CASE LAW UPDATE

Presented by:

GEORGE W. KUEHNER
Jardine, Logan & O'Brien, P.L.L.P.
8519 Eagle Point Blvd., Ste. 100
Lake Elmo, MN 55042
Office: (651) 290-6500
Direct: (651) 290-6508
Fax: (651) 223-5070
Email: gkuehner@jlolaw.com

June 2, 2016

ARISING OUT OF -- DYKHOFF

Hohlt v. University of Minnesota, File No. WC15-5821 (WCCA Feb. 3, 2016).

The employee, who worked for the University of Minnesota, was walking to her car after work. She slipped on the sidewalk maintained by the employer. It had been snowing and sleeting that day. She fractured her right hip. The employer denied primary liability and the compensation judge concluded that the employee's injury did not arise out of her employment.

This decision involves a detailed analysis of Dykhoff v. Xcel Energy. The court stated that the special risk analysis only applied to those cases in which the employee was not on the employer's premises when injured. Under a special risk analysis, an injury is only compensable if there is a greater risk of injury which originates on the premises and is one that members of the general public would not ordinarily encounter. In this case, the WCCA applied the increased risk analysis. They concluded that the employee was only on the employer's premises at the time due to her role as an employee, and therefore encountered the increased risk of injury. A personal injury is compensable if the employee encounters an increased risk of injury on the employer's premises because she is an employee and the injury follows from that risk. The WCCA, therefore, reversed the compensation judge and found the employee's injury compensable.

In a concurring opinion Judge Milun explained that the test is whether the employment increased the risk of injury, regardless of whether it is unique to the job or whether it is a risk members of the general public would encounter. The test is not whether the general public is exposed to the risk but whether the employee was exposed to the risk because of her employment.

[If the employer creates a dangerous situation to which employees and the general public alike are exposed and it is found not to arise out of and in the course and scope of employment the employer could be subject to civil liability claims for all damages sustained by an employee caused by an injury from that situation.]

Kubis v. Community Memorial Hospital Association, File No. WC15-5842 (WCCA Feb. 5, 2016)

The employee injured her right shoulder when she rushed up the stairs after working her full shift so that she could report on patients to the next shift of nurses. The compensation judge denied the employee's claim because the employee did not show an increased risk under the Dykhoff analysis. The judge found the employee's injury did not arise out of her employment. The WCCA reversed.

The court held that where an employee who normally avoids stairs due to knee problems, takes them because she feels rushed to report to the next shift, and in the process runs up the stairs and falls, the arising out of element is established.

The WCCA differentiated this case from Dykhoff where the employee fell for no identified reason, but here, the employee fell because she took stairs and was hurrying to report to the next shift.

Williams v. ISD #2396, File No. WC15-5820 (WCCA Feb. 17, 2016)

The employee was a custodian for a public school and asked to set up bleachers for a basketball game which she had done many times. The task required ascending and descending the bleachers several times. The employee testified that she was rushing to complete her duties. After preparing the bleachers such that they were "ready for public use," the employee fractured her foot descending some bleachers.

The employer and insurer denied liability and argued that the injury did not arise out of employment as the steps were set up for public use and the same that the general public may encounter. The compensation judge found that the injury was compensable and the employer and insurer appealed. The WCCA followed Hohlt v. University of Minnesota, finding that the employee was brought to the risk by her employment, not by her activities of daily living. The court also found that the bleacher steps in question were deeper and higher than the steps encountered in everyday life. The court found that there was sufficient evidence in the record to establish that descending and ascending these bleachers were an unusual risk of injury and that the employee's risk increased because of the duties of her employment.

IN THE COURSE OF

Groetsch v. Kemps, WC15-5844 (WCCA Apr. 4, 2016)

The employee admitted liability for a right forearm injury. He was treated at Golden Valley Family Physicians and scheduled for a follow up visit on June 26, 2014. On that date he left his home in Golden Valley, traveled to the home of his ex-girlfriend in Edina to drop off some boxes and then traveled north on 169 back toward Golden Valley when he exited on Highway 55 to proceed less than a mile to Golden Valley Family Physicians. At an intersection a short distance from the doctor's office he was rear ended. The drivers drove into the Golden Valley Family Physicians parking lot and exchanged insurance information. The employee proceed to his appointment for his forearm and also saw a doctor for neck, back, and shoulder symptoms from the accident.

In addition to litigating the nature and extent of the employee's original injury the employer and insurer denied that the injuries from the motor vehicle accident occurred in the course of employment. They argued that the employee deviated from the most direct route between his house and the site of his medical appointment. The compensation judge found that the motor vehicle accident was in the course of his employment as part of travel to the medical appointment for the work injury.

The WCCA affirmed. They rejected the employer and insurer's arguments under the special errand series of cases. The rule did not apply because the trip neither began nor ended at the place of employment. Instead, they applied the dual purpose trip rule. Under the facts of this

case the deviation was not so substantial as to obviate the "business purpose" of the trip. The accident occurred just minutes before the employee's scheduled appointment and was at a location so close to the medical appointment that the drivers exchanged information in the clinic parking lot.

INTERVENORS

Xayamongkhon v. ISD #625, WC15-5852 (WCCA Apr. 19, 2016)

The employee sustained a work related motor vehicle accident for which she subsequently had chiropractic treatment for headaches, neck pain, and low back pain at Moe Bodyworks. The employer had a chiropractic records review and subsequently denied payment of bills from the chiropractor and two other providers. The employee filed a Medical Request, all three providers were put on notice, and the employer filed objections to motions to intervene by all three providers. Prior to the hearing two of the providers' claims were resolved but the chiropractic bills from Moe Bodyworks remained. At the hearing no representative from Moe appeared. The employer argued that the bill should be denied based on their failure to appear. The judge ordered payment of the bill.

The employer appealed based upon Sumner v. Jim Lupient Infinity, 865 N.W.2d 706, 75 WCD 263 (Minn. 2015) holding that an intervenor must make a personal appearance at all conferences unless a stipulation has been signed. The employee argued that the right of an injured worker to directly claim reimbursement for medical expenses has not been affected by Sumner.

The Court of Appeals reversed holding that once a provider has intervened in a pending claim, the provider is a party and like all other parties has an obligation to attend conferences and hearings.

EVIDENCE/APPELLATE PROCEDURE

Gianotti v. ISD #152, WC15-5868 (WCCA Mar. 24, 2016)

The employee, a bus monitor, sustained a head injury when she fell head first into the stairwell of the school bus. When examined immediately after the accident, the employee was diagnosed with a neck sprain, left shoulder contusion, and thoracic back sprain. Although not being initially diagnosed with a concussion, the employee continued to complain of headaches and confusion and memory issues, along with pain in her left arm, and was eventually diagnosed with post-concussive syndrome.

The employer and insurer's IME, a licensed psychologist, noted that the employee demonstrated non-credible reporting of cognitive and memory problems. Despite the fact that the employee described nightmares of being on a bus involved in an accident, the IME noted that it is not describing nightmares associated with the actual work injury. The IME attributed the employee's depression and anxiety to pre-existing conditions and asserted that the employee was not accurately describing her medical history to her care providers.

The compensation judge relied upon the employer and insurer's IME doctor in finding that the employee did not sustain a concussive injury as a result of the work injury.

The WCCA reversed and held that the IME, a psychologist and not a medical doctor, was incompetent to render an opinion because it deemed a concussion to be a physical condition the psychologist was not qualified to evaluate. The court also noted that the IME doctor lacked requisite factual foundation for an opinion because he failed to review the video of the incident and his assumed factual basis was sufficiently at odds with the actual incident.

This case also involved an issue of timeliness of filing briefs. The employee had served his appellate brief one day late, and the employer and insurer moved to dismiss the appeal. The court held that the employer and insurer had not demonstrated any prejudice due to the late service of the brief, and therefore, dismissal was not the appropriate remedy.

Dennis v. Salvation Army, 874 N.W.2d 432 (Minn. 2016)

The employer and insurer filed a Writ of Certiorari for an appeal to be the Supreme Court from a decision of the WCCA. The employer and insurer served the Writ, the Petition, and Statement of the Case on the employee, the intervenors, and the WCCA. There was no Cost Bond filed as required by the rules. The Supreme Court dismissed the appeal holding that the timely filing of a Cost Bond is jurisdictional and failure to do so requires dismissal.

SUBJECT MATTER JURISDICTION

Gruba v. Tradesman International, Inc., WC15-58906 (WCCA Apr. 5, 2016)

The employee suffered an injury to his left hand and wrist while working for the employer in North Dakota. The injury was reported to North Dakota Workforce Safety and Insurance (WSI), which admitted liability and paid $6,130.29 in economic benefits and $74,328.14 for medical benefits. Thereafter the employee filed a Claim Petition in Minnesota and despite notice, WSI failed to intervene. The injury was found compensable in Minnesota and the employee found entitled to Minnesota benefits less benefits paid by WSI. The court held that there was no statutory authority in Minnesota to allow reimbursement of WSI for benefits paid to, or on behalf of, the employee pursuant to North Dakota law.

North Dakota then sent correspondence to the employee's counsel indicating that it would commence civil action for recovery if the employee failed to reimburse WSI. WSI served the employee with a Summons and Complaint in North Dakota seeking reimbursement pursuant to WSI's reversal of acceptance of the employee's claim.

The employee filed a Claim Petition seeking payment of temporary total disability benefits for the period of indemnity benefits that had been previously provided by WSI and medical benefits paid by WSI on the employee's behalf for which WSI was now seeking reimbursement. Notice was served on WSI.

As of the date of hearing the employee had received all benefits for which WSI was seeking reimbursement; the employee had not reimbursed WSI nor answered the Summons and Complaint; no judgment had been entered against the employee; and no potential intervenor had intervened. The compensation judge dismissed the employee's Claim Petition stating that there was no claim upon which relief could be granted. He determined that there was no subject matter jurisdiction regarding out-of-state benefits.

The WCCA affirmed stating that they lack subject matter jurisdiction to order the employer and insurer to reimburse WSI for workers' compensation benefits paid on behalf of the employee under North Dakota law. The employee argued that the medical expenses paid by WSI should now be considered unpaid in light of the request for reimbursement in the civil action in North Dakota. The court reasoned that the remedy the employee sought would require determination by a Minnesota workers' compensation court regarding the rights of the parties under North Dakota law. It held it had no authority to enforce the laws of North Dakota and, therefore, affirmed the dismissal for lack of subject matter jurisdiction.

David v. The Heavy Equipment Company, WC15-5802 (WCCA Feb. 17, 2016)

The employee suffered multiple injuries out of an incident for which the employer and insurer admitted liability and paid benefits including medical treatment expenses. Six years following this incident the employer and insurer filed a Petition for Reimbursement and a Petition for Discontinuance. At the hearing it was determined the injuries sustained by the employee were not the result of an activity related to his employment and, therefore, did not arise out of and in the course and scope of employment. The judge granted the Petition for Discontinuance but denied the Petition for Reimbursement. The employer and insurer did not make a claim for reimbursement against the medical providers.

More than two years later the employer and insurer filed a Petition for recovery of erroneously paid medical benefits against the medical providers. They had paid medical treatment expenses totaling $162,577.32. Several of the medical providers filed motions to dismiss.

As a result of the motion to dismiss the compensation held that Minn. Stat. §176.291(a) does not provide the basis for an action to recover medical benefits paid on behalf of an employee and that dismissal was appropriate.

The employer and insurer appealed asserting that the statute permits its Petition as it concerns "a dispute as to a question of law or fact in connection with a claim for compensation."

The WCCA affirmed holding that they have no jurisdiction in any case that does not arise under the workers' compensation laws of the State of Minnesota. With the earlier final determination that there was no compensable work injury, there is no longer any basis for action under the Workers' Compensation Act. The absence of a compensable injury takes the matter outside of the subject matter jurisdiction. The court did not reach the arguments over the breadth of Minn. Stat. §176.291(a) because it was irrelevant to the disposition of this proceeding since there was no longer any dispute that arose "in connection with a claim for compensation."

MEDICAL TREATMENT PARAMETERS

Meyer v. Genmar Transportation, Inc., WC15-5845 (WCCA Mar. 1, 2016)

The compensation judge found the employee failed to establish that the 3-level fusion performed by Dr. Sunny Kim was reasonable or necessary. On appeal the employee asserted the applicable treatment parameter, Minn. R. 5221.6500, subp. 2C(1)(d)(i) provides the surgery is reasonably required where the employee has incapacitating low back pain for longer than three months and degenerative disc disease with positive discogram. The court refused to address the treatment parameters as they were not raised at trial and do not apply to treatment of an injury after the insurer has denied liability for the injury.

PETITIONS TO VACATE

Bloome v. ISD #413, WC15-5866 (WCCA Feb. 23, 2016)

The employee injured his back on May 30, 2003. In March 2006 he entered into a full, final and complete settlement except for medical for $45,000. He had a 20% rating. Prior to the settlement he had undergone a fusion at L4-5 to L5-S1. At the time of the settlement he was working and receiving temporary partial disability. The settlement contained an acknowledgement regarding the potential for the employee's medical condition to worse.

Five months after the Award the employee had a sudden increase in low back symptoms and underwent various treatment ultimately resulting in a fusion at L3-4 in 2009. He had a revision surgery and removal of hardware in 2011. During this time he was accepted for SSDI. A neuropsychological examination indicated that his recovery was complicated by being "somatically pre-occupied." He suffered from sacroiliitis which arose from the fusions.

The request to vacate was not permitted on the argument of mutual mistake of fact because there was no evidence that the fusion had completely healed at the time of the settlement. However, the Petition to Vacate was granted on the grounds of a change in medical condition. See, Fodness v. Standard Café, 41 WCD 1054 (WCCA 1989). The diagnosis had changed to expand levels of spinal surgery. The employee's ability to work changed from a release to full time work to an inability to work. The employer had argued that future inability to work was foreseeable at the time of the settlement. There was no increased permanent partial disability rating. There was a substantial increase in the amount and cost of medical care. The change of condition arose out of the original work injury. Finally, the court concluded where a limited amount is paid as a settlement award and both parties reasonably believe the employee will continue working the subsequent total disability supports vacation of the award.

Stevens v. S.T. Services, WC15-5839 (WCCA Mar. 8, 2016)

The employee sustained work related shoulder injuries in 1984 and 1985. In 1994 the parties entered into a Stipulation for Settlement declaring the employee permanently totally disabled and entitled to ongoing permanent total disability benefits. He moved to Alaska and between 2008

and 2010 worked nearly full time at Home Depot not doing any manual labor but assisting customers. He then returned to Minnesota for personal health reasons.

In July 2011 the employer and insurer filed a Petition to Discontinue Benefits. [This case led to extensive litigation regarding the appropriate procedure for discontinuing permanent total disability benefits wherein it was ultimately determined that there would need to be a petition to vacate.]

In 2015 a Petition to Vacate was filed. The Court of Appeals held that the fact the employee was employable in a different labor market more than a thousand miles away 14 years after the settlement did not establish a mutual mistake of fact that the employee was employable at the time of the settlement.

The court also refused to vacate based upon a change in the employee's medical condition. While evidence of the employee's return to work is one of the Fodness factors a change in employability alone does not necessarily reflect a substantial change in medical condition. While it may seem incongruous that an employee may continue to receive permanent total disability despite having returned to work, returned to employment is not one of the definitions set forth in Minn. Stat. §176.461 that provides the limited basis to vacate a Stipulation for Settlement.

VOLUNTARY RECREATIONAL ACTIVITIES

Shire v. Rosemount, Inc., 875 N.W.2d 289 (Minn. Feb. 17, 2016)

The employer sponsored an annual employee-recognition for employees. The handbook stated that "recognition events are voluntary in purpose and all employees have the choice to decide to participate. ..." However, the employees had to attend the event to get the three hours of pay, otherwise they had to use accumulated vacation or take unpaid leave. The event consisted of dinner, bowling, and a game of laser tag. The employee sustained a right ankle injury playing laser tag. The employer denied liability under Minn. Stat. §176.021(1) excluding from coverage injuries in "voluntary recreational programs." The Supreme Court affirmed the award of benefits. It determined that the event was not "voluntary" because the only way to get paid without using vacation time was to attend.

The employer and insurer then argued that participation in laser tag was voluntary. The court held that the issue was whether the program was voluntary and not whether individual activities within the program are voluntary.