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MINNESOTA WORKERS' COMPENSATION CASE LAW UPDATE

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176.82 ACTIONS

***Schmitz v. United States Steel Corporation*, Case No. A12-0709, (Minn. Ct. App. May 13, 2013)**. The employee allegedly sustained an injury at work on October 23, 2006. He alleged that he reported the injury on the day it occurred to his direct supervisor, Mr. Bakk. No accident report was filed. The following morning, the employee called Mr. Bakk to tell him that his back hurt, but due to noise at the employer, Mr. Bakk advised that he would call the employee back later. Later that day, Mr. Bakk and his supervisor, Mr. Sutherland, called the employee at home. The employee indicated that Mr. Sutherland informed him that the employer would take a "very dim view" of the employee if he were to file an accident report. The employee asked Mr. Sutherland whether they would fire him, and the employee indicated that Mr. Sutherland responded, "without having to perjure [myself], yes." The employee testified that this conversation led him to believe that he would be fired if he filed an accident report. On that same date, the employee saw his doctor, reporting that he had been having low back pain since moving a heavy object at work, but noting that he adamantly refused to put this under workers' compensation because of other issues that had been going on at the employer. The employee never filed an accident report concerning his alleged work injury. He was able to return to work without restrictions, although it was noted that the employer provided him with accommodations. The employee subsequently injured his back at home in December 2006, and was unable to return to work. In April 2007, he filed a workers' compensation claim, asserting that his inability to work resulted from the October 2006 work injury. The employer denied liability asserting, among other reasons, a failure to provide notice of the injury. The employee underwent back surgery and was authorized to return to light-duty work in October 2007. The employer did not provide him with a position.

The employee brought a number of claims pursuant to Minn. Stat. §176.82. The case had a complicated procedural posture, with the end result being that the district court, following a bench trial, entered a judgment for the employee on his threat-to-discharge claim, awarding $15,000 in emotional-distress damages and reasonable attorney fees and costs. The court rejected the employee's retaliatory-discharge and refusal-to-offer-continued-employment claims. The employer appealed the judgment on the threat-to-discharge claim. The Minnesota Court of Appeals (Judges Hudson, Stoneburner and Kirk) affirmed in part and reversed in part. The court held that the statute proscribes three forms of conduct: discharging an employee for seeking workers' compensation benefits; threatening to discharge an employee for seeking benefits; and intentionally obstructing an employee seeking benefits. Although there is no prior case law on the issue, the court determined that the statute is unambiguous and provides a cause of action for threatening to discharge an employee for seeking workers' compensation benefits, which is a separate action from retaliatory discharge and intentional obstruction of benefits. In order to seek such a claim, the employee must show that: (1) a person with knowledge that the plaintiff suffered a workplace injury; (2) attempted to dissuade the plaintiff from seeking workers' compensation benefits through one or more communications; (3) the communication created a reasonable apprehension of discharge; and (4) as a result, the plaintiff delayed or ceased seeking workers' compensation benefits. The court further determined that the employer's actions do not

need to be "cruel or venal", as is required in an intentional-obstruction-of-benefit claim. *See Bergeson*. The court further determined that the employer was vicariously liable for the actions of the supervisor. The supervisor's tortious act of threatening to discharge an employee for seeking workers' compensation benefits was within the scope of his employment and is imputed to the employer. The court determined that all four elements of the test for a threat-to-discharge claim were met in this case. It affirmed the judgment for the plaintiff on that cause of action.

The employee appealed the denial of his request for a jury trial. The court determined that the employee's claim alleging retaliatory discharge in violation of the statute, seeking monetary damages, is an action at law guaranteeing the right to a jury trial. Conversely, an action based on the alleged refusal to offer continued employment is equitable in nature, and therefore, is not the type of action entitling the party to a jury trial. The matter was remanded to the district court for a jury trial on the issue of the retaliatory discharge claim.

ADJUSTMENTS/MINN. STAT. §176.645

Olson, Kevin v. Dart Distributing, Inc., File No. WC12-5516, Served and Filed April 4, 2013. The employee sustained an injury in April 1996, and was subsequently stipulated to be permanently and totally disabled. The employee later asserted that because the minimum Statewide Average Weekly Wage is increased each year, his permanent total disability rate should increase each year at the same rate as the minimum SAWW. The employer and insurer argued that the employee's initial PTD rate is established at the date of injury as 65 percent of the minimum SAWW, but is increased thereafter only by operation of Minn. Stat. §176.645. Compensation Judge Ertl, relying on *Vezina v. Best Western Inn Maplewood,* 627 N.W.2d 324, 61 W.C.D. 255 (Minn. 2001), determined that Minn. Stat. §176.101, subd. 4 provided for compensation at 66-2/3 percent of the daily wage at the time of the injury, subject to a maximum and a minimum. The WCCA (Judges Hall, Stofferahn and Wilson) affirmed, finding that any adjustments to the employee's compensation rate should be made pursuant to Minn. Stat. §176.645 and not under the employee's proposed reading of Minn. Stat. §176.101, subd. 4.

ARISING OUT OF

Kainz v. Arrowhead Senior Living Community, File No. WC12-5511, Served and Filed April 1, 2013. The employee twisted her ankle while descending a flight of stairs while working as a nurse for a senior living community. She described the stairs as "kind of steep." The employer and insurer denied primary liability alleging that the injury did not arise out of and in the course of her employment. Compensation Judge Arnold, applying the "increased risk" test, held that the ankle injury arose out of and in the course of employment. The WCCA (Judges Milun, Wilson and Hall) affirmed, but on different grounds. The WCCA held that "the 'increased risk' test is not the only test used in Minnesota to analyze the arising out of element." The WCCA relied heavily on *Dykhoff v. Xcel Energy,* File No. WC12-5436, Served and Filed Nov. 30, 2012, where the WCCA previously held that "the 'arising out of' and 'in the course of' requirements are elements of a single test of a work-connection." The WCCA concluded that since the employee's injury was unexplained and the "in the course of" element was sufficiently strong, the compensation judge appropriately held that the ankle injury arose out of and in the course of employment. *See also Bohlin*.

ATTORNEY FEES

Lann v. Stan Koch & Sons Trucking, Inc., File No. WC12-5524, Served and Filed March 6, 2013. The employer and insurer resolved a dispute on a Medical Request seeking an MRI. The employee's attorney filed a statement of attorney fees requesting fees of $543.75 based on the time spent handling the dispute. The employee's attorney also requested reimbursement to the employee of $163.13, pursuant to Minn. Stat. §176.081, subd. 7. The employer and insurer did not dispute the $543.75 attorney fee, but argued that the appropriate fee under Minn. Stat. §176.081, subd. 7 was $88.13, because the $250 reduction allowed under that statute applied to every award of fees. The statute provides in part that "in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.00." Compensation Judge Dallner agreed with the employer and insurer and held that the employee was entitled to subd. 7 fees totaling $88.13. The WCCA (Judges Stofferahn, Wilson and Milun) reversed. The issue on appeal was whether the $250 deduction in the statute is applied every time there is an award of attorney fees in a single injury or only at the time of the first award. The WCCA analyzed the statutory history and legislative intent of Minn. Stat. §176.081, subd. 7, citing Minn. Stat. §176.081, subd. 1(b), which contains language "requiring a focus on the injury and not on the claim in considering the award under Subdivision 7." The WCCA determined that "applying the deduction again would be contrary to the cumulative nature of fees for a single injury." Judge Wilson issued a dissenting opinion, reasoning that workers' compensation cases involve multiple claims for separate benefits and corresponding claims for fees, and there was nothing in the statute to support applying the $250 only once.

CAUSAL CONNECTION

McCarney v. Malt-O-Meal Company, File No. WC12-5497, Served and Filed March 5, 2013. Compensation Judge Wolkhoff found that the employee's symptoms, which developed on June 20, 2011, were the result of his underlying and ongoing back problem. In the process, the judge relied heavily on the opinion of the independent medical examiner, Dr. Jeffrey Dick. The WCCA (Judges Wilson, Milun and Stofferahn) reversed and remanded. The WCCA cited *Vanda v. Minn. Mining and Mfg. Co.*, 300 Minn. 515, 218 N.W.2d 458, 27 W.C.D. 379 (1979). That case stands for the proposition that, if an employee's work activities substantially aggravate or accelerate a pre-existing condition, the resulting disability is compensable. The WCCA felt that the opinion of Dr. Dick could "easily be interpreted as contrary to this established precedent." Therefore, if the compensation judge relied on an erroneous view by Dr. Dick as to what constitutes a compensable injury, the judge erred. The WCCA remanded the matter to the compensation judge for reconsideration and further findings on the issue of whether the employee sustained an injury on June 20, 2011.

JURISDICTION

Halls v. MN Swarm Lacrosse/Arlo Sports, File No. WC12-5478, Served and Filed April 30, 2013. The employee is a citizen of Canada. He sustained an admitted injury while employed as a professional lacrosse player for the employer. He worked a full time job at the time of the injury, in addition to playing professional lacrosse. After the injury, he could not return to work for

either of his date of injury employers. He obtained subsequent employment for a period of time, and was then laid off for the season. He sought payment of periodic temporary total and temporary partial disability benefits. During the time period the employee sought wage loss benefits, he also received unemployment and/or sickness benefits (the nature of a portion of the benefits was in dispute and never resolved) from the Canadian government because of his layoff for the season. The Canadian governmental division that issued the payments was put on notice of its right to intervene in the workers' compensation case, but did not intervene. The employee testified that he informed one of the employees of the unemployment department (Mrs. Ross) that he was pursuing a workers' compensation claim in Minnesota and that Canada could get its money back from that claim. The employee testified that Mrs. Ross told him that "the States work different than Canada and so they didn't want to know anything about what was going on in the States." There was no dispute that the employee received approximately $15,450 in Canadian dollars. Close to $14,000 was received during the period he claimed temporary total or temporary partial disability benefits. Compensation Judge Cannon determined the wage loss benefits awarded to the employee during the time period he received Canadian unemployment and/or sickness benefits should be offset by the amount received from the Canadian government. The WCCA (Judges Hall, Wilson and Stofferahn) reversed. The employee received unemployment benefits in Canada and workers' compensation benefits in Minnesota. There is no double recovery of workers' compensation benefits from multiple jurisdictions. Unemployment benefits do not fall within the same type of benefits considered by cases such as *Pierce v. Robert D. Pierce, Ltd.* and *Stolpa v. Swanson Heavy Moving Co.*, as those cases dealt with workers' compensation benefits in multiple jurisdictions. Although public policy disfavors unjust double recovery, public policy also dictates that a windfall to the employer and insurer should be avoided. Because the employee received no workers' compensation benefits from any other jurisdiction, the compensation judge awarded an equitable remedy that was beyond his jurisdiction. Minn. Stat. §175A.01 governs the jurisdiction of compensation judges and the WCCA. Jurisdiction is limited to questions of law and fact arising under the workers' compensation laws of Minnesota. Any claim not involving Minnesota workers' compensation laws must be dismissed for lack of subject matter jurisdiction. *See Hale v. Viking Trucking Co.*, 654 N.W.2d 119 (Minn. 2002). This case involved at least an implicit consideration of the Canadian unemployment benefits the employee received, and the likelihood that the Canadian government would pursue recovery from the employee. This determination extended beyond the compensation judge's jurisdiction.

MEDICAL ISSUE

***Washek v. New Dimensions Home Health*, Case No. A12-0395, (Minn. 2013)**. The employee sustained a spinal cord injury in 2002 and was rendered a paraplegic. The employer and insurer paid various workers' compensation benefits, including $58,000 to make the employee's home more accessible for her special needs. As a consequence of her disability, the employee suffered from multiple dermatologic issues, including skin ulcers, and carpal tunnel syndrome. An accessibility specialist examined the employee's home and recommended a remote-controlled, ceiling-mounted lift system which would extend from her bedroom to the toilet and shower stall, eliminating the need to propel the shower chair over thresholds and avoiding the necessity of having to slide onto a toilet seat, which had caused skin ulcers. The employee filed a Medical Request seeking payment for installation of the lift system. The cost of the lift system was $15,000, including installation of the system, and all parties agreed that it was reasonable and

necessary to cure and relieve the effects of the work injury, and further, is a medical expense compensable under Minn. Stat. §176.135. The installer of the lift system informed the employee that installation would require the employee to make several modifications to her home to accommodate the lift system. The modifications included moving electrical wires, raising door headers, and installing various support brackets capable of sustaining the lift system. The cost of these modifications was approximately $14,000. The employer and insurer contended that the modifications constituted an alteration or remodeling of the home, and that liability for those modifications was governed by Minn. Stat. §176.137, subd. 1. At the time of the injury, liability for remodeling was limited to $60,000. Since the employer and insurer had already paid $58,000 to remodel the employee's home, they contended that their liability for the additional modification was no more than $2,000. The compensation judge had determined that the cost of the structural changes was a medical expense pursuant to Minn. Stat. §176.135, which includes no limits on expenditures. The WCCA reversed. It concluded that the structural changes required to install the lift system constituted remodeling of the residence, and therefore, were governed by the limitations in Minn. Stat. §176.137. The Supreme Court (Justice Paul Anderson) affirmed. The Court determined that the type of alterations required to permit installation of the lift system, under any definition, constituted "alteration or remodeling" of the residence. The employee argued that the "remodeling" was necessary in order to "furnish" the reasonable and necessary treatment, i.e., the lift system. The Court rejected that argument. The cost of installation of the lift system is not in dispute -- it is the cost of the structural modifications to permit the lift system to be installed. The Court concluded that the cost of the structural modifications to the residence constituted remodeling, and therefore, were limited by Minn. Stat. §176.137.

Justice Page dissented. Minn. Stat. §176.135 requires the employer to "furnish" the apparatus to the employee, and the ceiling-mounted lift system has not been furnished until it is fully installed and operational. He agreed with the compensation judge's conclusion that the lift system was reasonable and necessary medical treatment, and that the costs of the system and everything needed to make it fully operational were medical expenses pursuant to Minn. Stat. §176.135.

Wald v. Walgreens Corporation, File No. WC12-5526, Served and Filed April 25, 2013. The employee filed a medical request requesting approval for a Med-X program. The employer and insurer denied the treatment stating that it was not reasonable and necessary, and was beyond the treatment parameters. At the hearing, the employee presented medical evidence, including an opinion from her treating doctor, stating the treatment was reasonable and necessary. The employer and insurer introduced an IME report stating that the treatment was not reasonable and necessary. In addition, they argued that the treatment was beyond the treatment parameters, and that a departure from the treatment parameters was inappropriate. Compensation Judge Schultz ruled in favor of the employee stating that the employee's condition qualified as a "rare case" exception to the treatment parameters and should be reviewed under the substantial evidence standard—essentially whether the treatment was reasonable and necessary. The judge adopted the employee's medical expert over the employer and insurer's. The WCCA (Judges Hall, Milun and Stofferahn) affirmed. In so doing, it cited *Jacka v. Coca Cola Bottling Co.*, 580 N.W.2d 27, (Minn.1998), noting that compensation judges can depart from the treatment parameters, and even set aside the departures permitted, in rare cases in which the departure is necessary to obtain proper treatment. The *Jacka* case allows a more flexible analysis of the treatment parameters. In other words, the WCCA will allow treatment that is beyond the treatment

parameters, even if it does not fall within the parameters, if the treatment is found to be reasonable and necessary.

PSYCHOLOGICAL INJURIES

Schuette v. City of Hutchinson, File No. WC12-5486, Served and Filed April 18, 2013. The employee worked as a police officer for the City of Hutchinson and responded to an incident involving a 12 year-old girl who fell from a pick-up truck and hit her head on the pavement. After trying to resuscitate the girl, the employee learned that he knew the girl and her family. The employee drove the ambulance to the hospital, and the girl was airlifted to another hospital, where she was pronounced dead. The employee testified that, while at the hospital, he felt sick and experienced "dry heaves." He further testified that after the incident, he experienced a variety of symptoms including difficulty sleeping, nightmares, anxiety, panic, mood swings, and headaches. The employee did not seek treatment until three years after the incident, and was diagnosed with chronic anxiety, post-traumatic stress disorder, and depression. In November 2008, he fell out of a loft bed and injured his shoulder and back. He claimed that these injuries were the result of his PTSD, which caused him to get out of bed and run while sleeping. Compensation Judge Kelly held that the PTSD condition represented a mental disability that is not compensable under the Minnesota Workers' Compensation Act. The WCCA (Judges Milun, Stofferahn and Hall) affirmed. The WCCA relied on *Lockwood v. ISD No. 877,* 312 N.W.2d 924 (Minn. 1981), which held that a mental injury caused by job-related stress without physical trauma is not compensable under Minnesota's Workers' Compensation Act. The WCCA determined that, pursuant to *Lockwood,* substantial evidence supported the compensation judge's determination that the employee did not sustain a compensable injury.

TEMPORARY TOTAL DISABILITY

Halls v. MN Swarm Lacrosse/Arlo Sports, File No. WC12-5478, Served and Filed April 30, 2013. For a summary of this case, please refer to the Jurisdiction category.