Case Law Update

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Kelly Lambert & Brad Delger

Aafedt, Forde, Gray, Monson & Hager, P.A.

150 South fifth Street ▪ Suite 2600 ▪ Minneapolis, MN 55402

phone (612) 339-8965 ▪ fax (612) 349-6839

www.aafedt.com

Workers' Compensation ▪ Civil Litigation ▪ Mediation ▪ Employment Law

MARCH 2014 WCCA DECISIONS

***Nelson v. Hormel Foods Corp.*, WC13-5603 (March 6, 2014)**

WAGES-CALCULATION. The compensation judge erred in excluding the employee's earnings up to and including the date of injury in calculating the employee's pre-injury wage rate pursuant to Minn. Stat. § 176.011, subd. 8a, if the daily wage received by the employee is irregular, the daily wage should be computed by dividing the total amount of wages, vacation pay, and holiday pay the employee actually earned "in the last 26 weeks" by the total number of days and fractional days in which such wages, vacation pay, and holiday pay was earned. The compensation judge interpreted the phrase, "the last 26 weeks" to exclude the last pay period ending after the date of injury. The WCCA held that when an employee performs the duties of employment during the week the employee is injured, daily wage is calculated on the employee's earnings up to and including the day of injury.

***Hansen v. Dayton's n/k/a Macy's Inc., Self-insured*, WC13-5615 (March 14, 2014)**

ATTORNEY FEES-EXCESS FEES. Substantial evidence supports a compensation judge's determination that payments made to an intervenor were the result of the parties' failure to include that intervenor in the settlement process, that there was no genuine dispute with regard to the employee's treating physician, and that there was no genuine dispute with regard to the medical bills the employer agreed to pay at a formal hearing. Excess attorney fees denied.

***Mack v. ISD 701 and Hanover Ins. Group*, WC13-5647 (March 24, 2014)**

ATTORNEY FEES-*RORAFF* FEES. The compensation judge properly considered the factors in *Irwin v. Surdyk's Liquor* in making his fee award and did not abuse discretion in failing to award fees calculated by multiplying the attorney's time by his usual hourly fee.

The employee's Claim Petition came on for hearing where benefits in dispute included primary liability, nature and extent of the injury, limited wage loss benefits, permanent partial disability, intervention reimbursement, and *Roraff* fees. The compensation judge found a temporary injury, awarded limited wage loss benefits, denied permanent partial disability benefits, and awarded reimbursement to the intervenor. The judge determined the employee's attorney was entitled to *Roraff* fees.

A Statement of Attorney Fees was filed following the hearing with 21.5 hours of time at $350.00 per hour, claiming total fees of $7,612.50. Counsel for employer objected to Statement of Fees. Attorney fee claim set for hearing. The judge held employee's attorney was successful in establishing primary liability, but unsuccessful in establishing a permanent injury. He found the nature of dispute and proof needed to present the case was not unusual or burdensome. The parties stipulated the employee's attorney was entitled to an hourly rate of $350.00 per hour. The judge held limited contingent fees plus $3,000.00 in *Roraff* fees was a reasonable and

appropriate attorney fee. The judge rejected the argument that all attorney time was reasonable to establish primary liability and therefore, the attorney is entitled to all time spent multiplied by the hourly rate. The court rejected this argument indicating a determination of a reasonable *Roraff* fee is not a matter of merely multiplying the attorney's hourly rate by the amount of time spent on the case. A determination of the amount of *Roraff* fees awarded in a particular case lies within the discretion of the compensation judge.

***Herbst v. Amano McGann, Inc. and Tokio Marine & Fire Group*, WC13-5642 (March 24, 2014)**

ATTORNEY FEES-*RORAFF* FEES. Determination of a *Roraff* attorney fee is done by a consideration of factors identified by the court in *Irwin v. Surdyk's Liquor*: time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulty of the issues, the nature of the proof involved, and the results obtained.

Medical dispute on admitted injury arose after employer obtained independent medical opinion that employee's injury was temporary and treatment at issue was not related to the employee's work-related injury. Clinic charges were paid by the employer under a mistake of fact. The issue outstanding at the administrative conference was limited to out of pocket expenses incurred by the employee. At the conference, an agreement was reached to pay out of pocket expenses.

A Petition for Attorney's Fees was filed requesting *Roraff* fees in the amount of $2,457.00. The employee's attorney spent 6.3 hours at an hourly rate of $390.00 per hour. The employer objected to the requested fee contending time was excessive. At an attorney fee hearing, the judge awarded $1,000.00 in *Roraff* fees. The employee's attorney appealed.

The parties stipulated the hourly rate of the employee's attorney was reasonable. The judge held the issue in dispute was straight forward and not difficult. The judge noted the disputed medical expenses totaled $198.00. The compensation judge awarded $1,000.00 representing two and a half hours for which the employee's attorney would be compensated. Time itemization from defense counsel was submitted in due evidence by the employee's attorney documenting defense counsel spent 6.6 hours in defending the employee's claim for medical benefits. The court held payment of medical expenses related to a work injury is important to injured workers. Having those expenses paid off depends upon the ability to hire an attorney with the experience to successfully handle a medical claim. The WCCA held the compensation judge's limitation on the award of fees discourages attorneys from accepting claims with little value in dispute. The WCCA reversed the decision with a substitute of the full fee claim requested by the employee's attorney in the amount of $2,457.00 plus subd. 7 fees payable to the employee.

***Moats v. Miltona Custom Meats and Ram Mut. Ins. Co.* WC13-5632 (March 24, 2014)**

REHABILITATION/TREATMENT PARAMETERS/FUNCTIONAL CAPACITY EVALUATION.

The employee had an average weekly wage of $370.74 at the time of work injury. Following work injury the employee selected a QRC and had a functional capacities evaluation ("FCE") to determine permanent restrictions.

Employee subsequently obtained a new job which paid $9.40 an hour and at which the employee would typically work between 30 and 36 hours a week resulting in a weekly wage between $282.00 and $338.40.

Employer and insurer then sought to terminate the employee's rehabilitation plan on the basis that the employee had already returned to suitable gainful employment and thus rehabilitation services were no longer necessary.

In determining whether the employee's new job constituted suitable gainful employment the court stated that it must determine whether the new job was economically suitable. The court explained that a job will be economically suitable if the wage is as close as possible to the pre-injury wage. In this case the court ultimately found that there was too much of a disparity between the pre and post injury wages for this job to be considered economically suitable and therefore it denied the employer and insurer's request to terminate the rehab plan.

The employee in this case also brought a claim for a second FCE and claimed that she was entitled to a departure from the treatment parameters which dictate only one FCE. One of the employee's primary arguments was that she underwent an injection between day 1 and day 2 of her FCE. The court rejected this argument and stated that the injection was clearly documented in the FCE and the doctors did not feel it was a problem and also that the employee had provided no doctor's reasoning for why the injection would invalidate the FCE.

The second basis the employee brought up in favor of a second FCE is that she had developed a medical complication but the Court again pointed out that she had no doctor support stating that she needed a new FCE in light of this medical complication. Finally, the employee claimed that she had an incapacitating exacerbation which allowed her to have a second FCE but the court pointed out that she had missed little or no work due to her condition and so the employee's request for a second FCE was denied.

***Marchesani v. Buffalo Dry Cleaners and Launderers, Inc. and Argonaut Great Cent. Ins. Co.* WC13-5621 (March 24, 2014)**

CAUSATION-*GILLETTE* INJURY. Substantial evidence including medical records, lay testimony, and expert medical opinion supports the compensation judge's finding that employee failed to prove she sustained a *Gillette* injury to her left thumb and wrist due to cumulative minute trauma as a press operator.

APRIL 2014 WCCA DECISIONS

***Sumner v. Jim Lupient Infiniti and SFM Risk Solutions,* WC13-5639 (April 3, 2014)**

INTERVENTION CLAIMS. Intervenors failed to appear for a hearing. If the employer and insurer had timely filed an objection to the intervention motion then that intervenor had its claim barred entirely. Minn. Stat. § 176.361 requires personal attendance by intervenors at all conferences and hearings unless excused by the judge.

***Renwick v. Halverson & Blaser Group, Self-insured/Meadowbrook Ins. Group,* WC13-5613 (April 10, 2014)**

ARISING OUT OF AND IN THE COURSE OF. Substantial evidence supports the compensation judge's determination that the employee's injury arose out of and in the course and scope of his employment as an apartment caretaker when he slipped in a rut and fell in a snow-covered tenant parking lot while walking back from discarding debris that he found in the back entryway of an apartment building; the dumpster behind the apartments.

***Anderson v. CrossMark, Inc. and Liberty Mutual Ins. Co.,* WC13-5624 (April 16, 2014)**

WAGE COMPUTATION-MULITPLE EMPLOYMENTS. Wages for multiple additional employers may be included in the employee's average weekly wage where the employee established an ongoing pattern of earnings through other employers, and where the employee testified that she did expect additional work from those employers, and that she actually scheduled work with one of the employers at the time of her injury.

The employee sustained an injury on her first day at work for CrossMark. Her job involved visiting grocery stores and gas stations to stock and arrange merchandise, and to audit stores to make sure items were properly shelved. Primary liability for injuries was accepted, but the parties dispute the average weekly wage rate. In particular, the parties dispute whether the employee's earnings for multiple employers during the 26 weeks preceding her date of injury should be included in her calculation of the average weekly wage.

The parties stipulated the employee would have worked about 20 hours per week with CrossMark earning $10.50 per hour (AWW: $210.00/week). The employee alleges additional wages earned from two other employers, New Concepts in Marketing (NCIM) and Sunflower should also be included in her average weekly wage calculation.

The employee began working for NCIM in 2006. She typically worked six hour shifts on weekend days. She was not guaranteed a set number of hours. She worked as a food demonstrator (sample lady) at grocery stores. NCIM paid the employee $52.00 per demonstration. In the 26 weeks leading up to her January 2012 injury, she received earnings from NCIM on 20 different occasions.

The employee began working for Sunflower in December of 2011 shortly before her work injury. The employee worked as a sample lady on two occasions before her work injury, earning a total of $180.00. She testified in January of 2012 that she was scheduled to work seven sample jobs for Sunflower. However, she was unable to work those assignments after the injury at CrossMark.

The employee conceded that there could be some weeks that she would not perform any demonstration jobs for her other employers because no jobs were available. She testified the work she was doing "offered flexibility" and allowed her to choose assignments that matched her needs.

The compensation judge allowed pre-injury earnings from both NCIM and Sunflower in the calculation of the average weekly wage. On appeal, the employer argued earnings from NCIM and Sunflower should be excluded from the average weekly wage because the employment was irregular. The WCCA conducted an analysis of irregular earnings, casual wages, and "speculative" evidence of anticipated earnings in reaching its opinion that the compensation judge had sufficient evidence to conclude the employee was regularly employed by both NCIM and Sunflower at the time of injury.

***Eisenschenk v. Anoka Turf Farms, Inc. and Westfield Group,* WC13-5630 (April 16, 2014)**

PERMANENT PARTIAL DISABILITY AND EXPERT MEDICAL OPINION. Expert medical opinion relied upon by the compensation judge failed to rate permanent partial disability in compliance with the applicable rule. The compensation judge's decision lacked evidentiary support and is reversed.

***Vogt v. Westinghouse Elec., Self-insured,* WC13-5619 (April 22, 2014)**

SUBSTANTIAL EVIDENCE-*GILLETTE* INJURY-SUBSTANTIAL EVIDENCE CAUSATION-TEMPORARY V. PERMANENT SUBSTANTIAL EVIDENCE-PERMANENT TOTAL DISABILITY AND APPORTIONMENT.

***Noble v. St. Paul Area Co., LLC and SFM,* WC13-5656 (April 29, 2014)**

EARNING CAPACITY. Substantial evidence supported the compensation judge's award of temporary partial disability benefits based upon the employee's actual earnings where the employee had restrictions related to his work injury, he was unable to perform his pre-injury job, and there was no evidence that he failed to cooperate with his QRC, he testified that he was looking for other work, and even the temporary job offered by the employer and rejected by the employee paid less than the employee's pre-injury wage.

On the date of injury, the employee was working part-time for the employer as a stagehand earning $23.00 per hour for straight time and more for overtime. He held a part-time job as a

singer at Macaroni Grill. Following the work-related injury, he was provided with restrictions that prohibited him from returning to work in his pre-injury capacity for the employer. He continued to work his part-time singing job. The employer extended a suitable job offer to him returning him to work earning $10.00 per hour. The employee was only released to return to work 20 hours per week. He rejected the job offer and continued to work part-time for Macaroni Grill.

The employer filed an NOID to discontinue benefits based upon the refusal of the job offer. A compensation judge found employee's restrictions were causally related to the work injury. The employer argued earnings as a part-time singer were not reflective of his earning capacity. The judge held the job offer rejected by the employee was for a temporary assignment. At the hearing, no evidence submitted that the job remained available for the employee. The court properly held actual earnings of an employee are presumptively representative of the employee's earning capacity.

***Tomford v. Mark's Welding, Inc. and United Fire & Cas. Group,* WC13-5655 (April 30, 2014)**

NEUTRAL PHYSICIAN-PRACTICE & PROCEDURE. Under the circumstances of this case, where the employer requested an appointment of a neutral physician shortly after the employee's renewed request for surgery based on additional testing, the appointment was mandatory pursuant to *Reider v. Anoka-Hennepin School District No. 11*.

MAY 2014 WCCA DECISIONS

***Corradi v. Mesabi Reg'l Med. Ctr. and Minnesota Assigned Risk Plan/Berkley Risk,* WC13-5598 (May 13, 2014)**

VACATION OF AWARD-SUBSTANTIAL EVIDENCE. The employee established an unanticipated and substantial change in medical condition sufficient to establish good cause under Minn. Stat. § 176.461 to vacate Award on Stipulation.

The court applied the *Fodness* factors to determine whether a substantial change in medical condition occurred:

1) change in diagnosis;
2) change in ability to work;
3) additional permanent partial disability;
4) necessity of more costly and extensive medical care;
5) causal relationship to work injury.

***Sanden v. Northern Contours and RTW, Inc. and The Work Connection, and RTW, Inc.,* WC13-5631 (May 13, 2014)**

SUBSTANTIAL EVIDENCE-PERMANENT TOTAL DISABILITY. Substantial evidence, including expert medical testimony and vocational evidence, supports the compensation judge's findings that the employee is capable of working within the restrictions established by an October 2011 Functional Capacity Evaluation and that the employee is not permanently and totally disabled.

***Lange v. Resource Recovery Techs. and Western Nat'l Mut. Ins. Group,* WC13-5657 (May 13, 2014)**

MEDICAL EXPENSE-DIAGNOSTIC TESTING. Substantial evidence supports award of a repeat cervical MRI as causally related to the work injury and allowable under the Treatment Parameters.