ERSTAD & RIEMER PA
ATTORNEYS AT LAW

Andrew J. Flynn
aflynn@erstad.com
7301 Ohms Lane, Suite 400
Minneapolis, MN 55439
952-837-3254

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Attorney Fees and Reaffirmation of the Hengemuhle Standard

Lagasse v. Horton, 982 N.W.2d 189 (Minn. 11-30-2022).

Background

In June 2017, the employee was run over by a garbage truck while working for Aspen. He sustained both extensive and severe injuries, including numerous spinal fractures, rib fractures, right upper extremity fractures, and a permanent nerve injury, which left him unable to use his right arm and hand. The employee primarily treated with Dr. Daniel Sipple Aspen's insurer requested that Dr. Sipple submit a Health Care Provider Report assessing the employee's injuries.

On August 8, 2018, the Insurer challenged Dr. Sipple's opinions in that report and requested clarification on the rating he assigned for brachial plexopathy. The insurer asserted that such a rating applies only to "[t]otal or complete loss of the brachial plexus, and [t]he presence of signs or symptoms of organic disease or injury and [a]natomic loss or alteration." The insurer viewed this to be at odds with the fact that the employee was allegedly able to drive and perform other activities of daily living "which would require use of his right arm."

On August 16, 2018, the employee retained representation of attorney Lagasse. Under the retainer, the employee agreed that attorney Lagasse would receive up to 20% of the benefits recovered. After an unsuccessful attempt at mediation, attorney Lagasse filed a Claim Petition on behalf of the employee on November 12, 2018.

On November 15, the insurer filed an answer in response to the claim petition. The answer admitted liability for some of the alleged injuries but also contained language denying parts of the employee's claim. The insurer specifically denied that he employee was entitled to benefits

reflecting a rating of 64.2% to the body as a whole. They also alleged that some of the employee's injuries may have been from pre-existing conditions. Finally, the insurer asserted that Dr. Sipple's PPD rating was made in error. The answer concluded by asking the court to dismiss the claim with prejudice.

On January 11, 2019, the employee presented for an independent medical examination that not only affirmed the findings of Dr. Sipple but also assessed a higher PPD rating. Subsequently, the insurer sent an email communication to attorney Legasse notifying him that the PPD sought (and more) would be paid and requested that he withdraw the claim petition. Shortly thereafter, the employee terminated his representation with Legasse.

When PPD benefits eventually became payable to the employee, Lagasse filed what would be his fourth statement of attorney fees. During this period, the employee requested that his PPD benefits be paid in a lump sum and asked that attorney fees not be withheld.

On April 1, 2021, the parties attended a hearing to resolve the dispute over attorney fees. The compensation judge concluded that the employee's PPD benefits were genuinely disputed and that Lagasse was entitled to a contingent fee under Minn. Stat. § 176.081, subd. 1(c) and to reimbursement of costs and disbursements. The judge further held that the employee was entitled to partial reimbursement of attorney fees under Minn. Stat. § 176.081, subd. 7. The employee appealed and the insurer filed a notice of cross-appeal on the issue of fees awarded under subdivision 7.

The WCCA reversed the compensation judge's award of attorney fees under both subdivision 1(c) and subdivision 7. The WCCA found that no genuine dispute existed over the payment of PPD benefits and that Lagasse took no actions that resulted in the employee being paid PPD benefits. The WCCA therefore concluded that "[t]here is no basis for an award of fees to Mr. Lagasse" and held that the compensation judge erred in awarding fees under both subdivisions. Lagasse appealed to the Supreme Court of Minnesota.

Standard of Review

Before we address the Supreme Court's holding, it is interesting to note the specificity with which the Supreme Court addressed the Hengemuhle standard in this decision. Chapter 176 states that a party has the right to appeal to the WCCA on the ground that the findings of fact and order were unsupported by substantial evidence in view of the entire record as submitted. M.S. 176.421 subd.1(3). Findings of fact should not be disturbed unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole.

The Court examines the Hengemuhle decision at length to reaffirm and clarify the appropriate standard the WCCA should take when overturning fact findings of the compensation judge. This could be interpreted as a "slap on the wrist" of the WCCA, an indication the Supreme Court believes the Hengemuhle standard is being misapplied by the WCCA.

Holding

The Minnesota Supreme Court first addressed the dispute over fees under Minn. Stat. § 176.081, subd. 1(c) which states that attorneys are entitled to contingency fees based "solely upon genuinely disputed claims or potions of claims. Fundamentally, the parities disagreed on what constituted a "genuine dispute."

First, the Court rejected the argument that an Answer on its own is insufficient as a matter of law to create a genuine dispute. The Court pointed out that the Claim Petition is the procedural vehicle for commencing an action when there is a dispute surrounding a claim for compensation. To that end, the Answer is what the other party must file in response to the claim to make clear what is actually in dispute. Citing Minn. Stat. § 176.321, subd. 2, the Court stated that answer is specifically required to "admit, *deny*, or affirmatively defend against" the allegations of the petition and it "shall state the contention of the adverse party with reference to the matter in dispute." Given this and other interpretive analysis, the Court found that the statutory language of the Workers' Compensation Act supported a finding that an Answer is sufficient to give rise to a genuinely disputed claim.

The Court made a point of noting, however, that an Answer does not categorically give rise to a "genuinely disputed claim" as a matter of law for the purposes of Minn. Stat. § 176.081, subd. 1(c). Highlighting the temporal component of the statute, the Court ruled that the existence of "genuinely disputed claims or portions of claims" hinges on two factors: (a) whether there is an actual conflict between the parties as to any claim or portion of claim, and (b) whether the employer or insurer have sufficient time and information to take a position on liability.

In analyzing the case at hand, the Court held that a genuine dispute did exist such that the WCCA erred in denying Legasse contingent attorney fees. The Court held that the insurer's Answer revealed several genuine conflicts. These included the denial that the employee was entitled to PPD benefits reflecting a 64.2% rating, the allegations that the employee's injuries may have been the result of pre-existing medical conditions, and the assertions that Dr. Sipple erred in his PPD calculations. The Court further noted indicia of a genuine dispute outside of the answer such as the questioning of Dr. Sipple's PPD rating in the insurer's August 2018 correspondence and the unsuccessful mediation attempt.

Turning to the second factor, the Court held that the insurer and employer "had adequate time and information to take a position on liability." The Court pointed out that the insurer had months to gather information before Lagasse filed a Claim Petition on the employee's behalf. Additionally, the Court found that the insurer could have conducted an independent medical examination in the time between July 9, 2018 when it received Dr. Sipple's Health Care Provider Report and November 12, 2018 when the claim petition was ultimately filed after a failed mediation. Finally, the Court highlighted the fact that the insurer filed its Answer just three days after it received the employee's Claim Petition. The insurer had 20 days to gather additional information before it was required to file its Answer. And, if it still did not believe it had enough information to take a position on liability, the insurer could have filed for an extension for up to an additional 30 days.

Ultimately, the Court held that the record contained substantial evidence to support the compensation judge's finding that a genuine dispute existed for the purposes of Minn. Stat. § 176.081 subd. 1(c). As such, the WCCA erred when it improperly substituted its own findings because a reasonable mind might accept the evidence in the record as adequate to support the compensation judge's finding.

The Minnesota Supreme Court then turned to the issue of the employee's entitlement to reimbursement of some portion of the fees under subdivision 7. The Court opined that the compensation judge may have conflated *contingent* fees under subdivision 1(c) and *additional* attorney fees under subdivision 7.The award of contingent fees requires the presence of a genuine dispute. In contrast, subdivision 7 requires an employer or insurer to "unsuccessfully resist payment." The WCCA failed to provide any analysis in its reversal of the compensation judge's findings on this issue. As such, the Court reversed and remanded for more detailed findings.

Occupational Disease – Presumption of PTSD for First Responders

Juntenen v. Carlton Cty, 982 N.W.2d 729 (Minn. 12-1-22)

This case addresses the requirements of the PTSD presumption in Minn. Stat. 176.011 subd. 15(e). The presumption requires 1.) employment in one of the listed employments (first responders, law enforcement, etc.), 2.) disability from the occupation due to a diagnosis of PTSD by a licensed psychologist or psychiatrist, and 3.) no previous PTSD diagnosis.

The Supreme Court held an injured worker only has to have a diagnosis of PTSD, they do not need to prove it is credible, before the presumption applies. The credibility of the diagnosis can then be a factor the court considers in whether the employer rebuts the presumption.

Background

The employee began working for Carlton County as a deputy sheriff in August 2001. The employee testified that he had never been diagnosed with or treated for any mental health condition prior to his employment with the County. In other words he met the first two requirements of the PTSD presumption in Minn. Stat. 176.011 subd. 15(e).

During his time in law enforcement, the employee responded to numerous traumatic events involving violence, death, and sexual abuse. Two events in particular were central to the employee's subsequent mental health treatment.

One was a fatal car accident with a severely injured 16-year-old boy who reminded the sheriff of his own son. The second was a police chase resulting in a self-inflicted gun wound of a perpetrator the sheriff had known the majority of his life. The record also indicated that the employee suffered trauma in his personal life. There was an incident where his former partner committed suicide.

After his partner's suicide, the employee began seeing a licensed professional clinical counselor. He met with her four times over three months. Approximately two years later in December 2018,

the employee returned to the counselor, reporting that he was suffering from increased anxiety at work.

On August 19, 2019, the employee presented to Dr. Michael Keller, a licensed psychologist for a forensic evaluation. Dr. Keller asked about the employee's symptoms over the past 30 days and administered several diagnostic tests, including Clinician Administered PTSD Scale for DSM-5 – Past Month (CAPS-5). Based on the evaluation, Dr. Keller diagnosed the employee with PTSD, major depressive disorder, and anxiety disorder. The employee was deemed "not currently fit for duty as a Police Officer/Deputy Sheriff." Dr. Keller noted in his report that the employee's condition was likely to persist for not less than 1-2 years and that he was unable to work in any capacity.

The next day, the employee reported his diagnosis to his supervisors. Within hours he was placed on leave. The County, through MCIT, denied primary liability for the employee's injury "pending the results of an IME with a psychologist or psychiatrist of MCIT's choosing." [of note, an IPE was not set up for over a year.]

On February 24, 2020, the employee filed a claim petition challenging the County's denial of liability and seeking various benefits. The County filed an Answer denying that the employee suffered from an occupational disease "[p]ending additional investigation."

The County scheduled an independent psychological evaluation with Dr. Paul Arbisi on July 20, 2020, eleven months after the employee was diagnosed with PTSD by Dr. Keller. As part of his evaluation, Dr. Arbisi reviewed medical records and performed testing. Dr. Arbisi opined that the employee suffered from major depressive disorder unrelated to his employment with the County and noted that he "does not report current symptoms associated with posttraumatic stress disorder." Dr. Arbisi's diagnosis, like Dr. Keller's, was based on reported symptoms for the 30 days before the evaluation. Dr. Arbisi testified that it was possible that someone would meet the criteria for PTSD during a different 30-day period, noting that "PTSD can be cured." While Dr. Arbisi included a critique of Dr. Keller's interpretation of PTSD diagnostic tools, his report did not include any opinions on whether Dr. Keller's 2019 diagnosis was correct.

Decision

At hearing the compensation judge denied all benefits for the employee. In her Findings and Order, the judge found the presumption did not apply. She held that while the employee had been working as a deputy sheriff and had no mental health treatment or diagnosis before he began working for Carlton County, the employee did not sustain PTSD arising out of and in the scope of his employment based on the opinion of Dr. Arbisi. The employee appealed.

The WCCA reversed and remanded, holding that the PTSD presumption in Minn. Stat. § 176011, subd. 15(e), applies when the statutory factors are met. The WCCA disagreed with the compensation judge's conclusion that the presumption does not apply unless the judge makes a finding that the employee has PTSD. The WCCA held that the County failed to rebut the presumption that the employee's diagnosis was a compensable occupational disease, stating that the County "*needed to offer evidence that at the time of the employee's disablement*, he did not

have a PTSD diagnosis" (emphasis added). Dr. Arbisi's testimony only opined as to whether the employee *currently* suffered from PTSD, he failed to address "whether the employee had a diagnosis of PTSD in September 2019." The County petitioned for a writ of certiorari.

Holding

The Minnesota Supreme Court affirmed the WCCA's ruling. In analyzing this case, the Supreme Court engaged in statutory interpretation, which they reviewed de novo. The Court examined the plain language of the presumption statute and focused on the term "diagnosed with." The court held:

> Based on the plain language of the statute—"is diagnosed with a mental impairment"—we hold that there is a single reasonable interpretation: that an employee need only present a diagnosis for the presumption to apply, not that the diagnosis is determined by a compensation judge to be more credible or persuasive than any competing diagnosis offered by an employer… The PTSD presumption in subdivision 15(e)… requires that the employee be *diagnosed* with PTSD. That is all. The statute does not require such a diagnosis to be more credible or persuasive than any competing diagnosis offered by an employer. Id. at 740.

Next, the Minnesota Supreme Court analyzed whether the WCCA properly found that the County did not rebut the PTSD presumption. The Court noted the WCCA could issue findings "that the factors to invoke the presumption were met" because the finding was not manifestly contrary to the evidence. The court then addressed the WCCA's finding that the presumption was not rebutted.

The Court stated that "[w]hen a statutory presumption applies, the presumption governs decisions on unopposed facts and is rebuttable but only by substantial proof to the contrary." Thus, an employer must make a strong showing by introducing substantial evidence to rebut the presumption. The presumption may be rebutted by substantial factors.

The WCCA held that to rebut Dr. Keller's diagnosis, the employer needed to offer evidence that at the time of the employee's disablement, he did not have a PTSD diagnosis. Dr. Abisi's opinion, however, only covered the period 30 days prior to his July 2020 evaluation. And, while Dr. Abisi criticized parts of Dr. Keller's opinion, he "did not indicate whether he agreed or disagreed with Dr. Keller's August 2019 diagnosis of PTSD." Therefore, the record was void of any "substantial proof" rebutting Dr. Keller's diagnosis and the Court held that the statutory presumption applies.

The Court acknowledged the concerns about the challenges and financial implications of the burden imposed by the statutory presumption. In doing so, the Court pointed out that nothing in the record suggests that psychiatrists and psychologists cannot determine whether someone had PTSD in their lifetime, even if they have not exhibited symptoms in the previous 30 days. Further, an employer may also rebut a diagnosis by demonstrating that the employee's diagnosis was invalid or not credible. In this case however, the Court found that Dr. Abisi's testimony did not amount to "substantial factors" that could overcome the PTSD presumption.

There is a concurring opinion from Justice Anderson that noted the conflict between two public policies: the desire to quickly pay medical benefits to first line responders who have PTSD and the

management of state monies on the public's behalf. The justices all agreed the Legislature chose the quick payment of medical benefits over stewardship of the public's monies.

Substantial Evidence in Support of Judicial Findings (Hengemuhle)– 3 WCCA Cases

Case1: River-Mata v. G & L Emp. Servs., d/b/a Specialty Pers. Servs., (W.C.C.A. Feb. 1, 2023)

The employee worked for G & L Employment Services, a self-insured employer which provides temporary workers for businesses. He was placed at Welsh Equipment, where he was tasked with cleaning concrete haulers using a power washer.

On September 25, 2019, he reported pulling on a stuck hose when it suddenly came loose. He alleged that this jarred his left shoulder and neck, causing injuries. He testified he felt pain immediately, but did not report the injury to his employer until October 23, 2019. The employer initially admitted the injury and paid temporary total disability benefits and medical expenses.

The employee also began treating on October 23, 2019. Over the ensuing four months, MRI imaging of the shoulder and cervical spine revealed mild degenerative disc disease at C6-7 and left shoulder tendinitis with a possible left labral tear. He was also diagnosed with left shoulder impingement syndrome. The employee treated with physical therapy.

In February 2020, the employer began conducting video surveillance. From February 2020 to late 2021 the employer captured over 160 hours of video. It showed the employee arriving at or leaving medical appointments and engaging in physical activities that he denied being able to perform due to extreme pain.

On May 5, 2020, the employer had the employee evaluated by Dr. Edward Szalapski. Dr. Szalapsi reported that the employee did not sustain any significant work-related injury, opined he was malingering and emphasized that the employee appeared to "put on a show" given his observations of the surveillance video.

On June 4, 2020, the employer filed a notice of intention to discontinue benefits, denying primary liability. The discontinuance was approved. The employee filed a claim petition for injuries to his neck, left shoulder and arm, low back, and consequential CRPS.

The employee saw Dr. Jorome Perra at Summit Orthopedics on November 12, 2020, and Dr. Ifechi Anyadioha, a pain management specialist at Mankato Clinic's Pain Management Center on January 8, 2021. Dr. Perra assessed the employee has having CRPS. Dr. Anyadioha did not observe all the symptoms required for a diagnosis, but nevertheless assessed him with CRPS of the left lower and left upper extremities based on his reported symptoms.

Dr. Szlapski evaluated the employee for a second time on January 27, 2022. He reported that his opinion remained unchanged and noted that the employee did not meet the diagnostic criteria for CRPS.

The case went to hearing and a Findings and Order was issued June 21, 2022. The judge found that the employee's testimony was not credible and that he failed to show that he sustained a work-related injury on the alleged DOI. Her decision was based on the employee's delay in seeking treatment, inability of providers to find an organic cause for his complaints, the employee's exaggerated pain response on evaluation, and the persuasive opinion of Dr. Szlalapski. The employee appealed.

Holding

The WCCA affirmed the compensation judge's decision. In his opinion, Judge Stofferahn applied the Hengemuhle standard noting the issue on appeal was whether substantial evidence supported the compensation judge's decision, not whether substantial evidence might support a conclusion contrary to that reached by the compensation judge.

The employee made several unsuccessful arguments. First, he claimed that the compensation judge mischaracterized the evidence in stating that the employee first sought treatment "approximately one month" after the incident. The WCCA disagreed, noting that, among other evidence, the employee's own medical records and legal pleadings noted a September 25, 2019, date of injury.

Second, the employee asserted that the compensation judge erred by relying on Dr. Szalapski's opinion over that of Dr. Anyadioha and that she mischaracterized Dr. Szalapski's opinion. The court noted that the trier of fact has the discretion to choose between competing and conflicting medical experts' reports. The assessment of the weight to be given to conflicting opinions is upheld on appeal absent an abuse of discretion. Dr. Szalapski's opinion was adequately founded.

Next, the employee argued that the compensation judge erred because she did not address all of the evidence, namely the employee's testimony regarding the severity of the inciting incident and that he attempted to work through the injury as instructed by his supervisor. The WCCA was not persuaded by this argument. The compensation judge specifically found that the employee was not a credible witness.

Finally, the employee asserted that the compensation judge erred by failing to adequately explain her basis for rejecting the medical evidence supporting his alleged CRPS condition. The WCCA noted a compensation judge is not required to refer to or discuss every piece of evidence introduced at the hearing in the findings and order. Substantial evidence in the record supported the compensation judge's decision and there was sufficient detail for meaningful review on appeal.

Case2: Eull v. Metal Sales & Mfg., (W.C.C.A. February 9, 2023)

Background

The employee worked as a laborer for the employer, Metal Sales & Manufacturing, packaging and loading metal materials. On November 4, 2009, he sustained an injury to his right shoulder while manipulating and lifting a 75-pound piece of metal over his head. The employee reported constant high pain levels and sought treatment and diagnosis from a long list of providers.

On August 3, 2010, the employee saw Dr. Eckstrom at the Institute of Low Back and Neck Care for a follow-up. The examination showed symptoms consistent with dystonia with right lateral tilt. Throughout the fall of 2010, the employee continued to be seen for right neck, eye, and shoulder pain.

The employee sought workers' compensation benefits through a claim petition and a rehabilitation request. The case came before a compensation judge on September 26, 2012. In a Findings and Order, the judge found that the employee's current diagnoses were right scapular winging and impingement syndrome while also noting that the employee's work-injury was not a temporary aggravation and had not resolved.

Over the next decade, the employee continued to seek treatment for his upper extremity symptoms. On several occasions he was diagnosed with, among other assessments, cervical dystonia, chronic pain of the right shoulder, and possible CRPS.

In February 2020, the employee began treating with Dr. Erin Bettendorf, a pain specialist, at the United Pain Center for his chronic pain syndrome. Through January 2022, Dr. Bettendorf consistently opined that the employee had findings consistent with CRPS, but did not initially diagnose him with the disease. In a narrative report dated January 7, 2022, Dr. Bettendorf opined that the 2009 work injury was a substantial contributing cause of the employee's chronic neck pain, chronic right shoulder pain, myofascial pain, and right occipital neuralgia.

From 2010 to 2022, the employee presented to at least six separate independent medical examinations at the request of the employer and insurer. These included three examinations with Dr. Mark Friedland on May 19, 2010, October 5, 2011, and September 30, 2013. The employee also presented to Dr. Michael D'Amato on February 26, 2020, and October 27, 2021. Finally, the employee was seen by neurologist Dr. Khalafalla Bushara on December 6, 2021. Each of the three independent examiners routinely opined that the employee had suffered only a minor upper extremity injury which had long since resolved or that the employee was malingering. Both Dr. Friedland and Dr. Bushara specifically opined that the employee did not suffer from cervical dystonia.

On April 28, 2021, the employee filed a claim petition seeking benefits due to a work incident on November 4, 2009, which resulted in a neck injury, chronic pain, occipital neuralgia, chronic scapular pain, chronic neck pain, and CRPS. The employer and insurer filed an answer admitting the right shoulder injury but denying all the other claims for benefits.

On April 26, 2022, the compensation judge issued a Findings and Order holding that as a result of his work incident, employee sustained a consequential neck injury in the nature of occipital neuralgia and cervical dystonia and consequential CRPS of the right upper extremity related to the right shoulder and neck injuries. The employer and insurer appealed.

Holding

The WCCA firmed the decision of the workers' compensation judge. On appeal, the employer and insurer argued the evidence was inadequate support the compensation judge's findings and orders. They made three main arguments.

First, the employer and insurer requested a remand of the case asserting that it was error of law for the compensation judge to make any finding on cervical dystonia because it was not listed as an issue for determination. The WCCA disagreed. The court conceded that a compensation judge's decision may not resolve matters that are not at issue, but it can resolve the nature and extent of the injury and consequential injuries. The record was replete with discussion of cervical dystonia by both parties' experts and it had been a potential diagnosis for at least a decade. The employer and insurer availed themselves of the opportunity to seek multiple examinations, opinions, and testimony regarding the employee's diagnoses. As such, the court found no error of law and no reason to remand on that issue.

Next, the employer and insurer argued that the opinions of Dr. Bettendorf lacked foundation. To that end, the employer and insurer also asserted that it was an abuse discretion for the compensation judge to choose her opinion over that of Dr. D'Amato and Dr. Bushara. They argued that Dr. Bettendorf, as a pain specialist, was not qualified to diagnose CRPS, occipital neuralgia, or dystonia and that only neurologists have the requisite training, experience, and education to diagnose these conditions. The WCCA rejected these arguments as well, noting that the qualifications of an expert do not usually go to the admissibility of the expert's opinion but merely to its weight. The court went on to find that Dr. Bettendorf's experience and training as a board-certified anesthesiologist and pain management physician, as well as her review of the employee's medical records, established her as competent to render an expert opinion on this case. Finally, the WCCA pointed out that a compensation judge may base their conclusions on other reliable evidence in the record beyond the testimony of medical experts. In this case, the employee's credible testimony.

Last, the employer and insurer claimed that the compensation judge erred by failing to sufficiently explain her findings with regard to the diagnoses of cervical dystonia and occipital neuralgia. The WCCA rejected this argument as well, noting that the compensation judge made sufficient findings on all issues and the basis for her decision was clearly articulated.

The main takeaway from both the Eull and River-Matra cases is that it remains difficult to overturn a compensation judge's findings of fact even when you have good expert witness reports and defenses. The WCCA noted on several occasions that the judge's findings only needed support in the record, not that the evidence may have supported a contrary result. The inertia of fact findings remains intact.

Case3: Espinoza v. Direct Home Health Care, Inc., (W.C.C.A. Dec. 20. 2022)

Background

The employee worked as a personal care assistant for the employer, Direct Home Health Care, Inc. The employee's sole client was his mother, whom he lived with. On the date of the injury, the employee and his client-mother were sitting on their porch during normal working hours when the client suggested walking across the street to participate in the neighborhood National Night Out event. The client was very immobile; she was SBA [stand-by assist] with walker-during short distances" and a "[h]igh risk for fall!" As the employee helped his client-mother cross the street, a vehicle backed out of a parking space, striking the employee.

The employee's duties as a PCA were governed by a care plan developed by registered nurse/social worker, Kristen Marquette. Under the plan, the employee was required to assist the client with a variety of activities, including mobility, errands, and escort. "Mobility" was defined as "moving from one place to another by walking, wheelchair, cane, or [H]oyer lift." "Escort" was defined by the plan as activity done with the client for "medical appointments, community, running errands." Finally, additional PCA duties listed on a charting form included "socialization."

The employee asserted the injury arose out of and occurred within the course and scope of his employment. He filed a claim petition seeking wage loss and medical benefits. The employer denied primary liability and the matter came before a compensation judge. The judge issued his Findings and Order on April 18, 2022, ruling that the employee was not engaged in work activities at the time of the incident and therefore the injury did not arise out of and occur within the course and scope of his employment. He reasoned that the employee's decision to take his mother to the National Night Out event was not an obligation of, or incident to, his employment as a PCA. Instead, the judge found that the act of going to the social event was for the benefit of a mother and son. The judge further held that even if the injury occurred during the employee's shift, the decision to take his client-mother onto the street to attend the event was a deviation from his approved duties. The employee appealed.

Holding

The Workers' Compensation Court of Appeals reversed the compensation judge's decision. They addressed both arising out of and occurring with the course and scope of his employment. The WCCA found that several findings did not have substantial support from the evidence. First, the lower court's Finding on the employee's job duties was incomplete and not fully supported by the evidence. The judge omitted from his analysis the mobility, escort, and socialization duties found in the employee's approved care plan. Given these duties, the WCCA concluded that that the employee was acting within his role as a PCA when he engaged in the task of escorting his client-mother to the neighborhood event. To that end, WCCA reasoned that the employee was subject to the increased risk associated with that activity when the car pulled out and struck him. The court concluded that because the employee was injured while he was engaged in his PCA duties, the injury arose out of his employment.

The WCCA also rejected the employer's argument that the employee's injury was outside the course and scope of his employment because the employee did not specifically state on his time sheets that he was performing "escort" or "social/recreation" tasks. The court held that the accuracy of an employee's recordkeeping does not determine whether an activity is a work duty.

The employer also argued that walking to the National Night Out event was more accurately described as a personal social activity and thus was a deviation from the employee's PCA duties. The WCCA rejected this argument as well. The court pointed out that "deviating" from work was an affirmative defense that required evidence that the employee stopped performing work tasks and began performing personal tasks. The employer failed to prove such a deviation as there was no evidence that the National Night Out event was a personal event rather than a community one.

Finally, the employer argued that because the client was deemed a high fall risk, the employee had engaged in a prohibited act by walking the client so far from her home. The WCCA ruled that there was no evidence that the employee was prohibited from walking the client, pointing out that the care plan specifically outlined mobility and escorting services as part of the employee's PCA duties. The court held that the employer likewise failed to prove this affirmative defense as it offered no evidence that the employee was prohibited from any specific activity he was conducting at the time of the injury.

The WCCA was very careful in overturning Judge Hartman's findings. They specifically commented on the Hengemuhle standard and the Supreme Court's recent reaffirmance and clarification of the standard in the Lagasse cases. They noted a reasonable mind could not find the employee was acting outside his work duties. It will be interesting to see whether the case is appealed to the Supreme Court.

Withdrawal From the Labor Market

Hanson v. Kato Cable/SFM Mut. Ins. Co. & ADP Totalsource/AIG, (W.C.C.A. Jan. 24, 2023)

Background

Starting in 2016, the employee worked for Kato Cable in its shipping and receiving department. Her duties included repetitive lifting, manipulating, and overhead work. Not long after starting employment, she developed left shoulder pain which required surgical repair. The insurer admitted liability for a Gillette injury and paid out various benefits including wage loss, a three percent permanent partial disability (PPD), and medical benefits. The employee returned to her job with the employer with permanent restrictions for her left shoulder.

In 2019, the employee began experiencing similar symptoms in her right shoulder. The employee sought treatment and the insurer admitted *Gillette*-type injuries to the employee's neck and right shoulder culminating on January 24, 2020.

Despite the employee's ongoing symptoms, she continued working for the employer with restrictions. Her symptoms worsened however, and she alleged that she was often assigned tasks that were beyond her restrictions. Eventually, the employee asked the employer if there were any remote jobs within the company. The employer responded that no such jobs were available.

In October 2020, the employee told the employer that she intended on resigning her job by the spring of 2021. After training in a replacement for a couple months, the employee alleged that she had been constructively discharged from her job and resigned on December 1, 2020.

Shortly thereafter, the employee and her wife sold their home and bought an RV with plans of traveling the country. The employee's wife owned and operated Atlas, a website design company and worked remote. On January 1, 2021, the employee was hired by her wife at $11 an hour to work on data entry tasks. The employee worked approximately 25-30 hours per week. She also alleged that she was taking free, online web-design courses and that her pay would increase as she became more skilled.

In June 2021, the employee began working with QRC Mike Miller. In his rehabilitation plan, Mr. Miller stated that the employee's current job at Atlas was suitable and that the employee did not need to look for any other work.

In response, the employer hired Maureen Ziezulewicz to conduct a vocational evaluation. Ms. Ziezulewicz opined that the employee withdrew from the labor market by quitting her job, failing to conduct a job search, and choosing to live in an RV traveling around the country. Ms. Ziezulewicz also noted that there were other jobs available that the employee could perform within her restrictions.

The employee filed a claim petition seeking various workers' compensation benefits including past and ongoing TPD benefits. The compensation judge issued an amending findings and order on June 16, 2022, wherein he found that the employee had work restrictions related to the permanent left shoulder injury and unresolved right shoulder and neck injuries. He awarded TPD benefits to the employee for various periods from 2018 through the end of 2020 but denied any TPD after January 1, 2021, because the employee had withdrawn from the labor market.

Holding

The WCCA affirmed the compensation judge's decision. The WCCA rejected both of the employee's arguments.

First, the employee argued that compensation judge erred as a matter of law by issuing a finding stating her right shoulder and neck injuries were not yet resolved but later indicated in a memorandum that the injuries were temporary. The WCCA noted that an unresolved injury cannot be said to be either permanent or temporary. However, the court held that the discussion contained in the compensation judge's memorandum is used only to explain reasoning or discuss credibility; it is not a finding. Thus, in the event there are any discrepancies between a compensation judge's findings and a memorandum, the findings control.

Second, the employee argued that the compensation judge erred in finding that she had withdrawn from the labor market after January 1, 2021. The WCCA acknowledged that choosing to work remotely is not necessarily a removal from the labor market. The court went on, however, stating that an employee must still search for work within her medical restrictions and earning capacity in order to remain eligible to receive certain workers' compensation benefits. The court quoted Bochert v. Am. Spirits Graphcis, 582 N.W.2d 214, (Minn. 1998), stating, "it is the employee's burden to establish a diminution in earning capacity that is causally related to the work injury. … Whether reduced earning capacity is attributable to the disability or to some other factor is a question of fact of the compensation judge." Id. at 215. In applying the law to this case, the WCCA found that the employee had effectively removed herself from the full-time labor market.

In support of this holding, the court pointed to several factors. First, the employee only worked 25-30 hours per week and yet her restrictions were only related to work activity, but not work hours. The evidence showed that the employee had not sought any additional work or demonstrated any efforts to improve her work situation or supplement her reduced income. Further, the employee failed to offer any evidence demonstrating that she was actively taking steps to increase her work hours, earning capacity, or expand her job duties with Atlas. The court admitted that she fully cooperated with the Rehabilitation Plan, but noted it was put in place after she withdrew from the market and she did not look for work as part of the Rehab Plan. Thus, the WCCA found that it was reasonable for the compensation judge to reject the employee's argument that her part-time job at Atlas would likely grow into more.

Collateral Estoppel; Reasonableness and Necessity of Treatment

Cagle v. St. Benedict's Church and Catholic Mut. Grp. (W.C.C.A. Dec. 1, 2022)

Background

On February 3, 2012, the employee sustained low back and hip injuries lifting a couch while working for St. Benedict's Church. The employer and its insurer admitted liability and paid benefits. The employee underwent low back and right hip surgeries with good results. Approximately one year later, the left hip became painful as well and the employee sought treatment. An MRI scan revealed a probable left hip labral tear and a CT scan showed femoral neck impingement in both hips.

In 2017, the employee was examined by Dr. Mark Gregerson. Dr. Gregerson noted that the employee suffered from pain and loss of range of motion in both the right and left hips and observed a femoral neck impingement present on both hips. He diagnosed the employee with a right hip femoral neck impingement and labral tear secondary to the February 3, 2012, work injury. Notably, Dr. Gregerson did not offer any opinions on causation for the employee's left hip conditions.

In June 2018, the parties entered into a settlement agreement, closing out indemnity benefits but leaving open future medical expenses related to the low back, right hip, and left hip.

A short time later, the employee sought treatment for her left hip. Orthopedic surgeon, Dr. Christopher Larson, saw the employee twice in August 2018, diagnosing her with a femoral neck impingement and labral tear. Dr. Larson also performed a diagnostic anesthetic injection to determine if left hip surgery would be appropriate.

The employer and insurer denied payment for the August 2018 treatments, relying on a report from Dr. Bradley Helms. Dr. Helms opined that the treatment for both of the employee's hips was not related to the work injury.

The employee filed a Claim Petition and the matter went to a hearing in March 2020. The compensation judge dismissed the opinions of Dr. Helms and ruled that the left hip treatment in August 2018 was causally related to the employee's work injury of February 3, 2012. In reaching this decision, the compensation judge adopted the opinions of Dr. Gregerson.

In July 2020, the employee returned to Dr. Larson with continuing left hip pain. Dr. Larson recommended an injection as well as arthroscopic femoral resection osteoplasty and labral repair. On September 3, 2020, the employee filed a medical request for the recommended surgery. This time, the employer denied the request based on the opinion of Dr. Loren Vorlicky. Dr. Vorlicky drafted a report dated December 16, 2020, which made two key assertions: 1) the employee's left hip condition was longstanding and not related to the February 3, 2012, date of injury, and 2) the recommended surgery was not reasonable as it was likely the employee would have a poor result.

The matter was heard before the same compensation judge on May 5, 2021. The employee argued that the issue of causation was already litigated, having been decided in the March 2020 Findings and Order. The compensation judge did not address employee's collateral estoppel argument and found that the left hip condition was not related to the 2012 work injury. The compensation judge failed to make any findings on whether the proposed left hip surgery was reasonable or necessary. The employee appealed the order. The Workers' Compensation Court of Appeals vacated the denial of the surgery and remanded the matter for specific findings related to the two unaddressed issues.

On remand, the compensation judge found that the employer and insurer were not estopped from litigating the causation issue and found that the proposed left hip surgery was not reasonable and necessary. The employee appealed again.

Decision

The Workers' Compensation Court of Appeals affirmed in part and reversed in part the compensation judge's decision. The WCCA first addressed the issue of collateral estoppel. Collateral estoppel applies when the issue decided was identical to the issue in a prior adjudication, there was a final judgment on the merits, the estopped party was a party or in privity with a party to the prior adjudication, and the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. The only factor in dispute is whether the issues were identical. The issue being causation for the left hip. They reviewed this issue de novo.

The court acknowledged that the compensation judge's 2020 order may have suffered from some evidentiary shortcomings. For example, the medical expert opinion of Dr. Gregerson, adopted in the prior hearing, did not actually offer an opinion on causation of the left hip condition. Nevertheless, the compensation judge's order clearly stated that the employee's left hip treatment with Dr. Larson in August 2018 was "causally related to the work injury of February 3, 2012." Thus, the compensation judge used clear and precise language in ruling on the issue of causation. The WCCA noted that without any additional facts or developments regarding the employee's injury, the doctrine of collateral estoppel prevented the parties from relitigating the issue of causation for the left hip injury.

On this issue it appeared that Judge Marshall was drawing a distinction between finding medical treatments for differential diagnosis compensable and issuing a finding on the nature and extent of the work injury, mainly that the left hip condition was caused by the work injury. Yet, the WCCA noted the diagnostic nature of the treatment was to assess whether a surgery was appropriate, not to determine a diagnosis.

As to the issue of whether the left hip surgery was reasonable and necessary, the compensation judge ruled that the employee had not met their burden. The WCCA stated that the law is clear; findings of fact should not be overturned unless they are clearly erroneous and contrary to the weight of the evidence or not reasonably supported. The court went on to find that there was substantial evidence in the record, such as Dr. Vorlicky's opinion that the surgery would not be beneficial, to uphold the compensation judge's findings that the proposed left hip surgery was not reasonable and necessary. As such, the appellate court affirmed the lower court's denial of the employee's left hip surgery.

Evidence – Admission of Medical Expert Opinion

Rucker v. Ramsey Cnty., (W.C.C.A. Jan. 13, 2023)

Background

The employee had a long and varied employment history. The record showed that, while incarcerated, he was injured when he fell on his left shoulder in the fall of 2019. Due to continuing symptoms, the employee underwent conservative treatment, including an injection. The employee reported significant pain and limitations in range of motion.

From April to May 25, 2020, the employee worked for FedEx unloading trucks. He worked in a similar capacity for Target for one month in December 2020.

Medical records from October and November of 2020 indicated that the employee's left shoulder was grossly limited in range of motion and an MRI showed severe glenohumeral joint osteoarthritis. It was indicated that "prompt" surgical intervention would likely be required.

On December 28, 2020, the employee began working for Ramsey County as a wellness assistant at a homeless shelter. The employee's duties included stocking food and supplies. The employee was unloading a truck when he caught a case of bottled water tossed by another worker. The employee alleged that he reported his injury to his supervisors, including Lakeisha Weems, who ultimately advised him to contact human resources (HR). The employee failed to do so. He continued to work, favoring his injured arm, and did not immediately seek medical treatment.

In February 2021, the employee sought treatment with Dr. Randal Norgard for his left shoulder pain. The employee did not immediately mention a work injury to Dr. Norgard. However, in a follow-up visit on March 24, 2021, the employee described a February incident in which a coworker dropped a box on the employee causing his left shoulder giving out.

Eventually, the employee underwent surgery on May 13, 2021. In his post-operative narrative, Dr. Norgard opined that there was no evidence of a rotator cuff tear but noted the presence of severe degenerative changes as well as eburnation of the humeral head. In a narrative report on March 3, 2022, Dr. Norgard opined that a February 12, 2021, work injury accelerated the employee's pre-existing degenerative arthritis.

The employee filed a Claim Petition against Ramsey County seeking payment for the left shoulder arthroplasty and other benefits based on the February 2021 injury. The employer denied liability, based in part on an independent medical examination by Dr. Loren Vorlicky. Dr. Vorlicky concluded that the employee suffered from longstanding osteoarthritis of the left shoulder unrelated to any work injury and there was no substantial contribution of any incident on February 12, 2021, to the employee's need for shoulder surgery.

The compensation judge agreed with the employer, finding that the employee's need for shoulder surgery arose form his preexisting shoulder condition and that the February 12, 2021, work incident did not substantially aggravate or accelerate the need for surgery. The employee appealed.

Holding

The WCCA affirmed the compensation judge's decision. The employee argued that the Dr. Vorlicky's opinion should have been excluded because he relied on inadmissible evidence in arriving at his conclusion. Several written witness statements were excluded from evidence because the witnesses were not available. The court rejected this argument, noting that the employee misstated the law. Under Minn. R. Evid. 703, while an expert may rely on facts and data that would be inadmissible at trial to form an opinion, the expert may only testify to information that is independently admissible. The record showed that statements made by the some of the employee's co-workers were included in the background letter submitted to Dr. Vorlicky by the employer's counsel. Those statement were inadmissible hearsay because those co-workers were not available to testify. Nevertheless, the WCCA found that Dr. Vorlicky did not reference any inadmissible statements in his opinions and testimony. Thus, the compensation judge made no error in admitting the doctor's opinion to the record.

The employee also argued that had Dr. Vorlicky's opinion been excluded from the record, the compensation judge would have been required to adopt Dr. Norgard's "uncontested" opinion. The

WCCA rejected this argument as a misstatement of the law. The WCCA noted that the compensation judge may rely on the employee's medical record and other substantial evidence to reach a conclusion contrary to an unopposed medical opinion. The WCCA found that even if Dr. Vorlikcy's opinion had been excluded, the record contained sufficient support for the compensation judge's decision.

Appeals – Timely Filing

Strege v. Commercial Drywall and Fed. Mut. Ins. Co., (W.C.C.A. Jan 30, 2023)

Background

On October 27, 2022, the WCCA served and filed an Order dismissing the pro se Employee's petition to vacate. That order included a notice, stating "Any party dissatisfied with this decision may appeal it to the Minnesota Supreme Court within 30 days of the date of the decision was served. See Minn. Stat. § 176.471 for information about what steps are required to file an appeal."

On November 3, 2022, the employee sought review of that order, but did so through a Notice of appeal rather than by certiorari. On November 7, 2022, the Clerk of the Appellate Courts informed the pro se relator that his notice of appeal would not be filed, explaining that a writ of certiorari was needed, and enclosed all necessary forms for the relator's convenience.

On December 8, 2022, the employee-relator filed the necessary petition for a writ of certiorari. In addition to being more than 10 days outside of the statutory filing window, the employee-relator failed to properly file proof showing service of the petition and issued writ on the WCCA, the Minnesota Attorney General, and respondents.

On January 1, 2023, respondents, employer and insurer, filed a joint motion to dismiss the appeal. Respondents asserted that the appeal was untimely and was not served on all parties.

Holding

The Supreme Court granted the respondents motion to dismiss. The Court acknowledged that the relator incorrectly sought review on November 3, 2022, by filing a notice of appeal. Proper procedure under Minn. Stat. § 176.471 required the relator to petition for a writ of certiorari within 30 days from the date the party was served with notice of the WCCA's Order. Despite ample courtesies by the Clerk of the Appellate Courts, the relator failed to meet the statutory deadline, never filed proof of service, and did not serve all of the necessary parties with the executed writ.

The Court explained that they strictly construe the statutory requirements for appeals by certiorari from an agency such as the WCCA. As such, the Court noted that they were obligated to discharge the writ because 1.) the petition for the writ of certiorari was not filed timely and 2.) even if the petition had been filed in a timely manner, the relator failed to serve the writ upon respondents and the WCCA as required by Minn. Stat. § 176.471, subd. 3.