



## Minnesota Workers' Compensation

### CASE LAW UPDATE

September 1, 2016 – November 30, 2016

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## AVERAGE WEEKLY WAGE

### **Samuda v. Minn. Vikings Football Club (W.C.C.A., November 15, 2016)**

**Background:** The employee sustained a right ankle fracture during training camp in 2014 while working as a professional football player for the Minnesota Vikings. He was being paid \$700 per week during training camp, which the employer and insurer used as his average weekly wage. The employee claimed that his average weekly wage should have been higher, since his contract for the 2014 season was for a \$320,000 annual salary. The compensation judge agreed with the employee and the employer and insurer appealed.

**Holding:** The WCCA reversed and remanded the case back to the compensation judge for a determination of the employee's history of earnings as a professional football player. The WCCA stated that generally, the employee's earning capacity should be based on the employee's actual earnings at the time of his injury and not on hypothetical future earnings.

### **Baker v. Minn. Vikings Football Club (W.C.C.A., November 16, 2016)**

**Background:** The employee was a professional football player for the Minnesota Vikings. In May of 2014, during minicamp, he injured his low back while lifting weights. He was able to recover enough to make it to training camp in August. However, he was released from the team at the end of training camp. While the employee attempted to sign on with other teams, ultimately, at his doctor's advice, he ended his football career because of his back condition. He then brought a workers' compensation claim alleging temporary total disability benefits.

The employee alleged that his average weekly wage should be \$9,193, as that is what he would have earned in 2014, had he made the team. The employer and insurer argued that the average weekly wage should be \$1,143.36, based on what he earned during the 17 week offseason.

The compensation judge rejected both of the proposed average weekly wages and substituted his own calculations by taking into consideration several factors, including the employee's wages during the 2013 season. The compensation judge also determined that the employee did not have any work restrictions and that he did not conduct a reasonable and diligent job search and therefore rejected the employee's temporary total disability claim. Both parties appealed the average weekly wage determination and the employee appealed the denial of temporary total disability benefits.

**Holding:** The WCCA affirmed the compensation judge's decision, holding on the average weekly wage issue that a compensation judge is not bound by agreements made by the parties. In this case, the compensation judge's approach to the average weekly wage determination was reasonable in light of the evidence submitted. Further, since the employee had only been restricted from playing professional football, he did not meet his burden of proving that he was

restricted from employment. The WCCA also affirmed the compensation judge's determination that the employee did not perform a reasonable and diligent job search.

## **BURIAL EXPENSES**

### **Grage v. Acme Electric Motor, Inc. (W.C.C.A., September 2, 2016)**

**Background:** The employee was killed following an electrocution while working for the employer. His spouse chose to have his remains cremated. She then purchased a bench-style monument with a plaque in place of a headstone for a total cost of \$11,000. She requested reimbursement for burial expenses, which the employer and insurer denied on the basis that "burial expenses" under Minn. Stat. § 176.111, subd. 18 refers solely to the act of burying, and a bench was not an integral part of the burial. The spouse also sought a rehabilitation consultation, which was also denied. Following a hearing, the compensation judge found that the bench monument was a burial expense but denied the spouse's request for a rehabilitation consultation. The parties appealed.

**Holding:** The WCCA affirmed the compensation judge's burial expense determination, holding that there was no requirement that funeral expenses be reasonable, only that they not exceed \$15,000. The Minnesota Workers' Compensation Act did not provide authority to define or limit burial expenses beyond placing the \$15,000 cap on expenses.

The WCCA reversed the compensation judge's denial of the spouse's request for a rehabilitation consultation, holding that she demonstrated a need for rehabilitation assistance to become self-supporting.

## **EVIDENTIARY SUPPORT AT HEARING**

### **Thao v. Synovis Life Technologies, Inc. (W.C.C.A., September 2, 2016)**

**Background:** The employee sustained an admitted *Gillette*-type injury related to her longstanding employment in 2008 involving her bilateral upper extremities. A settlement was reached that left open future medical expenses. One year post-settlement, she reported "new problems" that included left wrist pain and index finger pain and sought additional treatment. The employee obtained support from her treating doctor that her symptoms were work-related and a Medical Request was filed.

The compensation judge concluded that it was contradictory to conclude that the current symptoms were due to the 2008 injury date when the medical history refers to "new problems." The employer and insurer relied upon an independent medical examination report completed prior to the settlement agreement and the new complaints. The employee appealed.

**Holding:** The WCCA held that the compensation judge cannot disregard unopposed medical evidence and therefore erred by finding a lack of causation. In reversing the opinion of the compensation judge, it stated that there was nothing in the employee's medical record that supported a contrary position to that which was submitted by the treating doctor.

### GILLETTE INJURIES

#### **Olson v. Clearwater Rice, Inc. (W.C.C.A., October 12, 2016)**

**Background:** The employee was a seasonal worker who operated various bulldozers, tractors and similar equipment. He had a prior history of non-work conditions involving his low back with intermittent complaints thereafter. Relying upon an independent medical examination by Dr. Larry Stember, the employee argued that he subsequently developed a *Gillette*-type injury to his back due to his longstanding work activities that resulted in the need for fusion surgery. The employer and insurer relied upon an independent medical examination by Dr. David Carlson who concluded that the employee's findings were degenerative in nature and unrelated to any work activities. This was countered by another independent medical examination at the employee's request with Dr. Mark Larkins who directly attributed the increased symptoms and need for surgery to his work activities at the employer. The compensation judge found the employee's testimony unconvincing and the opinions of Dr. Stember inconsistent with a *Gillette* injury and concluded that the employee did not sustain a *Gillette*-type injury.

**Holding:** The WCCA affirmed the compensation judge's denial of the employee's claim and concluded that Dr. Carlson had adequate foundation. The WCCA specifically concluded that a "re-weighting" of the evidence on appeal is contrary to longstanding case law when the compensation judge has applied the correct legal standard.

#### **Turner v. Jerry's Enters., Inc. (W.C.C.A., October 25, 2016)**

**Background:** The employee worked at a grocery store and developed gradual onset of pain in the wrist and thumb with increased symptoms dependent upon the nature of his job duties. He had a specific non-work event in the nature of a pop and numbness in his thumb and wrist after pulling on a car door handle. This led to treatment and surgery by Dr. Mark Fischer, who later supported the employee's claim that he sustained a *Gillette*-type injury that weakened the EPL tendon and led to its eventual rupture in the non-work event. The employer and insurer relied upon an independent medical examination by Dr. William Call who opined that the rupture was idiopathic and developmental and not related to work activities.

The compensation judge found that the employee sustained a *Gillette*-type injury and awarded benefits. The employer and insurer appealed on the basis that the medical literature relied upon by Dr. Fischer lacked support and that the non-work event was a superseding cause.

**Holding:** The WCCA affirmed the compensation judge's decision, holding that Dr. Fischer's opinions were supported by substantial evidence, including the credible testimony by the employee that his pain symptoms increased during periods of particular types of employment and would decrease when he was performing less physical work.

**Lindelof v. Lano Equip., Inc. and Sylva Corp., Inc. (W.C.C.A., November 1, 2016)**

**Background:** The employee initially sustained an admitted injury to his neck, right shoulder and thoracic spine at Lano Equipment in 2002. He received injections for his shoulder for a described impingement syndrome and underwent anterior cervical discectomy and fusion at C5-6 by Dr. David Kraker. He later had arthroscopic shoulder surgery and was released to regular duty with 60 pound restrictions. He was placed at maximum medical improvement in 2004. He left Lano at the time and obtained employed with Sylva Corp. performing servicing and mechanical work. He had an admitted interim left shoulder injury in 2007 with resulting surgery. He noted worsening symptoms in his right shoulder and neck by late 2012 and left Sylva in August 2013 for a new employer. Further treatment was obtained through Dr. Michael Freehill in 2014, who recommended shoulder surgery. The employee claimed a *Gillette*-type injury to his shoulders and neck in November 2012 at Sylva, supported by an independent medical examination (IME) with Dr. H. William Park, who apportioned responsibility between the 2002 and 2013 claimed *Gillette* injuries. Lano obtained an IME with Dr. Paul Wicklund, who also apportioned liability for the right shoulder between the two injury dates. Sylva obtained an IME with Dr. Mark Friedland, who attributed responsibility for the employee's right shoulder and cervical spine injuries to the 2002 event and apportioned responsibility for the left shoulder condition to both the 2002 and 2007 dates of injury. Dr. Freehill, meanwhile, apportioned liability for both shoulders between the two dates of injury.

The compensation judge found that the employee sustained a *Gillette*-type injury at Sylva in 2012, apportioned responsibility for wage loss benefits at 50% to the 2002 injury and 25% each to the injuries in 2007 and 2012. Sylva and its insurer appealed this decision.

**Holding:** The WCCA affirmed the compensation judge's opinions in relevant part. The panel concluded that the employee's testimony supported a *Gillette* injury in 2012, noting that he claimed that he had increased pain in his neck and shoulders that became more frequent and persistent. This, in combination with the supporting opinions of Dr. Park, Freehill and Wicklund, provided adequate foundation for the compensation judge's conclusions. The WCCA noted that, in addressing an argument that the compensation judge only gave cursory mention to

Dr. Friedland's opinions, it is not necessary for the compensation judge to "specifically mention in a decision every piece of evidence or opinion that was part of the record."

### **INTERVENTION CLAIMS**

#### **Fischer v. ISD 625 (W.C.C.A., November 16, 2016)**

**Background:** Landmark Surgery Center, Summit Orthopedics, and First Class Recoveries filed motions to intervene but failed to appear at the hearing by telephone, pursuant to the Office of Administrative Hearing's standing order then in effect. The employee's attorney then asserted that he was making a direct claim on behalf of the employee for the expenses incurred with the intervenors. The compensation judge ordered the employer to reimburse the intervention claims and the employer and insurer appealed.

**Holding:** The WCCA reversed, holding that the intervenors failed to follow the requirements of the OAH's standing order. Further, since the employee's attorney did not unequivocally establish at the hearing that he was representing the intervenor's interest, he could not declare that he was making a direct claim on appeal.

### **MEDICAL CAUSATION**

#### **Clark v. Metro Transit (W.C.C.A., September 29, 2016).**

**Background:** The employee's claimed right knee injury and need for surgery was causally related to an otherwise admitted injury at the employer on February 10, 2014 when he slipped and fell in the employer's parking lot. The employee denied any prior history of knee problems but had been evaluated pre-injury for osteoarthritic conditions in her joints. The employee's claim of causation was supported by Dr. Douglas Becker, who also recommended surgery. The employer relied upon an independent medical examination by Dr. Edward Kelly, who opined that the employee had bilateral osteoarthritis of the knees and that any injury at work was no more than a sprain or contusion that had resolved.

The compensation judge found a direct causation between the employee's work injury and the need for the proposed surgery.

**Holding:** The WCCA affirmed the decision of the compensation judge, rejecting the arguments of the employer that because the judge failed to consider the history of treatment for osteoarthritis pre-injury, the decision should be reversed. The WCCA concluded that the compensation judge did not need to recite or refer to all medical evidence submitted at hearing and because the compensation judge found the employee to be credible, the substantial evidence supported the judge's conclusions.

## MEDICAL TREATMENT REFERRAL

### **Lethard v. Craig's Tree Service (W.C.C.A., October 6, 2016).**

**Background:** The employee sustained admitted injuries to his upper back and shoulder while working for the employer in 2003. He underwent significant treatment, including arthroscopic surgery by Dr. Michael Freehill and a series of medial branch blocks by Dr. James Andrews. He was referred to Dr. Samir Elghor for injections and had therapy at PNBC. He was given a permanent partial disability rating in 2007 and sought no additional treatment until 2013, when he sought treatment again with Dr. Elghor, who referred the employee elsewhere. The employer and insurer obtained an independent medical examination with Dr. Peter Boyum, who concluded that the work injury to the shoulder was a mild strain that had resolved and that further treatment was unnecessary for the cervical spine. A Medical Request was filed and the employee's request for a referral was denied at an initial administrative conference and by the subsequent compensation judge. The compensation judge denied the request for a medical consultation with a physician who had previously treated and discharged the employee.

**Holding:** The WCCA held that the employee's request for a medical consultation did not meet the criteria of Minn. Stat. § 176.135 because the record as a whole provided no clear basis for the referral. The employer and insurer also argued that denying the consultation barred all future medical treatment. The WCCA disagreed as the decision was on a single referral and the doctrine of *res judicata* only precluded claims specifically litigated and decided in an earlier decision.

## PENALTIES

### **Marcial v. Atlas Staffing (W.C.C.A., September 7, 2016)**

**Background:** The employee brought a penalties claim against the employer and insurer for frivolous denial of primary liability. The compensation judge did find that the employee sustained a temporary injury at the employer. However, she determined that since the employer and insurer had a good faith basis to deny primary liability, given that the employee provided different histories to his medical providers and to employer representatives regarding how the injury occurred, no penalties were warranted. The compensation judge also rejected the employee's argument that once the independent medical examiner determined that an injury occurred, the employer and insurer were obligated to accept primary liability. The employee appealed.

**Holding:** The WCCA concluded that the compensation judge's denial of the penalty claim was supported by the substantial evidence. The WCCA further agreed with the compensation judge's



determination that the independent medical examiner was assuming that the history given to him by the employee was correct in determining that a work injury occurred. Since the employer and insurer were challenging that history, they were not obligated to pick up the employee's claim.

### **PETITION TO VACATE ORDER OF DISMISSAL**

#### **Hudacek v. Loram Maint. Of Way, Inc. (W.C.C.A., November 3, 2016)**

**Background:** The employee sustained a knee injury in 1987 and was paid wage loss benefits. He subsequently filed petitions alleging entitlement to an underpayment of those benefits. Motions to dismiss were filed by the employer and insurer. A special term hearing was held but it was adjourned to allow time for the parties to obtain additional relevant information. Documentation was later obtained indicating that the employee did not have support for his claim of an underpayment of benefits. The compensation judge issued an order dismissing the employee's claims. The employee did not appeal the decision to the WCCA but the employee sought to vacate the order under the claim that he was wrongfully terminated and defrauded.

**Holding:** The WCCA first concluded that they have jurisdiction over a Petition to Vacate when a compensation judge issues an order dismissing a Claim Petition on the merits of the case. Further, they concluded that the employee failed to present a prima facie case of fraud. Having failed to present any documentation supporting the claim of fraud, the WCCA denied the employee's claim to vacate the order.

### **PERMANENT TOTAL DISABILITY BENEFITS**

#### **Dittel v. NW. Airlines Co. (W.C.C.A., November 15, 2016)**

**Background:** The employee alleged that he sustained a consequential psychological condition as a result of admitted work-related physical injuries at the employer. He also claimed that he was permanently and totally disabled and that he was entitled to a 20% permanent partial disability rating based on his consequential psychological injury. The compensation judge denied the employee's claim that he sustained a consequential psychological condition and that he was permanently and totally disabled. The employee appealed.

**Holding:** The WCCA affirmed, holding that the compensation judge's decision was supported by the substantial evidence and was based on a choice of medical opinions that had adequate foundation.

**Dekeyrel v. Metro. Mech. Contractors (W.C.C.A., November 16, 2016)**

**Background:** The employee alleged that he was permanently and totally disabled as a result of a work injury at the employer. The compensation judge determined that the employee failed to prove that his disability was likely to exist for an indefinite period of time and that it was premature to find the employee permanently and totally disabled.

**Holding:** The WCCA reversed, finding that the speculative potential that the employee could return to work in the future did not change the fact that his disability and inability to work existed and was likely to exist for an indefinite period of time. The WCCA also found that the compensation judge's finding that the employee might find employment if he received some unspecified training was speculative.

**Moyer v. Lifeworks Servs., Inc. (W.C.C.A., October 25, 2016).**

**Background:** The 71 year old employee worked for employer in a position that required her to administer medication and perform tube feedings for disabled individuals. She sustained a specific injury to her left shoulder with resulting consequential injury to her right shoulder. The employer was ultimately unable to accommodate the employee's light duty work restrictions. A QRC was placed on the file and the employee was eventually placed at maximum medical improvement with permanent restrictions against overhead work. An independent medical examination was performed by Dr. Tilok Ghose, who agreed with the necessity for restrictions and provided permanent partial disability (PPD) ratings of 6% bilaterally. While still in job search mode, a Claim Petition was filed seeking entitlement to permanent total disability (PTD) benefits. The employee returned to work in a position working no more than 6-10 hours per week. She also obtained the opinion of a chiropractor that her combined work and non-work related PPD was 20%.

The compensation judge denied the claim for PTD on the basis that the employee failed to establish the threshold 15% PPD rating to support her claim for PTD benefits and further determined that the employee had not met her burden of proof that her physical disability in combination with her PPD caused her to be unable to secure anything more than sporadic employment resulting in a insubstantial income. The compensation judge did order temporary partial disability (TPD) benefits. The employee appealed on the basis that the compensation judge should not have addressed the PTD issue once TPD benefits were awarded.

**Holding:** The WCCA affirmed the compensation judge's decision, holding that the compensation judge appropriately addressed all issues presented, including the PTD claim. It was therefore not a moot issue for the compensation judge to ignore once a determination was made ordering payment of TPD benefits. A finding that the employee is presently entitled to TPD benefits does not necessary preclude a future finding to the contrary. The WCCA also

affirmed the finding that the employee failed to meet the PPD thresholds, as the ratings provided by the chiropractor were lacking in foundation.

### **RSD/CRPS and RES JUDICATA**

#### **Barrick v. Custom Prods. of Litchfield, Inc. (W.C.C.A., September 23, 2016)**

**Background:** The employee sustained an admitted work injury to her right arm in July 2011 while operating a skid loader. She claimed a second twisting injury to her arm one month later. She was diagnosed with epicondylitis, shoulder sprain and ulnar nerve symptoms. An independent medical examination (IME) was obtained with Dr. Jeffrey Nipper, who opined that the employee sustained a temporary injury that resolved. Litigation ensued and following a hearing, the compensation judge determined that the employee's injury was ongoing.

The employee sought work elsewhere while also being referred to United Pain Center and undergoing treatment for possible RSD/CRPS. A second IME was obtained with Dr. Nipper, who did not causally relate the RSD/CRPS issues to the work injury. Further litigation ensued and, following a hearing, the compensation judge found causation and ordered ongoing treatment and wage loss benefits.

The employee had a new injury involving her arm at her new employer in December 2013/January 2014 and had an increase in symptoms. She returned to Dr. Hess at United Pain Center, was taken off work and received additional treatment. A third IME was performed by Dr. Nipper, who concluded that the incident at the new employer was a strain/sprain and that the employee did not have findings consistent with RSD/CRPS. The new employer was joined as a party to the action and various treatment options were offered. Dr. Hess provided a 40.5% permanent partial disability (PPD) rating and placed responsibility for the employee's condition solely on the original injury. This was also supported by an IME by Dr. Loren Vorlicky, obtained at the request of the new employer. Dr. Lon Lutz was appointed a neutral physician by the compensation judge in March 2015. He did not find RSD/CRPS but found the December 2013/January 2014 event to be a temporary aggravation of the employee's preexisting condition.

The employee sought entitlement to temporary total disability (TTD) benefits, 40.5% PPD, penalties for late payment of fees, medical expenses, underpayment of wage loss benefits, and referral to the Cleveland Clinic. The compensation judge, who was a different judge from the earlier proceedings, ordered payment of 18.5% PPD, ordered payment of injections, ordered the underpayment of benefits, denied PPD for the RSD/CRPS, denied penalties and denied the clinic referral. The employer and insurer appealed the 18.5% PPD award, arguing that the neutral examiner did not use a goniometer in his testing, and appealed the approval of injections. The employee cross-appealed the denial of PPD for the RSD/CRPS, the denial of penalties, and the denial of the referral request.

**Holding:** PPD affirmed: The neutral examiner provided the measurement required. Since there was adequate foundation for the compensation judge's determination, the WCCA upheld the decision.

Injections affirmed: Substantial evidence supported the compensation judge's decision.

PPD on RSD/CRPS affirmed: The WCCA rejected the employee's argument that since the earlier compensation judge had found RSD/CRPS, PPD should be awarded based on a *res judicata* argument. The WCCA pointed out that PPD was not an issue before the earlier compensation judge.

TTD: Substantial evidence supported the compensation judge's finding that the employee was not entitled to TTD benefits.

Penalty and Attorney Fees: The WCCA also reversed the compensation judge's denial of penalties, noting that he misapplied the \$250 deduction in Minn. Stat. § 176.081, Subd. 7.

Referral: Vacated the compensation judge's denial of the referral to the Cleveland Clinic.

## **SETTLEMENT OF PARTIES**

### **Perez-Rivera v. MPLSP Hotel Corporation (W.C.C.A., September 20, 2016)**

**Facts:** A compensation judge rejected a proposed stipulation for settlement that contemplated closing future medical benefits regarding the employee's admitted work-related left knee condition. He issued an Order Disapproving Stipulation, with a memorandum explaining the rationale for his decision. The compensation judge was concerned with the fact that the employee continued to have significant complaints and restrictions regarding her left knee. He also noted that the medical experts left open the possibility that the employee may develop progressive degenerative joint disease in the future, which would require additional medical treatment and a possible total knee replacement.

The employer and insurer then brought a Motion to Disqualify the compensation judge from the case, which was denied by an Office of Administrative Hearing supervising judge. The disapproval of the stipulation and the denial of the Motion to Disqualify were appealed by the employer and insurer.

**Holding:** The WCCA affirmed both determinations, holding that the compensation judge did not abuse his discretion in rejecting the stipulation for settlement as he could reasonably conclude that closing out of all future medical benefits and costs may not be in the best interest of the employee given the employee's injury and the medical opinions submitted. The WCCA also held that it lacked jurisdiction to rule on the order denying the Motion to Disqualify, since the order did not affect the merits of the case.

**Forrestal v. Miller Dwan Med. Ctr. (W.C.C.A., September 30, 2016)**

**Background:** The parties entered into a stipulation for settlement that settled the employee's low back and hip injury on a full, final, and complete basis, with certain medical treatment left open, subject to the defenses of the employer and insurer. When the employee signed the stipulation for settlement, she was on a drug regimen that included the narcotic drug Lortab. Following the award on stipulation, the expectation was that the employee would continue to receive Lortab for her chronic pain condition. The employee signed a contract, however, that included language that would stop the prescription if she violated the opioid contract. The employee subsequently breached the contract and then attempted to get the Lortab prescribed by numerous different providers. Each of the providers refused to prescribe narcotic medications, but offered alternative treatment, which the employee declined.

The employee then requested that the employer pay 11 medical bills related to her attempts to have the Lortab prescribed by different doctors. The employer denied the request, taking the position that there was no connection between the injury and the medical treatment. The compensation judge awarded payment of all 11 visits, finding that they represented a reasonable effort by the employee to obtain medical treatment for her injury. The employer appealed.

**Holding:** In a very thorough opinion, which included a separate concurring and dissenting opinion, the WCCA first held that the compensation judge's "reasonable effort" standard to reach his conclusion was not a standard by which medical treatment is awarded. The proper standard is whether the treatment is "reasonable and necessary to cure or relieve the effects of a personal injury." In this case, none of the providers indicated that the Lortab prescription was reasonable or necessary. In fact, the providers essentially stated the opposite. The WCCA found that substantial evidence supported the compensation judge's determination that some of the treatment, including treatment for symptoms of opioid withdrawal and treatment for ongoing low back pain, was reasonable and necessary. However, the substantial evidence did not support the compensation judge's findings on the remaining office visits. The WCCA was also persuaded by the fact that the employee refused the alternative treatment that was recommended by the providers.

**TREATMENT PARAMETERS**

**Puffer v. Precision Tune (W.C.C.A., September 23, 2016)**

**Background:** The employer and insurer appealed the compensation judge's determination that proposed disc replacement surgery to the lumbar spine was causally related to the employee's

work injury, and that ActiveL replacement discs was authorized medical treatment for use at the L3-4 level.

**Holding:** The WCCA affirmed, holding that the compensation judge's decision approving the surgery was based on medical opinions that had adequate foundation. The WCCA further held that there was no rule or statute prohibiting the use of ActiveL disc replacement. While the court had denied a similar surgery in a previous decision, that decision did not set out a rule of law to be followed in subsequent cases.

**Morgan v. Care Force Homes, Inc. (W.C.C.A., November 14, 2016).**

**Background:** The employee sought approval of various treatment modalities, including Botox injections, to treat his work-related low back condition. The employer and insurer denied the request, but a compensation judge awarded the treatment. The employer and insurer then appealed the compensation judge's award of Botox injections, arguing that Minn. R. 5221.6200, subp. 5C of the treatment parameters specifically states that "[Botox] injection are not indicated in the treatment of low back problems and are not reimbursable," and a departure from the parameters was not warranted.

**Holding:** The WCCA affirmed the compensation judge's decision, citing Minn. R. 5221.6050, subp. 8, which states "[a] departure from a parameter that limits the duration or type of treatment . . . may be appropriate." They concluded that in this case, the evidence included a documented medical complication.

**MISCELLANEOUS**

**Daniel Driggins v. Midwest Specialty Maint. (W.C.C.A., September 21, 2016)**

**Background:** The employee alleged that his low back injury at the employer was a permanent aggravation of a pre-existing condition. The employer and insurer argued that the employee's injury was temporary and resolved. The compensation judge agreed with the employer and insurer. She also concluded that the employee's testimony regarding his symptoms and inability to work was unreliable. The employee appealed.

**Holding:** The WCCA affirmed, indicating that they would not disturb the compensation judge's credibility determination and found that her reliance on the independent medical examiner's opinion was supported by the record.

**Yde v. Viking Coca-Cola Bottling Co. (W.C.C.A., September 27, 2016)**

**Background:** The employee sustained a fall that caused him to land on his left elbow during his work as a delivery driver. He had experienced left elbow pain on several occasions in the weeks leading up to his work injury. An independent medical examiner concluded that the employee's fall at work was not a substantial contributing cause of what had been diagnosed as a complete retracted tear of the biceps tendon and mild lateral epicondylitis. Following a hearing, the compensation judge rejected the independent medical examiner's opinion and adopted the opinion of the treating doctor. The employer and insurer appealed.

**Holding:** The WCCA affirmed, declining to disturb the compensation judge's choice of medical experts.

**Mattick v. Hy-Vee Food Stores (W.C.C.A., October 14, 2016)**

**Background:** The employee sustained an admitted fracture injury to her right ankle in 2000 with resulting surgery. She returned to work without restrictions and performed normal activities and had only occasional pain for the next 10 years. She had a subsequent event at work in 2014 when she tripped over a pallet. She had increased swelling and was diagnosed with a sprain. She had a non-work event (tripped on a sidewalk) two months later with resulting new onset of swelling. She was again diagnosed with a sprain. An independent medical examination (IME) by Dr. David Fey concluded that the second work fall was a temporary event that would have resolved within two months. The treating doctor recorded a history of ongoing complaints since the second work injury. Dr. Fey countered this opinion by stating that significant swelling would have been expected if they were related to the second work event.

The employee had a second IME at his attorney's request with Dr. Jack Bert. He felt that the employee's necessity for treatment was directly related to an aggravation at work. The employee sought approval of surgery. The compensation judge rejected the opinions of Dr. Bert on the basis that he did not sufficiently review the employee's medical records. The compensation judge concluded that the second work injury was temporary in nature and not a substantial cause for the need for surgery. The employee appealed.

**Holding:** In reversing the compensation judge, the WCCA reviewed the six factors necessary for consideration in determining whether an aggravation is temporary or permanent. These factors (referred to as "*McClellan* factors") include the nature and severity of the preexisting condition; the nature of the symptoms and extent of treatment prior to the new incident; the nature and severity of the new incident and any resulting disability; the nature and extent of the medical treatment after the new incident; the nature and extent of the work and non-work duties

during the relevant period; and medical opinions on the issue. The WCCA held that five of these six factors “unambiguously” supported a finding that the work injury was a permanent aggravation of the employee’s pre-existing condition (the sole factor not being Dr. Fey’s IME report). The WCCA rejected the foundation conclusions of Dr. Fey, noting that “the compensation judge overlooked significant aspects of the employee’s condition both before and after the work injury.” The WCCA therefore strayed from the usual custom of leaving such determinations to the compensation judge.

**Nyema v. Brown Tank, LLC (W.C.C.A., October 7, 2016)**

**Background:** The employee sustained injuries to his head, right shoulder and right hand while working as a welder for employer at an out of state project. He underwent various testing, most of which came back negative, and he was able to drive himself back to Minnesota. He received chiropractic treatment for his orthopedic complaints and was seen at Allina West Health for post-concussive symptoms. An IME was performed by Dr. Khalafalla Bushara, who concluded that the employee’s injury was in the nature of a sprain/strain that was temporary and had resolved. Post-IME the employee treated at Noran Clinic and had normal MRI scans of his head and neck. The employer and insurer filed a Petition to Discontinue.

The compensation judge concluded that the employee’s injury was temporary in nature and had resolved, accepting the opinions of the Dr. Bushara. The employee argued on appeal that a referenced photograph in evidence was not an accurate representation of the ladder at issue in the accident. He also argued that the compensation judge should have accepted the opinions of the treating doctors.

**Holding:** The WCCA affirmed the compensation judge’s decision, noting that the compensation judge heard testimony by the employee at hearing concerning the actual size of the ladder and specifically noted that the testing and other findings supported the compensation judge’s findings. The WCCA held that Dr. Bushara’s conclusions were supported by adequate foundation.



