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WORKERS' COMPENSATION
SEPTEMBER 2015 - NOVEMBER 2015
CASE LAW UPDATE

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WORKERS' COMPENSATION SEPTEMBER 2015 – NOVEMBER 2015 CASE LAW UPDATE

Besic v. Wal-Mart Stores, No. WC15-5790 (Served and Filed September 2, 2015). The employee appealed Compensation Judge Peggy Brenden's denial of medical treatment. The self-insured employer also cross-appealed the award of permanent total disability benefits. The employee sustained an admitted low back injury in August 2009. She received extensive treatment including physical therapy and acupuncture. Ultimately, she started treating with Dr. Sandness, a physical medicine and rehabilitation specialist, and he took her off work and referred her for trigger point injections, additional physical therapy, and additional acupuncture. The employer denied the request for acupuncture. Subsequently, after additional treatment, the employee was given restrictions which the employer could not accommodate and the employee began job placement. Between August 2012 through October of 2014 the employee continued to receive acupuncture treatment with no change in pain. Dr. Sandness opined that the employee was in too much pain to work. Dr. Norgard, on the other hand, opined that the employee could work without restrictions, and that the treatment with Dr. Sandness was not reasonable or necessary. The W.C.C.A. noted that the compensation judge stated that the employee had an extensive history of similar symptoms for which she received treatment. In addition, she had a history of work-related injuries and workers' compensation claims. However, at her deposition, she denied ever filing a claim prior to the 2009 injury. Compensation Judge denied the employee's requests for reimbursement for acupuncture treatment, as well as medications and other treatment, but determined that the employee was PTD. On appeal of the denial of treatment, the employee argued that ongoing treatment was appropriate because it relieved her symptoms and because she had a permanent injury. *Peterson v. Kandi Kourts*, 45 W.C.D. 528 (W.C.C.A. 1991). However, the W.C.C.A. noted that *Peterson* does not state that all treatment for a permanent injury must be considered reasonable and necessary. The W.C.C.A. noted that the question of reasonableness and necessity is one of fact which will not be overturned unless it is clearly erroneous and unsupported by the record as a whole. In this case, the compensation judge outlined the incredible amount of conservative care that provided no lasting or significant relief. The W.C.C.A. affirmed the findings of the compensation judge due to substantial evidence supporting the findings made regarding the denial of treatment. With regard to the cross-appeal, the W.C.C.A. affirmed the compensation judge's finding that the employee is PTD. The employer argued that the QRC's testimony that the employee should not have been required to conduct a job search because she had no transferrable skills, and his testimony that Dr. Sandness had taken the employee off work, was not supported by evidence. The employer additionally argued that Dr. Sandness' assessments and opinions were based on the employee's subjective reports of pain, and that neither the QRC nor Dr. Sandness were aware of the employee's past work injuries. The compensation judge concluded that the employee's pre-existing conditions and restrictions from her work injury combined rendered her permanently and totally disabled. Further, the judge relied on Dr. Wengler's opinion that the employee could not be productive in any way given her physical findings, Dr. Sandness' opinion that returning to work was not realistic, and the QRC's opinion that she had no transferrable skills. As a result, the W.C.C.A. concluded that the compensation judge had substantial evidence to find the employee permanently and totally disabled.

Ruby v. Casey's General Store, Inc., No. WC15-5804 (Served and Filed September 23, 2015). The employer and insurer appealed Compensation Judge Bouman's conclusion that the employee's neuropathic pain transferred from her left lower extremity to her right upper extremity. The employee sustained an injury in 2005 and was subsequently diagnosed with Complex Regional Pain Syndrome ("CRPS") in her left foot and ankle. Within a few months she began to feel the symptoms in her left shoulder. She sought and was awarded medical care for neuropathic pain in her left arm. This decision was ultimately affirmed by the Supreme Court. See *Ruby v. Casey's Gen. Store, Inc.*, No. A11-0964 (Minn. September 28, 2011). In September 2013, she began to report symptoms in her right upper extremity and elbow. Within a few months she was describing several RSD symptoms in her right upper extremity and she was ultimately diagnosed with RSD of the right upper extremity. The employer and insurer obtained an IME with Dr. Hubbard who opined that the employee did not have RSD/CRPS and only had tendonitis in her right elbow that was not related to the 2005 date of injury. Further, Dr. Hubbard concluded that the employee was not suffering from RSD/CRPS in any extremity. The employee was also evaluated by Dr. Elghor who opined she did have CRPS in the right upper extremity and that the right elbow problems were due to overuse arising out of her inability to use her left arm and her need for a cane. Compensation Judge Bouman concluded that the employee's right upper extremity condition was neuropathic pain that transferred from her upper left side and was caused by her RSD/CRPS condition that arose out of the original left foot/ankle injury. The W.C.C.A. affirmed rejecting the employer and insuree's argument that the medical evidence was insufficient to support the judge's decision because the evidence was unduly subjective. The W.C.C.A. noted that the medical records contained observed, objective symptoms affecting the right upper extremity that are consistent with RSD/CRPS. The W.C.C.A. found that the evidence submitted was sufficient to establish the chain of causation running from the work injury to the right side neuropathic pain.

Lopez v. JBS USA, LLC, No. WC15-5816 (Served and Filed September 28, 2015). The *pro se* employee appealed Compensation Judge Bradley Behr's conclusion that the employee's work injury had resolved and that he was not entitled to further benefits. The employee sustained an admitted work-related cut to his left hand. In dispute was the nature and extent of the injury, along with the employee's claims of direct or consequential injuries to his neck, chest, heart, legs, and left shoulder, along with various wage loss and medical benefits. Ultimately, the W.C.C.A. affirmed the compensation judge's conclusion that the employee did not meet his burden of proof, and that the medical opinion on which the employee relied was based upon a lack of review of all of the medical records and the reliance on the employee's history of his problems, which was not supported by the contemporaneous medical records.

Svenningsen v. Innovative Benefit Concepts/Petty & Sons Timber Prods., Inc., No. WC15-5808 (Served and Filed October 5, 2015). The employee appealed Compensation Judge William Marshall's conclusion that the employee's need for surgery in 2013 was not related to his 1998 work injury. In 1998, the employee sustained a work injury resulting in a herniated disc at the L4-5 level, underwent a laminectomy, and was paid TTD and PPD. The employee subsequently worked for multiple other employers and did not seek additional medical treatment for his low back until 2010. The employee was subsequently diagnosed with a repeat herniation at L4-5, along with a disc bulge at L5-S1. In 2013, he underwent a "re-do" laminectomy at L4-5, along with a discectomy and foraminotomies. The treating surgeon indicated that he could not determine whether the need for surgery in 2013 was causally related to the 1998 injury. An IME

found no causal connection between the 1998 injury and the problems occurring in 2010. The IME reported that had the recurrent disc problem occurred within the first year following surgery, it would have been related, but since it occurred 11 years later, it was not related. The employee then obtained his own expert opinion, and that doctor found a causal connection between the 1998 injury and the 2010 problems and 2013 surgery. The employee attempted to argue that the IME's opinion should have been rejected because he failed to note the employee's claims that his condition waxed and waned over the years. What the IME did note was that the employee did not seek medical treatment for approximately 10 years, and he did quite well following the initial surgery. The lack of medical treatment was not in dispute. Viewing all of the evidence submitted and the entirety of the opinions of the IME, the W.C.C.A. concluded that the compensation judge did not err in relying on the IME's opinions and affirmed the denial of benefits.

Holtlander v. Granite City Roofing, No. WC15-5810 (Served and Filed October 15, 2015). The employer and insurer appealed Compensation Judge James Cannon's determination that the employee sustained a consequential injury to his right knee. The employee initially sustained a low back injury in 2000, resulting in several surgeries. The employee's doctors noted that he had a "severe antalgic gait" following the injury and surgery. The employee claimed that he sustained several falls, due to his leg giving out. As a result of one of these falls, the employee injured his right knee. An IME concluded that the employee was not experiencing knee instability of neurologic disorders as a result of the low back injury and that the right knee condition was not a consequence of the low back injury. The employee's treating doctor, however, provided a report finding a causal connection between the employee's low back injury and the instability in his legs, indicating that this condition then caused the fall and knee injury. The W.C.C.A. concluded that the judge's choice between conflicting medical opinions was supported by substantial evidence, and that there were no foundational issues with the opinions on which the judge relied. They therefore affirmed the determination of a consequential injury. It is interesting to note that one of Judge Cannon's findings was that the fact that the employee had multiple surgeries "in and of itself" supports a conclusion of instability. This conclusion was not supported by any medical opinion. However, the W.C.C.A. found that this error did not change the outcome as there was ample evidence independent of this perceived connection to support the judge's determination.

Allan v. R.D. Offutt Co., No. WC15-5883 (Served and Filed November 12, 2015). This decision follows the decision of the Minnesota Supreme Court, issued August 31, 2015 which was discussed during the case law update at the September 2015 meeting. As a reminder, the Supreme Court determined that in order for PPD to be included for purposes of meeting the statutory thresholds for a PTD claim, the condition for which the PPD is rated must impact the claimant's employability. In reaching this conclusion, the Supreme Court reversed the decisions of Compensation Judge Cannon and the W.C.C.A. which both concluded that the employee's PPD, rated for loss of teeth, could be included in order to reach the PPD threshold requirements. On remand from the Supreme Court, the W.C.C.A. simply reviewed the history of the matter and its previous decision, along with the Supreme Court's determination that "a disability that contributes to the employee's permanent-partial-disability rating must affect the employee's ability 'to secure anything more than sporadic employment resulting in an insubstantial income.'" *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 37, 75 W.C.D. 401, 4010 (Minn. 2015). The W.C.C.A. concluded that the issue of whether the PPD ratings used to meet the statutory

threshold affected the employee's employability was not raised by the parties at the hearing, addressed by the compensation judge, or considered by the W.C.C.A. Therefore, it remanded the matter to the compensation judge for an evidentiary hearing and indicated that the employee "must present evidence as to the functional loss represented by the ratings of permanent partial disability from the disability schedule which he claims may be used to meet the statutory threshold. The employee must also present evidence as to how any such functional loss affects the employee's ability 'to secure anything more than sporadic employment resulting in an insubstantial income,' considering the employee's age, training, experience, and work available in the community." See *Schulte*, 278 Minn. at 83, 153 N.W.2d at 133-134, 24 W.C.D. at 295.

Arne v. Contingent Work Force Solutions, LLC, No. WC15-5805 (Served and Filed November 17, 2015). The employer and insurer appealed Compensation Judge Rykken's determinations regarding the nature and extent of the injury and award of TTD benefits. The employee was working as a food server at the Stillwater prison at the time of her injury. She was assaulted by an inmate. The assault was captured on video tape, but the location and angle of the camera prevented an absolutely clear view of what parts of her body she hit when she fell after being punched by an inmate. The injury was initially admitted, but over time the body parts involved and nature and extent of the injury became disputed, along with the employee's entitlement to ongoing TTD benefits. Extensive medical records were presented to the judge, along with expert opinions and the videotape of the incident. The compensation judge concluded that the employee sustained injuries to her left knee, low back, neck, vision problems, and a psychological condition, and that she was not at MMI. She was awarded the requested TTD and medical benefits. The employer and insurer appealed, with the primary argument being that the employee gave contradictory, inaccurate and misleading statements regarding her injury. In support of this argument, the employer and insurer pointed to the video tape, information in various medical records, and the employee's deposition testimony. The W.C.C.A. affirmed the judge's determinations, noting that a determination of credibility is generally entrusted to the compensation judge. The court noted that the judge could reasonably conclude that any differences in the employee's accounts of the injury were to be explained, in-part, by the traumatic nature of the experience. Further, because medical records are created by providers, and not the patient, and therefore, contain the providers' understanding and interpretation of the history given, the judge could reasonably conclude that minor inconsistencies between the various recitals of the medical history did not necessarily indicate that the employee provided inconsistent information to the different providers. The compensation judge found that the various medical histories were all "reasonably consistent" and the W.C.C.A. concluded that the various inconsistencies were not of a sufficient degree or nature to render the compensation judge's credibility determination clearly erroneous. Similarly, the W.C.C.A. rejected the employer and insurer's arguments regarding foundational issues with the opinions of the employee's physicians, noting that because the judge accepted the various medical histories as all reasonably consistent with the employee's testimony, there were no obvious foundational defects.

Moore v. Carley Foundry, No. WC15-5812 (Served and Filed November 20, 2015). The employee appealed Compensation Judge William Marshall's conclusion that he failed to meet his burden of proving that he sustained a work-related injury. The employee had a lengthy history of low back problems. In April 2014, he reported to his supervisor that he had low back pain and that he thought it was due to wearing poorly fitting boots. The employee subsequently

gave other versions of his low back pain, including, that it developed over a period of time, and later, that it was a result of a specific lifting incident. Primary liability was denied. The employer and insurer's IME agreed that if the employee was lifting at work when his low back pain started, then his condition was work-related. However, the doctor went on to note the changing story regarding the cause of the condition, and concluded that the employee's first story regarding ill-fitting shoes was likely the most accurate and that this would not have caused the employee's low back condition. On appeal, the employee's attorney argued that the employee was a "misinformed man" who lost his claim because he initially thought that his tight work boots caused his condition. Because he was misinformed he did not understand the cause of his low back condition. The employer and insurer, however, noted that no advanced medical or legal training is necessary to tell a doctor the source and cause of one's pain. The W.C.C.A. affirmed Judge Marshall's denial of the employee's claims, noting that the employee did not meet his burden of proving that his work activities were a substantial contributing factor to development of his low back problems. The W.C.C.A. further noted that the medical expert reports and deposition of the treating doctor did not adequately expose or discuss how the work activities might have caused the employee's condition. Finally, the W.C.C.A. affirmed the compensation judge's choice between conflicting medical opinions. *Nord v. City of Cook*, 360 N.W.2d 337, 342 W.C.D. 364, 372-73 (Minn. 1985).

Contreras v. Jennie-O Turkey Store, No. WC15-5822 (Served and Filed November 24, 2015). The employee appealed Compensation Judge Bradley Behr's denial of TTD and medical benefits. Judge Behr found that the employee sustained injuries to several body parts and awarded some of the claimed benefits. However, he denied a period of claimed TTD, concluding that the employee refused a suitable job offer that she was physically capable of performing, and therefore was not entitled to TTD based upon Minn. Stat. 176.101, subd. 1(i) which indicates that TTD benefits shall cease if an employee rejects a suitable job offer. The W.C.C.A. vacated this portion of the judge's Findings and Order, noting that this provision only applies if a claimant is actually being paid TTD at the time of the cessation event. In this case, the employee was not receiving or being paid TTD at the time of the job offer, and therefore, this statutory provision does not bar future receipt of TTD benefits.

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