CASE LAW UPDATE

December 7, 2017

BY:

HEACOX, HARTMAN, KOSHMRL, COSGRIFF, JOHNSON, LANE & FEENSTRA, P.A.
Attorneys at Law

550 Hamm Building
408 St. Peter Street
St. Paul, Minnesota 55102
TEL: 651.222.2922 – FAX: 651.222.2066

Tom W. Atchison
550 Hamm Building
408 St. Peter Street
Direct: (651) 846-7055
Email: *tatchison@heacoxlaw.com*

Eric S. Westphal
550 Hamm Building
408 St. Peter Street
Direct: (651) 846-7022
Email: *ewestphal@heacoxlaw.com*

TABLE OF CONTENTS

MINNESOTA SUPREME COURT CASES

EVIDENCE- EXPERT OPINIONS

Gianotti v ISD 152, No 16-0629, (Minn. Feb. 8, 2017)

The Supreme Court reversed the W.C.C.A. and held that the W.C.C.A. had erred when it ruled on the forfeited issue of whether a psychologist was competent to provide an expert opinion and when it reversed the compensation judge's determination that there was an adequate factual foundation for the psychologist's opinion.

The employee was a bus monitor and suffered a fall when the bus stopped suddenly on October 7, 2014. She hit her arm and claimed that she hit her head as well. She was seen a week later by a doctor who found that she had no concussive symptoms.

She self-reported certain symptoms later on that a different doctor thought were indicative of post concussive syndrome. By early 2015 she reported suffering panic attacks. She was seen by Dr. Arbisi, Ph.D., in March 2015 for an IME. He examined the employee along with her records, some of which had not been seen by any of her treating doctors and further had the employee undergo certain tests that were not performed by the treaters in this case.

He opined that she was faking it, my words not his, and that the employee had not suffered a concussion of any kind. The Court made special note of the fact that Dr. Arbisi is not a medical doctor but does hold a Ph.D.

The matter was heard before a Judge who adopted Dr. Arbisi's report and conclusion in their entirety. Both parties agreed that despite the lack of a medical degree, Dr. Arbisi was professionally competent to render his opinion.

The employee argued on appeal that there was insufficient basis for Dr. Arbisi's opinions. The W.C.C.A. reversed the Judge's findings though based on the finding that he was not competent to render his opinions and there was a lack of foundation for his report because he had not reviewed the video of the accident. See, *Gianotti v ISD 152*, 15-5868 (March 24, 2016).

The Supreme Court reversed and held that the issue of Dr. Arbisi's professional competence had effectively been forfeited at oral argument when both parties agreed that he was competent. That issue was not specifically raised in the Notice of Appeal to the W.C.C.A. It was also not raised in the briefs of the W.C.C.A. either.

The Court then held that the decision as to which medical report to adopt was within the Judge's discretion, See *Hengemuhle*, and further held that the W.C.C.A. erred when it reversed on the basis of a lack of foundation.

The employee argued that the IME 's report lacked foundation because he had not been shown the video of the original injury. The Court noted that the claim of a lack of foundation for

the IME opinion "perplexed" them since none of the treating doctors had apparently reviewed it either. Thus, the Court held that Dr. Arbisi's opinion had as much foundation as any other in the case and the Judge was free to adopt his opinion.

Mattick v. Hy-Vee Food Stores, 2017 WL 2960745, ---N.W.2d --- (Minn. 2017)

The Supreme Court held that because the compensation judge's decision was supported by substantial evidence, the W.C.C.A. clearly and manifestly erred when it reversed the compensation judge's factual finding that the employee's work injury was not a substantial contributing cause of her surgery that addressed a pre-existing arthritis condition.

The W.C.C.A. found that Dr. Fey's expert opinion lacked adequate factual foundation. An expert opinion lacks adequate factual foundation when (1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion, (2) it does not explain the basis for the opinion, or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence. The opinion need only be based on enough facts to form a reasonable opinion that is not based on speculation or conjecture. Whether an expert's opinion rests on adequate foundation is a decision within the discretion of the trial judge, subject to review for abuse of discretion.

The Supreme Court held that here, like in *Gianotti,* the W.C.C.A. rejected Dr. Fey's entire report based on a few statements that it took out of context. The specific portions of Dr. Fey's report that the W.C.C.A. criticized failed to establish that the report as a whole lacked adequate foundation. The facts the Dr. Fey assumed were supported by the record. Accordingly, Dr. Fey's opinion rested on adequate foundation and the compensation judge did not abuse its discretion by relying on it.

SETTLEMENTS

Rochel v Schwan's Home Service, No. WC15-5884 (W.C.C.A. May 20, 2016)

The Court held that there was ambiguity in a settlement stipulation and that the employee never intended to close out all pain modalities even though the document closed out "any and all future chronic pain treatment." The Court reversed a finding that closed out certain treatment including a pain evaluation and prescription medications.

The employee was injured in 2010 and had several surgeries. She was prescribed Vicodin for pain and eventually was evaluated at, but apparently never formally enrolled in, the Phoenix pain m management program. After disputes arose over medications and other treatment the parties entered into a full final stipulation in 2014 that closed out a list of treatment modalities but left medical benefits open. There was no close out of pain or narcotic medications.

The stipulation also provided "After the conclusion of the Phoenix Chronic Pain Center program in which the employee is presently enrolled is complete, any and all future chronic pain treatment is closed ." The employee was never formally enrolled in that program however.

Soon thereafter, on a referral from the doctor who had evaluated her at the Phoenix program, the employee saw Dr. A.V. Anderson who evaluated her for pain and prescribed additional pain medications. The insurer refused payment claiming that they were closed out by the terms of the stipulation.

The Judge found that the treatment provided by Dr. Anderson, including the prescriptions for opioid medication, was chronic pain treatment that had been closed out by the stipulation. There was apparently no decision on whether it was reasonable or necessary.

The employee appealed and the W.C.C.A. reversed and found the stipulation was ambiguous in that it appeared to close out only the type of pain treatment program, i.e. an inpatient program, of the sort offered at Phoenix and did not close out all other pain treatment modalities. The Court further held that the determination of ambiguity is a question of law to be determined by the courts *de novo*.

The W.C.C.A. offered a definition of a pain program as follows: "In workers' compensation practice, the term 'chronic pain treatment' describes an interdisciplinary approach to intractable pain which is specifically designed to manage pain without the lengthy use of opioid medications." The W.C.C.A. noted the Phoenix program was designed to get employees off opioids and that there was clear distinction between that type of program and what the employee was treated for later.

Further, the use of the term "all" could still be construed as limited to the type of pain programs Phoenix offers and not literally "all" other forms of pain management. The Court then discussed the employee's intention to close out a limited form of pain management and not all opioid medications - since there was no specific close-out of medications of that type.

The W.C.C.A. found that the stipulation was ambiguous, that ambiguity is construed against the drafter, and reversed the denial of benefits.

In a summary disposition, the Supreme Court affirmed the W.C.C.A.'s decision regarding the ambiguity of the settlement but reversed, without much in the way of opinion, regarding the claim for medical expenses and remanded to the Judge for findings on the reasonableness of the treatment at issue.

STIPULATIONS- VACATION OF AWARD -INTERPRETATION

Ryan v Potlatch Corp., 882 N.W.2d 220 (Minn. 2016).

The Supreme Court reversed the W.C.C.A. finding that the employee's claimed depression was within the scope of the stipulation and was therefore closed out by full final language in a stipulation for settlement. The claimed depression was thus "reasonably anticipated" by the parties at the time of settlement. The Court also remanded the case, holding that the employee

would now have to petition to vacate the stipulation under 176.461 in order to make the depression claim.

The employee was injured in 2002 and the claim was settled in 2003. The stipulation was a full final settlement with future reasonable and necessary medical treatment left open. It did not mention psychological claims at all in the close outs of benefits.

By 2009 the employee underwent further treatment, including a 3-level fusion, and developed psychiatric symptoms that the parties agreed were due to the underling low back injury. The employee filed a claim for treatment of the psychiatric claim as well as for PT benefits due to that claim.

The insurer filed a motion to dismiss, citing the 2003 stipulation. The Judge denied that motion, finding that there was evidence to conclude that the employee had developed a consequential injury based in the psychiatric findings. An evidentiary hearing was held at which the parties agreed that the employee's psychiatric conditions were a direct consequence of the admitted low back 2002 injury. The parties also stipulated that the employee was PT and that her psyche condition was a substantial contributing factor to her PT status.

The Judge determined that the 2003 stipulation did not need to be vacated in order to proceed on the merits. The W.C.C.A. affirmed.

The Supreme Court reversed and remanded the case and held that a stipulation can close out not only the worker's compensation injury but also conditions, such as a claimed consequential injury, arising out of that original injury and that it is not necessary that those be specifically referenced in the stipulation.

The Court noted though that the stipulation "must resolve the workers' compensation injury, but also any conditions or complications out of that injury that were, or should have been, reasonably within the contemplation of the parties at the time of the agreement." Id. at 225.

The Supreme Court also noted that on these facts, the psychological injury was reasonably anticipated at the time of the settlement. It was significant that the language settled "all claims under the [Act] which the employee may have as a result of the ... injury."

The Court went on to hold that depression is a condition that arises out of and is a consequence of the original injury - thus closed out by the stipulation.

Second, depression is a condition that may arise from the pain associated with a chronic back condition- such as the employee had.

The case was then reversed and the employee was informed she would have to petition to vacate the original stipulation under the terms of Minn. Stat. 176.461.

That appears to have been the main issue here - i.e. whether the employee could proceed without having to petition to vacate and prove up one of the statutory factors for that. The lower courts

had allowed the claim to move forward without that but the Supreme Court's decision here makes that one difficult.

Hudson v. Trillium Staffing and XL Insurance, 896 N.W.2d 536 (Minn. 2017)

Following the employee's injury, the parties settled on a full, final, and complete basis, with medical left open for $125,000.00. Following the settlement, the employee began seeing a psychiatrist who assigned a PPD of 75% for his traumatic brain injury. The opinion also resulted for the first time in a medical opinion that the employee was unable to work due to his injuries.

The employee then filed a Petition to Vacate the stipulation. The W.C.C.A. granted the petition. The Supreme Court reversed.

The W.C.C.A. reasoned that such a substantial change in PPD rating and an accompanying inability to work necessarily satisfied the statutory standard.

The Supreme Court found that the W.C.C.A. failed to sufficiently scrutinize the factual foundation for the expert's opinions. Here, the PPD rating lacked foundation. It was descriptively flawed because it never indicated what facts formed the basis for her opinion that the injury warranted a PPD rating of 75%. Nor did it explain how she calculated such a high PPD rating. In addition, the PPD rating is not consistent with Minn. Rule 5223.0360, subp. 7D(4). In short, the expert assigned a PPD rating that was manifestly contrary to the facts in the record. The employee did not require sheltering. To the contrary, he was independent in his daily activities, he rents a room and lives on his own. He cares for his son. He manages his finances, medications, and personal affairs. He meets with friends and volunteers at his son's school.

ARISING OUT OF AND IN THE COURSE OF

Hohlt v. University of Minnesota, 897 N.W.2d 777 (Minn. 2017)

The Supreme Court held that the employee's injury, which occurred when she slipped and fell on ice while walking on university-maintained sidewalk to a parking ramp owned by the university, after finishing her work for the university, was compensable.

The employee was walking from her work place to a parking ramp owned and operated by her employer, the U of M. The parking ramp was a public ramp, but it was owned and operated by the U of M. She walked from the building that she worked in that day to the parking ramp where she parked. It was sleeting and snowing. She carefully walked the four blocks between the work building and the parking ramp. The city of Minneapolis owns the sidewalk, but the U of M, as an adjacent property owner has the responsibility to maintain it, including keeping it clear of snow and ice. She slipped on ice and fell.

For an injury to arise out of employment, a causal connection is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment, or ...peculiarly exposes the employee to an external hazard whereby he is subjected to a different and a greater risk than if he had been pursuing his ordinary personal affairs. When the employment creates a special hazard from which injury comes, then, within the meaning of the statute, there is that causal relation between employment and the injury.

Here, the causal connection existed because the employee's employment exposed her to a hazard that originated on the premises as part of the working environment. The hazard was the University-maintained sidewalk. She was moving from one part of her employer's premises to another.

The test is not whether the general public was also exposed to the risk, but whether the employee was exposed to the risk because of the employment.

The Court found that the employer tried to take *Dykhoff* a step too far when it argued that an icy sidewalk is not an increased risk because all Minnesotans face the risk of falling on winter ice or snow.

When an employee encounters an increased risk of injury from a hazard on the employer's premises because of her employment, her injury is one arising out of employment under the statute.

Next, the Court addressed whether it was in the course of her employment here. In so doing, they noted that an employee is in the course of employment while providing services to the employer and also for a "reasonable period beyond actual working hours if an employee is engaging in activities reasonably incidental to employment." A reasonable time has included up to 45 minutes before the official workday begins and up to an hour after the official workday ends. Here, the employee simply walked the four blocks from the work building to the employer's parking ramp, shortly after work.

The Court also held that by establishing or sponsoring a parking lot not contiguous to the working premises, the employer has created the necessity for encountering the hazards lying between these two portions of the premises. No such considerations apply to a trip to some bus stop or to some parking location on a public street over which the employer has no conceivable control.

Here, the employee sustained the injury shortly after leaving work at a University building and walking directly on the University-maintained sidewalk to the University's parking ramp. Thus, she was injured in the court o her employment.

Kubis v. Community Memorial Hospital, 897 N.W.2d 254 (Minn. 2017)

In this case, the employee fell and injured her shoulder while rushing up a staircase at the workplace of her employer. The compensation judge denied her claim. The W.C.C.A. reversed. The Supreme Court reversed and concluded that the W.C.C.A. impermissibly substituted its own view of the evidence for that of the compensation judge and ordered reinstatement of the compensation judge.

The employee needed to return to the second floor, after a mock code and debriefing, to complete her report to the next shift and clock out. She wanted to go upstairs because she was afraid of the overtime and she wanted to report off to the next crew. The elevators just closed. She decided to take the stairs rather than wait for another elevator because she thought it would be faster. The stairs are open to the public as are the elevators. She generally didn't take the stairs as she feared tripping. As she hurried up the stairs, she tripped and fell. There was a handrail on each side of the stairwell, the stairwell itself was not defective in any way, and there was nothing on any of the stairs that could have caused the fall.

The employee's supervisor told the employee to stay and complete her documentation, thus authorizing overtime. She had not been disciplined for working overtime. In fact, she had worked overtime in 10 of the 13 pay periods preceding her fall.

Among other findings, the compensation judge specifically found that the employee's claim that she was rushing up the stairs because she felt pressured to do so because of the overtime was not credible.

The W.C.C.A. cited two reasons from the record that could support the claim of increased risk: fatigue and hurrying. The W.C.C.A. concluded that there was a lack of substantial evidence to support the fatigue claim.

SECTION 82 CLAIMS – UNDOCUMENTED EMPLOYEES

Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267 (Minn. 2017)

The Supreme Court held that the employee raised a genuine issue of material fact as to whether the employer discharged him and as to whether the discharge was motivated by the employee seeking workers' compensation benefits. Further, the Court held federal immigration law does not preempt the employee's claim. Therefore, the summary judgment that was granted was revered and the case was remanded to the district court for further proceedings.

The employee was undocumented. His visa expired. He bought and used a false social security number with the intention to apply for jobs. He presented the false number to the employer when he was hired. He then worked for the employer for about 8 years, until December 20, 2013. According to the employee, the employer knew for the majority of his employment that he was not authorized to work in the U.S. The employer also received annual notices from SSA stating that the social security number that the employee provided did not match his name.

On September 23, 2013, the employee sustained an injury at work. He was off for some time. He made a First Report of Injury. He hired an attorney to give him advice about the process. When he told the employer that he had a lawyer, the employer responded that he hated lawyers and said, "the bridge between us is broken." The Claim Petition was filed on November 6, 2013. The employee's deposition was taken on December 11, 2013. In it, the employee was asked if he was

authorized to work in the U.S. The employee testified that he was not. One or two days later, at work, the employer asked the employee whether he was "illegal." The employee stated that the employer knew he was. Then the employer told him that he could not work for them anymore because of his legal situation.

About a week later, the employer signed a letter to the employee putting him on an unpaid leave of absence. He was further advised that once he provided the employer with legitimate paperwork showing that he could legally work in the U.S., he could come back and work for them.

The Supreme Court found that an employer discharges an employee when the employer ends the employment relationship between them with no intention to resume it. The actual intent of the employer is key in deciding whether a discharge occurred because the employer is the party with the greatest control over the employment relationship. If an employer placed an employee on a "temporary" leave, but intends that the leave should never end, then the employer is really discharging the employee. The focus on the employer's actual intent prevents employers from avoiding a retaliation charge by simply attaching a different label to what is in reality a discharge.

Here, the employer asserted that it did not discharge the employee because the employee can return to his job once he presents legal authorization to work in the U.S. The Court, however, found that taking the facts in the light most favorable to the employee (because it was on summary judgment), there was reason to doubt that the employer ever intended to rehire the employee. If the employer's motivation for placing the employee on leave was retaliatory, it implies that the employer intended the unpaid leave to be permanent. In the end, the question of whether the employer intended the leave to be permanent is a factual dispute, to be resolved by a factfinder.

In addition, the employer also contended that the federal Immigration Reform and Control Act required it to place the employee on leave and that the employer cannot be held liable for taking an action required by federal law. The Court held that because the IRCA's aim is to discourage employment of undocumented workers, removing labor protections would undermine that goal by making the employment of undocumented workers cost-effective.

WORKERS' COMPENSATION COURT OF APPEALS CASES

ARISING OUT OF AND IN THE COURSE OF

Crushshon v New AM Hospitality, No. WC16-5936 (W.C.C.A. August 24, 2016).

The W.C.C.A. affirmed a finding awarding benefits where the employee tripped over an irregular walkway and fell. This case is very fact-specific and it was pretty clear that this was a different case from *Dykhoff* but that didn't stop somebody from asserting that as a defense.

The employee fell and immediately indicated that she had tripped over a brick on an irregular walkway leading into the employer's building.

What was interesting was the W.C.C.A.'s assessment of the *Dykhoff* holding. The Court stated as follows: In considering *Dykhoff*, it is important to recognize what the decision of the Supreme Court did and did not do. What the Supreme Court did was to reject the balancing test used by this court in *Bohlin* and in subsequent decisions. What the Supreme Court did not do was to create a new rule of law for deciding if a personal injury arises out of employment. Instead, the court relied on previous case law and reiterated that there must be some "causal connection between the injury and the employment." *Dykhoff*, 840 N.W.2d at 826, 73 W.C.D. at 871.

The W.C.C.A. noted further that "the *Dykhoff* court noted that the required causal connection "is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment."

The Court went on to clarify that "the hazard encountered by an employee need not be unique to persons in the course of employment or need not be an exposure encountered only by a person in the course of employment."

Here the walkway was irregular and two others had recently fallen in a similar spot. On those facts, the Court affirmed the finding that the injury arose out of the employment.

See also, *Legatt v Viking Coca Cola*, WC 16-5994 (W.C.C.A. January 26, 2017) where the employee's claim was allowed and affirmed where the employee was found to have also tripped on an irregular and crumbling concrete floor.

Groestch v Kemps, No. WC15-5844 (W.C.C.A. April 4, 2016), affd w/o opinion October 31, 2016

The W.C.C.A. affirmed a finding that the injury was compensable where the employee was injured on the way to a medical appointment and did a personal errand as a part of that travel. The Court held that the so-called dual purpose trip test applies.

The employee was injured in May 2014. He began treating with a doctor and on June 26, 2014 he was on his way to see that doctor for the purpose of getting treatment for that injury. On the way

though he stopped to perform a personal errand. This took him slightly out of the way of a direct route to the doctor's office. He left and was on his way to the doctor's office when he was rear-ended by another vehicle.

The Judge determined that the employee was in the course of his employment at the time of the motor vehicle accident of June 26, 2014, and that he sustained injuries to his neck, upper back, and lower back. The insurers appealed. The W.C.C.A. affirmed.

The W.C.C.A. first noted that there is a long-standing rule in Milmesota workers' compensation law that an employee is in the course of employment when traveling to a medical appointment to treat for a work injury. As a result, injuries sustained during the travel are compensable.

The Court then dealt with the claim that there was a non-work related deviation from the direct route that took this out of the realm of work comp. The Court cited a long string of prior cases discussing the "dual purpose trip doctrine and held that on these facts, "it is appropriate to apply the "dual purpose trip" analysis. The evidence adequately supports the compensation judge's determination that seeking medical care for the admitted work injury was the primary purpose to Mr. Groetsch's trip even though there was also a personal purpose as well."

The insurer had argued that if the employee had driven to Chicago, for example, that would certainly have not been compensable. The Court noted that, but held that each case will be determined on its own facts and that here the accident happened within a few miles of the doctor's office. The question of whether the dual-purpose doctrine applies or whether the deviation is so substantial as to obviate the business purpose of the trip is thus for the Judge to determine based on the facts of each case.

Lein v. Eventide, (W.C.C.A. Dec. 7, 2016)

While descending the stairs on her way to the first floor to use the vending machines, the employee's "right foot slipped out from underneath" and she fell backwards. The employee described this stairwell as the "back stairwell." The WCCA specifically noted that photographic evidence showed the stair treads were unpainted concrete and did not have an anti-slip thread surface.

The employer and insurer denied the employee's claim, contending that the employee's injuries did not arise out of her employment and argued that the employee had the burden to show an increased risk of injury. The compensation judge determined the injury did not arise out of the employment and found that the employee was not "exposed to an increased risk as required by *Dykhoff*."

The W.C.C.A. reversed and remanding, holding that the employee provided the requisite causal connection to conclude that the injury arose out of employment. Contrary to *Dykhoff* (where the employee was unable to provide any connection between her injury and her employment other than her mere presence on the employer's premise), the employee in the instant case testified her

foot slipped, causing her to fall. Furthermore, it was uncontroverted that the stairs did not have anti-slip treads.

The W.C.C.A. also determined that the compensation judge's application of a legal standard based on a negligence action was prohibited by the Workers' Compensation Act and contrary to *Dykhoff.*

Roller-Dick v. Centra Care Health Sys., (W.C.C.A. Oct. 19, 2017)

The employee worked on the second floor of the employer's building and slipped while using a stairway to exit the building at the end of her workday. The employee did not use the railings; she had a purse hanging from the crook of her elbow and was using both hands to carry a plant. While descending the second of about 10 stairs, she slipped, dropped the plant, and grabbed one of the railings as she fell down the stairs.

At the time of the fall, the employee was wearing rubber-soled shoes and testified she felt that the rubber on the sole of her shoes stuck to the rubber surface of the stair material. Relative to the stairs, the flooring was covered in rubber, there were hand railings on either side, there was no water present on the stairs, and the stairs were not defective or non-compliant with building or OSHA standards.

The employer and insurer denied the employee's claim, contending that the employee's injuries did not arise out of her employment. The compensation judge found the employee's injury did not arise out of her employment because the employee failed to establish an increased risk of injury [on the stairs]. The WCCA reversed and remanded, holding that the employee was not obligated to show there was "something" about the flight of stairs which further constituted an increased risk or hazard because the flight of stairs alone increases the risk of injury and therefore, the injury arose out of her employment. Contrary to its previous holding in *Lein v. Eventide,* the WCCA held that an employee does not have to establish that "something about" the stairs (e.g. lack of non-slip tread, lack of access to hand rails) because the stairs alone increase an employee's risk of injury.

The WCCA compared the facts of the instant case with *Hohlt v. Univ. of Minn.*, 897 N.W.2d 777 (Minn. 2017) and *Kirchner v. Cnty. of Anoka*, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983). Specifically, the WCCA noted stairs alone, like icy sidewalks, increases the risk of injury (as in *Hohlt*). Furthermore, when an employee is injured while descending stairs located on the employer's premise and the injury occurred when the employee was unable to utilize the available handrail, the employee has provided the requisite causal connection to establish that the injury arose out of her employment.

Williams v ISD 2396, No. WC15-5820 (W.C.C.A. Feb. 17, 2016)

The W.C.C.A. affirmed a finding of compensability where the employee was injured setting up some bleachers.

The employee was injured in January 2014 when she was helping to set up bleachers. As she descended the stair her foot hit a metal lip on one of the stairs and she felt immediate pain in her foot.

The insurer denied the claim asserting a *Dykhoff* defense since the stairs were not defective in any way and they were not slippery or wet. The Judge found that the injury was compensable and the W.C.C.A. affirmed.

The Court noted that it had dealt with a very similar argument in *Hohlt v. University of Minnesota*, No. WC15-5821 (W.C.C.A. Feb. 3, 2016), discussed last year, and rejected the insurer's defense that the stairs presented no special danger not faced by the public, since they were going to presumably be on the stairs shortly anyway.

In *Dykhoff*, the employee had slipped for no apparent reason. Here the Court found that the metal lip placed the employee at an increased risk- along with the fact that she was on stairs anyway, and determined that the injury was compensable.

The Court noted that the employee had set up the bleachers about 100 times over the course of her employment, which was a task which required her to ascend and descend them several times each time they were set up. To the extent that descending and ascending bleachers bears some unusual risk of a misstep and of injury, the employee's risk of such an injury was thus increased by the duties of her employment.

In addition, the employee testified that she was rushed by the limited time available to complete the set-up tasks in the gym that day. The Judge could reasonably conclude that the risk of injury the employee confronted in descending bleachers was increased by the requirements of the employment beyond the risk she would otherwise have faced in her daily life.

The Court rejected the claim that she made no mention of being rushed in the First Report and found that her later testimony was not inconsistent with that.

ATTORNEYS FEES - RORAFF FEES- GENUINE DISPUTE

Engren v Majestic Oaks, No. WC15-5881 (W.C.C.A. June 6, 2016)

The Court held that where the employer and insurer failed to acknowledge the employee's claim for payment of a medication and orthotics made four months before the hearing, went to hearing on the issue, tried and lost the issue, and did not appeal the issue, there is sufficient evidence that a genuine dispute existed.

The Court also held that where the record did not establish that the medical benefits approved were recovered by the employee, the employee's attorney is not entitled to *Roraff* fees solely for obtaining approval of the medical benefits. The matter was remanded to determine whether the employee in fact recovered the medical expenses.

The employee was injured and settled her claim in 2010 leaving only medical benefits open. In 2014 the employee's attorney requested certification of a dispute over treatment at MAPS. There were denials of the requested treatment. The employee later made requests for additional treatment for orthotics and for something called "Savella" but the insurers never responded to those.

The Judge ordered the orthotics and the Savella. As of several months later though there was no bill for the Savella or the orthotics and no evidence the employee ever got it.

The employee's attorney filed for *Roraff* fees and there was an objection. That matter was tried and the Judge found that there was a genuine dispute over the orthotics and Savella and ordered a $3,000.00 *Roraff* fee.

The W.C.C.A. found that there was a genuine dispute over the orthotics and the Savella based on the unique facts of this case. There was clear evidence that the items were placed in issue for trial and the Judge specifically found that there was a genuine dispute.

The second argument was found to be more persuasive in that there was no evidence that the employee had actually "received" the medical benefits in dispute. Without evidence of that the Court held, consistent with *Crowley v Plehal Blacktop*, 66 W.C.D. 11 (W.C.C.A. 2005), that no *Roraff* fee is due unless there is evidence the employee actually got the medical treatment. The matter was remanded for further findings on that issue.

INTEREST AND PENALTIES

Fishback v American Steel, WC16-5943 (W.C.C.A. February 3, 2017)

The W.C.C.A. held that pursuant to Minn. Stat 176.221, subd 7, interest on any delayed payment of benefits, including underpayments, is mandatory.

The employee suffered a fatal injury in 1996 and his family began receiving dependency benefits. Over the course of time the surviving spouse and the adjuster exchanged a number of messages regarding the dependent children and when they would turn 18 and no longer be eligible for benefits. The facts are long, complicated and drawn out and it was clear that over the course of years there were a number of messages back and forth and that it was difficult to get a handle on what was owed and to whom.

Suffice it to say that by 2015, there were underpayments of benefits and that there was a delay in getting the correct amount of dependency benefits to the surviving children. The underpayment was some $15,030.00.

The employee claimed interest and penalties of the underpayments. The Judge determined that there was no interest due on the underpayments and that no penalties were due for "vexatious or unreasonably" delayed payments.

The W.C.C.A. reversed on the question of interest and held that under Minn. Stat. 176.221 Subd 7, any payments not made when due shall bear interest from the date the payment is made. Here even though the judge found that not all of the necessary information had been provided to properly calculate the benefits from 2003 to 2014, the W.C.C.A held that interest was due nonetheless.

The Judge also determined that delay was due in large part to the surviving spouse's inability to provide correct information to the insurer to make the correct payments. The Court however held that partial payments could have been made earlier than they were and that it was apparent from this unique record that the insurer was aware all along that there was an underpayment.

Moreover, the payments could have been correctly determined by February 2014 but were still delayed. Accordingly, under the clear terms of the statute, interest was due on these payments.

INTERVENORS

Goble v Leisure Hills of Hibbing, No. WC15-5900 (W.C.C.A. July 11, 2016)

The W.C.C.A. held that common law governing notice between a principal and agent does not supplant the notice requirement under Minn. Stat. 176.361, subd. 2(a). A request to extinguish an intervention interest under Minn. Stat. 176.361, subd. 2(a), must comply with the statutory notice requirement to be granted.

The employee was injured in 2003 and Medica paid some of her health bills in 2005 pursuant to a contract it had with DHS.

In 2010 the employee filed a Claim Petition but did not notify Medica of its potential intervention interest. Minnesota DHS was served with notice but did not intervene at that time. The Judge who heard that claim in 2012 determined that the 2003 injury was a substantial factor in that proceeding.

In 2013 the employee filed another claim for additional benefits and notified DHS again who notified Ingenix of its potential interests, who in turn notified Medica. This time they did intervene - for over $50,000.00. The Judge determined that Medica had not been properly noticed in the 2012 litigation and awarded reimbursement of their expense. The insurer appealed. The W.C.C.A. affirmed.

The insurer argued that under common law notice rules, since MN DHS was notified in 2012, Medica was charged with notice as well and should be closed out. The Court held flatly that those rules do not apply here and that Minn. Stat. 176.361, subd. 2a provides for the procedure for closing out potential intervention interests. The Court also held that there is no other statutorily

allowed procedure for foreclosing an intervenor's interest. Since there was no proper notice to Medica in 2012, the 60-day period provided for in the statute never started.

Erven v Magnetation, No. WC16-5903 (W.C.C.A. June 20, 2016)

The W.C.C.A. held that the intervention motion of a health care provider that is not filed within 60 days of being notified of its right to intervene and is not therefore timely under Minn. Stat. 176.361, subd. 2(a), the intervention interest must be denied. The Court reversed a ruling allowing the interest of a clinic even though the clinic had filed a motion for intervention but did so outside the 60-day time limit.

The employee was injured in 2014 as he was hurrying to get to an emergency situation. In his haste, his ankle rolled over injuring it even though he did not trip or fall over anything. The Judge ruled that this was compensable - even in the face of a *Dykhoff* defense. This was affirmed by the Court.

The employee sought treatment at Grand Itasca Health Clinic who was notified of its intervention interests when the claim was commenced. Grand Itasca filed a motion to intervene.

The claim was filed in November 2014 and the original date for hearing was July 15, 2015. Intervention notice was sent to Grand Itasca on April 13, 2015 but the clinic did not file its intervention motion until July 27, 2015, well after the 60-days had lapsed.

The matter was continued until November 2, 2015 and the hearing took place then. The Judge found that the injury arose out of the employment, as noted above, and allowed the intervention interests of Grand Itasca Clinic. The insurer appealed from that as well.

The W.C.C.A. reversed on the question of the intervention interest of Grand Itasca Clinic. The Court cited Minn. Stat. 176.136, subd. 2a and in a holding that was somewhat different than those from about 10 years ago, held that where the intervention notice is not filed within 60 days, the interest is extinguished. The Court noted that the clinic's willingness to render treatment was commendable, but on these facts, their interests must be denied. The Court reversed the Judge's ruling allowing the clinic's interest.

Sumner v. Jim Lupient, 865 N.W.2d 706, 75 (W.C.D. 263 (Minn. 2015) held that intervenors must now appear or get a waiver of appearance for their interests to be considered. It is apparent that the Courts are getting tougher on intervenors and requiring that they follow the rules, as long as they were properly notified of them or face having their interests extinguished.

Duehn v. Connell Car Care, Inc., 2017 WL 1335240 (WCCA March 20, 2017)

The provider filed its motion to intervene, but did not file it within the requisite 60 days. The compensation judge awarded the intervention interest anyway. The WCCA reversed. The

language of Minn. Stat. Section 176.361, subd. 2(a) plainly and clearly requires that the intervenor's interest be extinguished if the motion to intervene is not timely filed. Once a health care provider decides to intervene, it becomes a party to the litigation and as a party must follow the statue and rules in the same manner as any other party. Further, the employee was not able to represent the claims of the intervenor directly as the claims belong to the intervenor, not the employee. If the employee's attorney wishes to represent the claims of the intervenor, it must be established unequivocally at the hearing that the attorney represents not only the employee but also represents the intervenor. See also, **Varela Leal v. Knife River Corp**., 2017 WL 1066868 (WCCA March 3, 2017) (upon intervention by a medical provider, an employee cannot assert a direct claim for benefits on behalf of the intervenor absent a demonstration that the employee or employee's counsel is authorized to act on the intervenor's behalf).

Xavamongkhon v ISD 625, No. WC15-5852 (W.C.C.A. April19, 2016)

The Court held consistent with the *Sumner* decision that a medical provider must appear at conferences hearings etc., or their claims will be dismissed. The Court also held that the employee cannot make those claims directly once the medical providers have filed a motion to intervene. This was a pretty significant holding and something of a change from prior law.

The employee was injured in 2013 and eventually there were disputes about medical treatment at various providers. Those providers were notified of their intervention interests and all filed motions to intervene.

Some of the claims were resolved prior to hearing, but one was not. No one from that provider appeared and the employee's attorney submitted the bills directly over the objection of the employer, who argued that since nobody showed up from that intervenor, the claim should be denied. The Judge ordered that the provider be reimbursed and the employer appealed. The W.C.C.A. reversed.

The employee argued that the sole issue was that one bill and relied on *Adams v DSR Sales, Inc.*, 64 W.C.D. 396 (W.C.C.A. 2004) that pretty clearly said the employee could submit the bills on his/her own. The Court declared that *Adams* was not relevant because in that case the intervenor had not appeared at all whereas here it had.

Since the provider never appeared and the attorney was not directly representing the provider, the Court held that dismissal was mandated and reversed the award to the non-appearing provider.

The *Fischer* case below makes it clear, that the employee's attorney may still be able to make a direct claim for a non-intervening provider but has to make it clear that he or she represents not only the employee but also the intervenor as well.

Fischer v ISD 625, No. WC16-5955 (W.C.C.A. November 16, 2016)

The Court held that where a medical provider has intervened, an employee cannot assert a direct claim for benefits on behalf of that provider absent a demonstration that the employee or employee's counsel is authorized to act on that provider's behalf.

The employee was injured in 2013 and the employer admitted the claim and paid various benefits. There arose a dispute about medical bills and the potential interveners were placed on notice and they intervened. An objection was filed as to their interests.

Several intervenors elected to appear by phone when they submitted their motions, but never did. The employee asserted a direct claim for those interests at the hearing. The Judge awarded benefits to the intervenors whose interests were asserted directly by the employee's attorney. The W.C.C.A. reversed.

The Court held that this result was governed by the Supreme Court's decision in *Sumner v Jim Lupient*, 865 N.W.2d 706, (Minn. 2016) and that intervenors must now appear or get the waiver contemplated by the OAH standing order. The Court found that these intervenors did not comply since they did not appear by phone as they said they would.

The issue was pretty straightforward - "The question for this court is whether in that situation the employee was able to make a direct claim for the expenses that are the subject of an intervenor's claim."

The holding was even more so: "No, unless the attorney represents the intervenor and makes that unequivocally clear at the hearing."

See, also, *Xayamongkhon v. ISD 625*, No. WC15-5852 (W.C.C.A. Apr. 19, 2016), once a provider or other entity intervenes in a workers' compensation case, it becomes a party. Although an intervenor's claims may be inextricably connected with those of the employee, those claims belong to the intervenor, not the employee. Thus, the attorney will have to represent them both and cannot just make a direct claim without that.

This result is in apparent conflict with the holdings in *Adams v DSR Sales, Inc.*, 64 W.C.D. 396 (W.C.C.A. 2004) and, *Carlino v Peterson Construction*, slip op. (W.C.C.A. October 4, 2004) that held that the employee could submit bills for payment directly. The sole distinction was that there the intervenors had not appeared separately. See, also, *Basting v Metz Framing*, No. WC16-5971 (W.C.C.A. Jan. 5, 2017), which is in accordance with *Fischer*.

The rule now, after these cases, is that once an intervenor has intervened they become a party and must attend all hearings unless it is clear that the employee's attorney also represents the intervenor as well.

Sumner v Jim Lupient, No. WC16-5968 (W.C.C.A. November 30, 2016).

We have seen this one before, i.e. *Sumner v. Jim Lupient Infiniti*, 75 W.C.D. 243 (W.C.C.A. 2014) and by the Minnesota Supreme Court in *Sumner v Jim Lupient Infiniti*, 865 N.W.2d 706, 75 W.C.D. 263 (Minn. 2015).

Well, this case is back again. This time the W.C.C.A. held that if an intervenor has filed a motion to intervene the employee cannot present the bill directly.

The employee was injured in 2012 and all potential intervenors were notified. After all the various remands and re-appeals, the matter came on for hearing again in 2016. One of the issues for determination at that point was whether Rehab Results and McCarron Lake Chiropractic were entitled to reimbursement of their intervention claims.

The employee submitted those bills directly to the Judge for determination who denied the intervention claims of Rehab Results and McCarron Lake Chiropractic. The employee appealed. The W.C.C.A. held that the Judge erred in extinguishing those two intervenors' interests.

The Court held that the employee could not bring their interests directly since they had already filed intervention motions. So, the Court affirmed the denial of the employee's direct claims for those intervenors' expenses before this court, pursuant to *Xayamongkhon v. Ind. Sch. Dist. No. 625*, No. WC15-5852 (W.C.C.A. Apr. 19, 2016), writ of certiorari filed (Minn. May 18, 2016).

In a strange twist though, the Court reversed the denial of the interests of Rehab Results and McCarron. The Judge had apparently ruled that the Rehab Results and McCarron interests were extinguished due to their non-appearance under the original *Sumner* decision. However, the Court noted that those two had been excepted because no one had filed a motion objecting to their interests.

The Court ruled that Rehab Results and McCarron got paid through May 29, 2012, which is when the Judge made a separate finding that the employee had fully recovered from her injuries.

Gist v. Atlas Staffing, Inc., 2017 WL 3400792 (W.C.C.A. June 21, 2017)

The jurisdiction of the workers' compensation courts does not extend to interpreting or applying laws designed specifically for the handling of claims outside the WC system. Where the employer and its third-party administrator's position requires the interpretation and application of federal law implementing the Medicaid and Medicare programs, the compensation judge properly determined she lacked subject matter jurisdiction.

Here the compensation judge properly rejected the employer and its third-party administrator's argument that a medical provider that accepts payments from Medicaid and Medicare is barred from receiving workers' compensation payment for treatment provided to an injured employee, and properly awarded payment of the outstanding medical intervention interests associated with treatment of the employee's end-stage renal disease pursuant to the WC fee schedule and in accordance with the WC law/fee schedule of the state of Michigan for services rendered in that state.

In this case, the medical provider received Medicaid payments and eventually also Medicare payments for care and treatment provided. The provider intervened in the WC case seeking payment of medical expenses representing the clinic's charges for the employee's treatment. The employer argued that because the provider accepted payment from Medicaid and Medicare, the claims are deemed to have been paid in full and the provider can make no claim for additional payments.

The WCCA concluded that the provider had the right to a *Spaeth* balance, even though it had accepted Medicaid and Medicare benefits.

Hemphill v. Sovde Enterprises, 2017 WL 3400793 (WCCA August 1, 2017)

The WCCA held that intervention claims were not addressed at the hearing. It further held, "It is incumbent upon not only employees' attorneys, but also attorneys for employers and insurers and compensation judges, to make sure that all issues are considered, and that the rights of all parties, including intervenors, are addressed at the hearing. The case was remanded for determination of intervention interests.

JOB OFFER- REFUSAL

Gilbertson v Williams Dingmann, No. WC15-5878 (W.C.C.A. May 2, 2016)

The Court held that where the rehabilitation plan calls for the employee to return to work at a different employer, the refusal of a job with the pre-injury employer is not grounds for discontinuance of TTD benefits under Minn. Stat. 176.101, subd. 1(i).

The employee was injured in October 2011 moving a casket. There was evidence that prior to the injury the employer had accommodated her child care issues and that she worked a somewhat flexible schedule.

She was released to return to light duty by April 2012 and the QRC noted in the rehab plan that the employee would return to a different employer but in the same industry and that the plan was to "RTW at a different employer."

The pre-injury employer offered her a light duty job within the restrictions outlined by the treating doctors. The employee asked if she would lose her benefits if she refused that job. Her QRC told her that she did not think so since the plan was to return with a different employer. The employee also indicated that the subsequent job offer created personal problems for her and that the light duty offer would not have been suitable for her.

The employee refused the employer's light duty offer and the insurer moved to cut off her TID benefits. The Judge denied the claim for TTD benefits but awarded TPD benefits for those periods when the employee worked after April 2012 - she worked several jobs thereafter at a wage loss.

The employee appealed the denial of the TTD benefits. The W.C.C.A. reversed that part of the decision, citing Minn. Stat. 176.101, Subd. 1(i) as follows: Temporary total disability compensation shall cease if the employee refuses an offer of work that is consistent with a plan of rehabilitation filed with the commissioner which meets the requirements of section 176.102, subdivision 4,

The Court held that the language is unambiguous and did not allow for discontinuance under these circumstances. The Plan called for a return to work for a different employer. The offer of work was from the date of injury employer and did not therefore meet the standards of being consistent with the existing Plan and could not be used as the basis to discontinue TTD.

JURISDICTION

David v The Heavy Equipment Co., No. WC15-5802 (W.C.C.A. February 17, 2016.

The Court held that the Judge did not err in dismissing the employer and insurer's petition for recovery of erroneously paid medical benefits where there is no subject matter jurisdiction for the claim.

The employee was injured in 2005. The claim was originally admitted and benefits paid. Later though a Judge found that the employee's injury did not arise out of or in the scope of employment, but that the employee's claim was made in good faith and that he did not defraud the surer.

The insurer filed a claim seeking reimbursement from the medical care providers in the case. The Judge dismissed that action finding that there was no subject matter jurisdiction for those claims. The W.C.C.A. affirmed.

The Court held that it has no jurisdiction to determine matters that do not arise under the Minnesota worker's compensation law. Here the claims were for reimbursement of medical benefits paid on behalf of an employee.

Here the Judge determined the matter was not a compensable work injury and that took the matter outside of the jurisdiction of the Workers Compensation Courts.

Gruba v Tradesman International, No. WCIS-5896 (W.C.C.A. April5, 2016)

The W.C.C.A. affirmed a dismissal of an employee's petition for recovery of benefits paid under the North Dakota compensation system for which benefits the North Dakota system now seeks repayment as there is no subject-matter jurisdiction for the claim.

The employee was injured while working in North Dakota in April 2012. North Dakota began making payment under their law. The employee filed a claim in Minnesota and notified North Dakota of their right to intervene. North Dakota did not intervene, citing the decision in *Johnson v. Young & Davis Drywall, Inc.*, slip op. (W.C.C.A. August 8, 2001). The Judge awarded benefits under Minnesota law less any benefits that had been paid under the North Dakota law.

Later North Dakota asserted a claim against the employee for any benefits it had paid and threatened to commence civil action against him unless it got repaid. The employee then filed for additional benefits and asked the Minnesota Courts to resolve any issues dealing with the North Dakota claim for reimbursement.

North Dakota never intervened in any of the Minnesota actions. The record showed that there was no judgment entered against the employee in North Dakota.

The Judge found that none of the North Dakota benefits were owed in the form of reimbursement required of the employee, due to the lack of a judgment in any civil action regarding those benefits. The Judge determined there was no subject-matter jurisdiction regarding out-of-state benefits. And dismissed the matter. The employee appealed and the W.C.C.A. affirmed.

The Court held that under Minn. Stat Ch. 175 and 176, there is no jurisdiction for out of state claims. Here even though the Court recognized that the North Dakota claims and the potential for litigation there placed "stress" on the employee, it held that there is "no remedy at present that can be afforded to the employee that does not require a determination regarding the rights of the parties under North Dakota law." Any such determination was held to be outside the jurisdiction of the Minnesota Courts.

MEDICAL EXPENSES- REASONABLE AND NECESSARY

Forrestal v Miller Dwan Medical Center, No. WC15-5897 (W.C.C.A. September 30, 2016).

The W.C.C.A. held that bills incurred by providers who declined to prescribe more opioid medications to an employee who had violated an opioid contract were not reasonable and necessary expenses.

The employee was injured in 2008 while restraining a mental health patient. Between 2008 and 2012 she was prescribed various opioid medications for pain. In 2011 she signed various contracts with her providers regarding pain medications. These contracts had various conditions, including taking them only as prescribed and never to use abusive language when dealing with medical staff.

In 2013, for various reasons, she was found to have violated the opioid agreement mostly for her attempts to get early refills and for swearing at the clinic staff. The employee disputed those assertions by the provider and staff.

The employee then sought treatment with different providers who refused to prescribe her additional meds due to the apparent violation of the previous opioid contract. When she submitted those bills for payment the insurer refused and the matter went to hearing. The Judge awarded the bills for treatment where the employee had sought more meds but was refused.

The W.C.C.A. reversed that award, holding that the language in the Judge's ruling that the 11 visits were "reasonable effort[s] by the employee to obtain medical treatment for her work injury residuals," was not the proper standard for determining whether medical treatment was reasonable and necessary under the statute.

Here, because the employee violated 3 or even 4 of the prior opioid contracts with her efforts to get more narcotic meds and that if the Court affirmed the Judge's ruling they would in effect "nullify the intent of the opioid contract." Further, a ruling that the violations were minor and would in effect substitute the Court's judgment for that of trained medical professionals who declined to prescribe more narcotics for the employee.

The Court affirmed the award of treatment at Essentia, however, for opioid withdrawal and because she actually received treatment there, as opposed to the 11 visits where she was declined treatment by the doctors who would not prescribe meds for her any more.

There was a spirited dissent by Judge Milun in this case that would have allowed the treatment. She noted the apparent discord of not paying for the doctors who were doing the correct thing here by not allowing additional medications and asking them to absorb the cost of those 11 visits. Judge Milun called the result reached by the majority of denying payment to a provider who enforces an opioid agreement "absurd."

Hagel v Barrel-0-Fun Foods, No. WC15-5831 (W.C.C.A. March 21, 2016)

The W.C.C.A. affirmed a finding allowing the claims for lodging provided to the employee by a friend that was required by the employee to obtain medical care prescribed to cure and relieve the effects of her work injury.

The Court also held that child care expenses are not reimbursable under the medical care provisions of Minn. Stat. 176.135.

The employee was injured in 2007 and lives in Perham, MN - some 180 miles from the Twin Cities. Her hands were crushed when she was trying to clean a roller at the employer.

She treated with physicians in the Twin Cities and took up residence with a friend while she sought care. She also had another friend watch her children while she was undergoing medical

treatment. She then claimed medical expenses for certain treatment. The two people who had provided living expenses for her and child care for her children intervened.

The Judge awarded the two intervenors living expenses and child care expenses for the employee during her treatment. The insurer appealed. The W.C.C.A. affirmed the award of living expenses but reversed the award of child care expenses.

LIVING EXPENSES: The Court could find no specific statute or rule on point but ruled that the Judge could reasonably conclude that it was unreasonable to travel 180 miles each way to seek treatment in the Twin Cities from Perham, MN. The Court also determined that $50.00 per day was a reasonable charge for living expense, especially since living in a transitional care facility or even an extended stay hotel would have been much higher.

The Court had to go through some mental gymnastics to get around Minn. Rule 5221.0500, subp. 2. E., which reads, in part:

> Travel expenses incurred by an employee for compensable medical services shall be paid at the rate equal to the ... rate paid by the state of Minnesota under the commissioner's plan for employment-related travel, whichever is lower.

The Court held that in their opinion that rule did not apply, largely because it appears to apply to travel expenses, not lodging.

Anyway, the Court held that the Judge could reasonably conclude that the expenses incurred were reasonable and necessary and affirmed the award.

CHILD CARE: Different story with the child care. The Court reversed that award noting that nothing in Minn. Stat. 176.135 authorizes reimbursement of child care expenses during medical treatment.

While 176,102 authorizes such expenses as a part of rehabilitation benefits to allow the employee to look for work, there is no corresponding section for medical treatment.

More to the point, both the W.C.C.A. and the Supreme Court have held that Minn. Stat. 176.135, subd. 1, does not provide for the payment of child care expenses incurred while an employee is undergoing medical care and treatment. See, e.g., *Langa v. Fleischmann-Kurth Malting Co.*, 481 N.W.2d 35, 46 W.C.D. 156 (Minn. 1992); *Ryks v. Control Data*, slip op. (W.C.C.A. June 4, 1990).

PERMANENT TOTAL

DeKevrel v Metro Mechanical, No. WC16-5930 (W.C.C.A. Nov. 16, 2016)

The W.C.C.A. reversed a denial of PT benefits where the employee may have been able to get retraining and where a second surgery may make the employee more employable. The Court noted

that mere speculation on these issues did not provide an adequate basis for a compensation judge to conclude that an employee is not currently permanently and totally disabled.

The mere fact that a future FCE might have fewer or different restrictions was pure speculation. The question is whether the employee is PT based on the factors of age, disability, training, experience and work available in the area.

The employee suffered an admitted serious low back injury in 2011. Despite treatment and a surgery, things did not go well and he continued to have pain and other symptoms due to the injury.

As of the date of the hearing, he still had not been released to work by his treating physicians. The Judge ruled that it was premature to find the employee PT because a second surgery might have been more successful in getting the employee's restrictions to a point where he could perform sedentary work. Likewise, there was the possibility that retraining might have been successful as well even though no formal retraining plan was submitted. The employee and the QRC discussed the possibility of retraining but the QRC ultimately believed that the employee was PT. The Judge denied the claim for PT benefits. The W.C.C.A. reversed.

What was interesting about this was the standard of review. The Court noted the well-worn *Hengemuhle* standard and noted that facts findings by a Judge will be overturned only if they are manifestly contrary to the weight of the evidence, yet reviewed the case on a *de novo* basis under the *Krovchuk* holding.

The Court noted that neither of the employee's treating doctors opined that he was PT, but noted that he has such significant restrictions and has been out of work for an extended period of time. The Court also noted that the employee's disability and inability to work has existed, and is likely to continue to exist, for an indefinite period of time into the foreseeable future.

The Court also reiterated that the question of whether an employee is PT is primarily a vocational issue, not necessarily a medical one. Thus, the fact that the treating doctors had not rendered an opinion on that question was not controlling.

At the end of the day, the Court reviewed the record, reversed the Judge, and stated that "given the employee's ongoing disabling back condition and the extended period during which the employee has been unable to work, the record as a whole does not support the finding that the employee is not currently permanently and totally disabled."

REHABILITATION - CHANGE OF QRC

Bode v 3M, No WC16-5910 (Dec. 9. 2016)

The W.C.C.A. reversed a denial of a request to change QRC's where there was evidence that over 9 months the QRC had failed to provide work leads/assignments within the employee's restrictions and where the employee testified that she had lost trust in the QRC. Under those circumstances a change of QRC was in the best interest of the parties.

The employee was injured in 2014 and benefits were commenced. She was eventually released to return to work on light duty which the employer accommodated. She requested rehab services a few months later and the insurer assigned one. Over the next 9 months though the employee reported to her QRC that the employer was not following her restrictions. The QRC's response was to have her speak up to supervisors when that happened, but not much else.

Through a long series of interactions between the two, relations soured between the employee and the QRC, mostly due to the employee's longstanding complaints about the employer not honoring her restrictions. She sent a letter outlining all of that to the QRC who, unbeknownst to the employee, shared the letter with the employer.

That caused the employee to hit the ceiling. In August 2015, she filed a request to change QRC's - well past the 60 days from the commencement of rehab services. The Judge denied the request, finding nothing to justify a change of QRC at that time.

The W.C.C.A. reversed and noted that the Judge even found that the employer was in fact requiring the employee to work outside of her restrictions the and QRC had "failed in her charge" to ensure that the employee was placed in a job within restrictions.

The court also discussed the concept of "adversarial communications" and defined them as "reporting information not *directly related* to an employee's rehabilitation plan." (Emphasis in original).

At one point the QRC reported that the employee was thinking about taking a cook job but decided against it due to her restrictions. In another communication, the QRC wrote that the employee's husband got a new job and that they were selling their home.

The Court found that neither of these had anything to do with the rehab plan and that the employee reasonably felt "betrayed" by the QRC. There was also the letter the QRC sent without the employee's knowledge or consent to the employer outlining her dissatisfaction with the adherence to the restrictions that also factored in here.

REHABILITATION -COMPENSABLE EXPENSES

Washek v New Dimensions Home Health, No. WC15-5861 (W.C.C.A. May 16, 2016)

The W.C.C.A. affirmed a denial of an adapted van as a rehabilitation expense, where the employee was not physically capable of returning to her pre-injury vocation, did not have a rehabilitation plan to return to work, and was not capable of working for almost all of the ten-year time period involved.

The employee was badly injured in 2002 and is permanently totally disabled. In 2014 the employee filed a claim for the cost of a 2003 Dodge handicap accessible van that had been

previously purchased in 2004 and for a vehicle that had been purchased to replace that older van. The insurer had paid for the conversion of that older van but had not paid for the base cost of it. The insurer had also paid for the conversion cost of the newer vehicle but not the base cost of it.

The employee sought payment of the base cost of the van as a rehabilitation expense. The Judge denied that claim, finding that the vehicle did not enable the employee to look for work.

The employee did not appeal the denial of the base cost as a medical expense, but did appeal the ruling that the base cost of these vehicles was not a rehabilitation expense.

The W.C.C.A. affirmed the denial, holding that even though the Court "continue[s] to be of the view that in appropriate circumstances the full cost of a handicap accessible van appropriately may be awarded to a disabled employee under the Workers' Compensation Act," these facts did not support the employee's claim.

REHABILITATION SERVICES- SURVIVING SPOUSE

Grage v Acme Electric Elevator, No. WC15-5898 (W.C.C.A. September 2, 2016)

The W.C.C.A. affirmed a finding of rehabilitation services for a surviving spouse whose dependency benefits would cease within 6 years, in need of additional training to obtain full licensure to secure and maintain employment, had demonstrated a need for rehabilitation services to become self-supporting and was a qualified dependent surviving spouse entitled to rehabilitation assistance as contemplated by Minn. Stat. § 176.102, subd. 1a.

The employee was killed in 2012 when he came into contact with a high voltage power line. At the time of his death the spouse was in the last semester of school to get her Master's Degree in special education but due to the stress of her husband's death and financial issues, she did not finish at that time.

She sought rehabilitation benefits following her husband's death. The Judge denied those benefits. The W.C.C.A. reversed, citing the language of the statute and relying on the spouse's circumstances. She sought jobs in the special education field but was able to earn only about $2,000-3,000.00 per year. She needed coursework of some 30 hours to get a special license to obtain employment and she testified that without it she would likely be unemployed. The spouse was 54 at the time of the hearing and had a very limited employment history. While she had a degree in art and theater, the local economy did not support a job with those degrees. She needed the special education license.

Based on the facts of that case the Court determined that she was eligible for rehab services. The Court held that the question of whether a surviving spouse is eligible for rehab services is a mixed question of law and fact. Each case will frankly depend on the facts of that case. Here due to the spouse's age and limited work history and that her dependency benefits would soon end, the Court found that she was eligible.

REHABILITATION- DISCONTINUANCE OF SERVICE

Halvorson v B & F Fastener, No. WC15-5869 (W.C.C.A. May 9, 2016)

The W.C.C.A. reversed a finding discontinuing rehabilitation services where the parties expressly limited the issue before the judge to whether the employee was a "qualified employee." The Court further held that a finding that she was not does not support the discontinuance of rehabilitation.

The employee was injured in 2007 and had an AWW of about $390.00 per week. She was unable to return to her pre-injury job and rehabilitation service were commenced. TTD benefits were paid until 2009 when apparently, the statutory maximum was reached.

After taking and getting fired from a number of fast food jobs, the employee finally found one that she liked, and who apparently liked her, in November 2014. By January 2015, the QRC filed an amended plan seeking an additional 12 weeks and to re-evaluate then since the employee was still recovering from a surgery and that final restrictions had yet to be placed on her.

In February 2015, the insurer filed a request to terminate rehab services. DOLI denied the request but the Judge at OAH allowed the discontinuance. The parties agreed that the sole issue was whether the employee was a qualified employee for rehabilitation services.

The insurer withdrew the issue of whether the employee was likely to benefit from further rehab services at the hearing however.

The Judge granted the request to discontinue and the employee appealed. The W.C.C.A. reversed.

The Court first dealt with the issue of whether the employee had found suitable employment and noted that this case was something of a matter of first impression. Many of the cases cited by the insurer dealt with the issue of whether rehab could be initiated but not with the question of whether rehab could be *terminated* due to the employee's finding a suitable job.

The Court cited Minn. Rule 5220.0130 and noted that it requires that an employee be a "qualified employee" before rehabilitation is "implemented." However, that section has no mechanism to terminate rehabilitation if an employee is not a "qualified employee."

The rules governing termination of rehab services are found at Minn. Rule 5220.0510, subp. 5, and Minn. State 176.102, subd. 8.

Minn. Rule 5220.0510, subp. 5 provides as follows:

A. a new or continuing physical limitation that significantly interferes with the implementation of the plan;

B. the employee's performance indicates that the employee is unlikely to successfully complete the plan;

C. the employee is not participating effectively in the implementation of the plan; or

D. the employee is not likely to benefit from further rehabilitation services.

Here the last issue was specifically withdrawn as an issue and the Judge improperly expanded the analysis to include it.

Further Minn. Stat. 176.102, subd. 8 provides as follows:

Upon request to the commissioner or compensation judge by the employer, the insurer, or employee, or upon the commissioner's own request, the plan may be suspended, terminated, or altered upon a showing of good cause, including:

(a) a physical impairment that does not allow the employee to pursue the rehabilitation plan;

(b) the employee's performance level indicates the plan will not be successfully completed;

(c) an employee does not cooperate with a plan;

(d) that the plan or its administration is substantially inadequate to achieve the rehabilitation plan objectives;

(e) that the employee is not likely to benefit from further rehabilitation services . . ..

The Court noted that none of those issues were raised at the hearing and that the matter was therefore reversed.

SETTLEMENTS

Perez-Rivera v MPLSP Hotel, No. WC16-5918 (W.C.C.A. Sept, 20, 2016)

The W.C.C.A. affirmed a denial of approval of a stipulation and ruled that the Judge did not abuse his discretion in denying approval of a stipulation that closed out future medical benefits and costs. The Judge determined that the close-out of medical benefits was not in the best interests of the employee.

The employee injured her knee in 2013. This was an admitted injury and the employee sought considerable medical treatment for it.

By 2014 the parties sought mediation at DOLI and settled on $35,000.00 for a full final settlement including all future medical benefits. That was disapproved by the Judge at OAH.

The parties then got additional medical information indicating that the employee would not likely need any future medical treatment, but opined that the employee sustained a 2% permanent partial disability, even though the treating doctor assigned a 0%. There was also one doctor who indicated that while the employee did not need a total knee replacement at that time, she could in the future. The parties then jointly submitted the stipulation to the same Judge who again disapproved the stipulation.

The Judge noted in his memorandum that even the insurer's IME doctor opined that the employee had sustained a permanent injury and that the employee could develop future degenerative changes in her knee in the future. He concluded that a close out of future medical benefits was not fair and reasonable, nor was it in conformity with the Act. The insurer appealed and the W.C.C.A affirmed the Judge's disapproval of the stipulation.

The Court noted that any stipulation that closes out medical benefits is not presumed to be fair and reasonable or in conformity with the Act. The parties argued that the employee was represented by competent counsel and that she wished to have the settlement approved as well. The Court noted the wide latitude given judges to approve settlements and held that absent an abuse of discretion, the Judge's ruling would not be disturbed.

The Court held that an abuse of discretion is one where the determination to approve or disapprove a settlement agreement is based upon a clearly erroneous conclusion given the record.

The parties also tried to get the case reassigned but that too was shot down by the Chief Judge and the W.C.C.A. as interlocutory and premature.

Dahl v. AG Processing, Inc., 2017 WC 3400791 (June 21, 2017)

The employee entered into a stipulation for settlement in September of 2008 wherein the employee agreed to settle all claims, on a full, final, and complete basis, "except for certain future medical expenses which remain open to the right shoulder, subject to defenses."

The employee then had treatment for his cervical spine and sought to have it paid by the employer and insurer. The compensation judge denied the treatment. The WCCA affirmed. The court noted that a cervical injury was clearly within the reasonable contemplation of the parties at the time they entered into the stipulation. The employee had sought medical treatment for his cervical spine prior to the stipulation and had even filed medical requests for payment of such cervical treatment. Thus, as the compensation judge found, the cervical treatment was among the "any and all claims" the employee settled when he entered into the stipulation for settlement.

The employee also tried to argue that the cervical symptoms might constitute a consequential injury and therefore would be compensable. The WCCA, citing *Ryan v. Potlatch Corp*, found that even if the employee's cervical symptoms had been found to arise from a consequential injury,

this consequential condition was in the reasonable contemplation of the parties and would be foreclosed by the stipulation.

Similarly, in **Allen v. Kolar Buick GMC,** 2017 WL 3400787 (WCCA June 22, 2017), the WCCA held that the compensation judge correctly interpreted a stipulation for settlement in concluding that a claim against that particular employer was closed out because the condition at issue was known to the parties at the time of settlement. The fact that the employee did not identify a separate date of injury until well after the settlement does not alter the analysis under Ryan v. Potlatch Corp. Accordingly, the compensation judge did not err in dismissing the employer from further participation in the litigation of the employee's claim petition against other employers. Knowledge of the condition at the time of settlement determines the extent of the close out.

TREATMENTPARAMETERS-DEPARTURES

Morgan v Care Force Homes, No. WC 16-5957 (W.C.C.A. Nov, 14 2016)

The W.C.C.A. affirmed a finding that Botox treatments were reasonable and necessary as departures from the treatment parameters under Minn. Rule 5221.6050.

The employee suffered an admitted low back injury with Care Force in 2013. She treated conservatively, but her symptoms worsened over time and she underwent several injections to her low back and hip area. By 2015 her doctors recommended Botox treatments and by 2016 there was discussion of RSD.

Eventually there was a hearing before a Judge on the issues of causation for the claimed RSD and approval of various branch block treatments and Botox.

The Judge found that the employee had not established a claim for RSD but found that the treatments recommended by her treating doctors was reasonable.

With regard to the Botox treatments, the Judge found that they were precluded by the treatment parameters, but were allowable as a departure from the parameters due to the documented complications that employee had.

The W.C.C.A. affirmed and held that even though Minn. Rule 5221.6050, subp. 5. C, precludes Botox treatments to the low back, under the unique facts of this case, they were allowable as a departure from the parameters.

First, the insurer argued that the employee had not made a departure claim at the hearing. The W.C.C.A., however, referred to 5221.6050. subp 7. D that *requires* that a judge consider whether a departure from the applicable parameter is necessary. Thus, the Judge's consideration of departure was entirely appropriate and was part of the determination of whether the parameters applied.

The insurer also argued that as a matter of law, departures can only be permitted for parameters that limit the scope or duration of treatment and not from parameters that exclude a treatment modality in any form.

The Court disagreed with that argument and cited 5221.6050, subp. 8, governing departures of "any type of treatment."

The Court then affirmed the ruling on substantial evidence grounds.

VACATION OF AWARD ON STIPULATION

McKinley v Target, No. WC15-5877 (W.C.C.A. June 27, 2016).

The Court granted a petition to vacate an award based on substantial change of condition where the employee, who had been confined to a wheelchair for 15 years, suddenly and miraculously found that she was able to walk again. This time, the employer and insurer brought the petition to vacate.

The employee was badly injured in 1993 when she fell, hit her head and was unconscious for 2 hours while her arm and foot were pinned under her. She developed what the Court termed a constellation of symptoms and problems and by 1995, was in a wheelchair.

The parties litigated causation of her symptoms in 1996 and the Court eventually found that her multiple problems were related to her work injury. The parties eventually settled her case to 52% PPD and agreed that she was PT. There was an extensive history of treatment and arguments over treatment for years.

In 2012 however, apparently after the employee fell out of her wheelchair and laid on the floor for 8 hours, she experienced what she called a miracle and was able to walk again. She was found to be deconditioned and fatigued easily but was more mobile, according to her doctors, than she had been in many years.

The insurer had her see an IME who opined that the employee had essentially been faking all along and needed no further care. The matter went to hearing and the Judge who heard the case in 2013 found the employee to not be credible and that she had exaggerated her disability and was actually doing her own care. Soon thereafter the insurer filed a petition to vacate the earlier stipulations. The W.C.C.A. granted that petition.

Obviously, this is a very fact specific case but the Court found that due to the subsequent findings and medical records, the employee had in fact experienced a substantial change in condition and that the insurer had established grounds to vacate the stipulation.