial contributing factor to that condition. The Employee also acquired a supportive opinion from Dr. Michael Keller.

The Employer and Insurer also acquired a new independent psychological examination from Dr. John O'Neil. Dr. O'Neil opined that the Employee was not exposed to sufficient trauma, nor did she suffer from intrusion symptoms.

At the second hearing on July 29, 2020, the Compensation Judge awarded benefits on the basis that the Employee did suffer from PTSD and it was causally related to the altercations at work.

The Employer and Insurer appealed, attacking the foundation of Dr. Keller's opinion, and alleging that the Findings and Order was ambiguous as to whether the injury was established under the PTSD statute or as a physical-mental injury.

The W.C.C.A. found that Dr. Keller's foundation was not objected to at hearing. Regardless, they also found that Dr. Keller's opinions were supported by other medical providers in the record that found the Employee satisfied the elements of DSM-5 and affirmed.