MINNESOTA WORKERS' COMPENSATION QUARTERLY CASE LAW UPDATE

Minnesota Self-Insurers' Association

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by

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"Arising Out of and in the Course and Scope of Employment" Cases

Paskett v. Imation Corp. and Traveler's Group, No. WC12-5494, (W.C.C.A, Jan. 3, 2013)

This case involves a denial of a work injury because it occurred during a voluntary employer-sponsored recreational activity pursuant to Minn. Stat. § 176.021, subd. 9. That provision provides that injuries occurring at certain voluntary recreational activities that are sponsored by an employer, including wellness programs, athletic events, parties, picnics, etc., are not compensable. However, the exclusion does not apply where the injured employee is required to participate in this recreational activity or program by the employer.

In this case, the employee participated in a flag football game during an employer sponsored charity week to benefit the United Way. He paid an entry fee of $20.00 to participate, but the entire entry fee went to the United Way. He was paid his regular wage by the employer during his time participating in the football game. He did not have to take any paid time off or vacation time to participate. During the flag football game, the employee injured his Achilles heel tendon, needed surgery, and missed two weeks of work.

The workers' compensation judge denied the employee's claims for workers' compensation benefits from the flag football injury pursuant to Minn. Stat. § 176.021, subd. 9. The W.C.C.A. upheld the finding of the compensation judge indicating that § 176.021, subd. 9, makes clear that it has to be a voluntary activity and the facts of the case supported the employer's contention that this was strictly a voluntary recreational activity. The court did not find persuasive the employee's contention that he was not told about alternatives for participation. The court also noted that even if there is a benefit to the employer for having a charity week, the statute was added in order to specifically exclude certain recreational activities that are sponsored by an employer from being potential compensable injuries and, therefore, denied any analysis under previous case law in which those types of activities were previously compensable.

When evaluating whether or not an injury is compensable, it will be important to know whether or not this is an injury that occurred as a result of a recreational-type event that was sponsored by the employer, whether it was a voluntary event, what type of an event it was, and whether or not employees were given the opportunity to not participate and go on with their regular workday, take unpaid time off, or take paid time off instead of participation.

Dykhoff v. Xcel Energy, No. WC12-5436 (W.C.C.A. Nov. 30, 2012)

In this case, the facts were largely undisputed, and there was only one real issue: whether the Employee's left knee injury arose out of and in the course of her employment. She had slipped on a marble floor in a hallway on her way to a mandatory training session. The compensation judge found that the Employee's injury did not arise out of and in the course of her employment. The Employee appealed, and the W.C.C.A. reversed the compensation judge and held that the Employee's injury did arise out of and in the course of her employment.

The employee usually worked at a suburban office of the employer, but was visiting the headquarters in downtown Minneapolis for computer training. She was told to wear dress clothes instead of her usual jeans, and she chose to wear two-inch wooden heels as part of her outfit. She entered the building and walked across the spot where she fell at least twice before the fall actually occurred. She was carrying her laptop bag over one shoulder, her purse over the other, and her coat over her right arm. She testified that first her right, and then her left foot "slipped" out from underneath her and she felt the left knee pop. She landed on her buttocks on the floor and felt left knee pain. She testified that she thought the floor was slippery, but an employer witness testified that he examined the floor after her fall and it was not slippery.

The compensation judge denied the claim. She found that in order for the Employee to prevail, she had to show that the condition of the floor put her at an "increased risk" of injury. The judge then found that the floor was not slippery, and she also found that because the floor was not slippery and there was nothing to explain the employee's fall, the employee had not been at an "increased risk" of falling because of the floor condition, and therefore her injury did not "arise out of" her employment.

The W.C.C.A. explained that "in the course of" and "arising out of" are two separate elements of a single test of work-connectedness.

First, to occur "in the course of" employment, an injury must occur within the time and space limits of employment, as well as occur while the employee is engaged in work or in activities reasonably incidental to work.

Second, to "arise out of" employment, an injury must have a causal connection with work activities.

If the "in the course of" element is present but weak, but the "arising out of" element is strong (or vice versa), an injury can still be work-related.

The W.C.C.A. found that the Employee was certainly "in the course of" her employment when she fell, because she was on the employer's premises, on her way to a training session that was required for work.

The W.C.C.A. then found that the compensation judge erred when she found that the Employee had to show she was at an "increased risk" of injury in order to prove that her injury arose out of her employment. While the "increased risk" test is a starting point for determining whether an injury "arose out of" employment, it is not the ending point. If there is no explanation for a fall because it was not contributed to by an idiopathic condition, and if there was no "increased risk" involved, then there should be further analysis. For example, the compensation judge could and should have applied the "positional risk" analysis. Under this test, if the employment placed the employee in a particular place at a particular time, and the employee was then injured by a "neutral" risk, then the injury still "arose out of" employment. In the instant case, the employment did not place the employee at an increased risk of her fall, and the injury could not be explained by an idiopathic condition that was particular to the employee. However, her employment did place her in the hallway at the time of her fall, and she was injured by a

"neutral" risk (the floor). While the "arising out of" element was not strong, it was indeed present. Because the "in the course of" element was very strong, the claim should be compensable under an overall work-relatedness analysis. The W.C.C.A. did not hold that a given test (such as the positional risk or increased risk test) would always be applicable; instead, the compensation judge should analyze overall work-connectedness considering the facts of the case and the strength of each of the two elements ("in the course of" and "arising out of").

The W.C.C.A. also noted that to affirm the compensation judge would essentially prevent compensation, as a matter of law, for every single unexplained injury, which would put an unreasonable burden of proof on the Employee and which would be inconsistent with the "no fault" nature of the workers' compensation system.

This case could narrow the types of falls that are not work-related. After this case, if a fall occurs on a normal, flat surface and there is no explanation for the fall, it may be found to arise out of the employment as long as the "in the course of" element is somewhat strong.

Kanable v. Service Master of Rochester, No. WC12-5466 (W.C.C.A., Jan. 21, 2013)

This case involves a very interesting fact pattern in which the Employee was working in a typical office setting near the frontage road along Trunk Highway 52 when a runaway tractor-trailer semi went off the road at 50 to 60 miles per hour, barreled down an embankment, and struck the Employee's building and went through the entire building, and then crashed into woods and rocks. The truck caught fire and the driver perished. The Employee was injured when she was trapped from collapsing debris of the building and having to be extricated from that debris. She sustained multiple injuries, as well as had ongoing headaches, dizziness, problems with concentration, and post-traumatic stress disorder.

The Employer and Insurer denied pursuant to § 176.021, subd. 1, alleging that the Employee's injury did not "arise out of and in the course and scope of employment" because the Employee was not at an "increased risk" greater than the general public. Generally, the "increased risk" test addresses "arising out of" cases and this requires a causal connection between the employment activities and the employee's source of injury.

The compensation judge held that the employee was at an "increased risk" because she worked in an office building that was precariously situated to the frontage road of Highway 52, there was no natural or artificial barriers between that fast moving highway and the employer's building, and there was an unimpeded slope and a fairly shallow angle between that highway area and the building.

The employer and insurer contended that the situation of the building was typical of many office buildings that are close to highways, and therefore, there is no increased risk. The compensation judge instead found that this building was situated in a spot in which the employee was placed at a greater risk of injury, than the public in general.

The employer and insurer further argued that this was simply a freak accident, similar to a lightning strike, or being struck by a straight bullet, which are characterized as "neutral risks" or those risks that have no specific or direct association with the nature of employment.

The W.C.C.A. affirmed the compensation judge's decision and indicated that this "neutral" risk, even if unexpected or unusual, was made substantially greater because of her employment. The W.C.C.A. found that the employee sufficiently provided reasons why this building's location placed the employee at an increased risk – there were no natural barriers between the highway and the building, the shallow angle to the highway, and the precariously short path.

Finally, the W.C.C.A. noted that this was a substantial evidence case and the judge's decision was supported by substantial evidence given the factual record established at trial.

Gilbert v. Independent Sch. Dist. 615, No. WC12-5481 (W.C.C.A. Jan. 23, 2013)

In this case, the W.C.C.A. held that substantial evidence supported the compensation judge's finding that the Employee was not in the course of his employment when he died. The Employee was a 38-year-old custodian. On the date of his death, his job duties were to shampoo a carpet and to secure the school by ensuring that no one was in the building when his shift ended at 4:30 p.m.

There were security cameras inside the school, and intermittent footage of the Employee showed that he stayed at school long past 4:30 p.m., and was behaving erratically. In one instance he stood motionless in a hallway for ten minutes, and another time, he sat in a desk in a hallway for 30 minutes. He then moved the desk into a classroom at around 8 p.m. and was not seen on camera again. His wife called the police early the next morning, and they found the deceased Employee lying face-down in the classroom and the desk tipped on its side. The medical examiner wrote that there was "no anatomic cause of death." "Hypertension" was listed under "other contributing cause." The employee also had diabetes, elevated cholesterol, and obesity, and had had a pituitary gland tumor that had been removed seven years before his death.

The Employee's representative filed a claim petition alleging that the Employee's death arose out of and in the course of his employment and that dependency benefits were due. The employer and insurer's expert opined that the Employee's death was from natural causes and that his behavior on camera was consistent with someone experiencing a metabolic disturbance, which may have been caused by his pituitary gland condition and could have led to cardiac arrhythmia. The Employee's estate's expert disagreed and thought the cause of death was multifactorial. She hypothesized that he might have been standing on the desk and fell, with the trauma of the fall causing a fatal arrhythmia. The compensation judge found that the preponderance of the evidence failed to establish that the Employee's death arose out of or in the course of his employment.

On appeal, the W.C.C.A. stated the general rule that for an injury or death to "arise out of" employment, there must be a causal connection between the work activities and the injury or death. For an injury or death to occur "in the course of" employment, the activity of the

employee at the time of the injury or death must be reasonably incidental to his employment. The two phrases "arise out of" and "in the course of" are elements of one issue of work-relatedness. Where one element is weak, the injury may still be compensable if the other is strong. The W.C.C.A. found that in this case, the Employee was not in the course and scope of his employment when he died. His death occurred at least three and a half hours after his shift was scheduled to end, and he had not called his supervisor to request overtime. The video footage showed he was not engaging in any work activity after 4:30 p.m. There is no indication that he carried the desk into the classroom for any work purpose. Therefore, substantial evidence supported the compensation judge's denial of dependency benefits.

Joint Employer Liability and Uninsured Employer Liability

Mironenko v. Grounded Air, Inc., No. WC12-5431(W.C.C.A. Dec. 3, 2012)

Drier v. Grounded Air, Inc., No. WC12-5424 (W.C.C.A. Dec. 3, 2012)

These are companion cases in which Mr. Mironenko and Mr. Drier sustained compensable work injuries. Grounded Air is a solely owned company by David Herzog. Grounded Air contracted with a labor staffing company, Pay Source, Inc. (PSI), to handle payroll, taxes, and workers' compensation insurance. PSI failed to obtain the workers' compensation coverage.

The "loaned servant doctrine" is applied to cases where the employee is employed by more than one employer. There is usually a special employer that directs the actual work activities and then the general employer, which in this case is the labor pool or staffing agency. Both are liable for workers' compensation insurance and under Minn. Stat. § 176.071, the joint employers are proportionately liable for benefits based on the proportionate share of wage liabilities.

The compensation judge found that Grounded Air, Inc. was uninsured at the time of the injury, as was PSI. Because both employers were uninsured, the Special Compensation Fund was liable for payment of compensation benefits and Grounded Air, Inc. and its owner, David Herzog, were liable for reimbursement to the Special Compensation Fund, including penalties and the 65% add on pursuant to Minn. Stat. § 176.183.

Grounded Air, Inc. argued that under Bilotta v. Labor Pool of St. Paul, 321 N.W.2d 888 (Minn. 1982), the special employer should not be liable where they have contracted away their workers' compensation to a labor pool or staffing agency.

The W.C.C.A. disagreed, indicating that employers cannot shift the burden of obtaining workers' compensation insurance. Instead, this case was distinguishable from Bilotta, because both the general and special employer were uninsured at the time of both injuries and in Bilotta, the special employer alleged reimbursed for workers' compensation benefits from the general employer.

Generally, the Special Compensation Fund is required to pay compensation when there is no coverage obtained by the employer, or where an alleged insurer denies coverage exists. When neither the general or special employer obtains coverage, the Fund is responsible subject to reimbursement from the uninsured employers.

The W.C.C.A. found that even though Minn. Stat. § 176.071 permits joint employers to agree how to handle workers' compensation between themselves, it does not permit an employer to contract away its statutory obligation, under Minn. Stat. § 176.021 subd. 1, to obtain workers' compensation insurance. Because Grounded Air was uninsured due to PSI's failure to obtain workers' compensation insurance, it was still liable for reimbursement to the Special Compensation Fund even though the result was harsh given that Grounded Air's failure to obtain coverage was due to its reliance on PSI per the staffing agreement.

Substantial Evidence Cases

May v. Delta Air Lines, Inc., No. WC12-5468 (W.C.C.A. Dec. 27, 2012)

This case involves a flight attendant for Delta Airlines who alleged a left shoulder injury in late May 2011, after doing repetitive overhead reaching and lifting, specifically closing overhead bins and lifting baggage.

The employer initially admitted the injury, but after the October 2011 IME, it attempted to file a NOID, based on Dr. Hadley's IME, in which he found no Gillette- type injury.

The compensation judge was presented with medical opinions from Dr. Kittleson, Dr. Dowdle, and Dr. Callaghan, which supported the finding of a work-related injury, due to repetitive use. However, this case was interesting because the employee had an injury that was unlike typical repetitive use injuries, because he sustained a comminuted proximal humerus fracture, which was confirmed on MRI. The employee's treating doctors found that the stress fracture from repetitive use then led to the gradual displacement of the humerus. Dr. Hadley disagreed.

The compensation judge found that the medical providers did have proper foundation to find a work injury based on the repetitive work and that because there is an explanation that this was a repetitive use injury that led to a gradual displacement. Dr. Hadley opined that the employee's work activities would not cause this type of injury and that there had to be some other incident or trauma to cause this displacement. The compensation judge adopted the employee's medical experts' opinions. The W.C.C.A. affirmed on substantial evidence review. Further, the W.C.C.A. found that the judge's decision to not define the injury as a Gillette-type injury did not matter, as he found a compensable injury arising out of and in the course of the employee's employment activities.

Engelhart v. Liston Gen. Contracting, No. WC12-5451 (W.C.C.A. Dec. 18, 2012)

This case is one where the employer and insurer won at trial based on a temporary injury theory.

The employee was injured in a significant incident in which a 6x6x6 beam fell and struck the left side of his back. This happened on 6/16/2009, and the employee eventually alleged a cervical spine injury from that incident. However, the employee did not treat for his neck symptoms for at least six weeks after the injury and even then the treatment and symptom complaints still focused on the employee's low back and mid-back. The employee was evaluated by two IME doctors. First, Dr. Paskoff opined the employee sustained a myofascial strain of the neck in the 6/16/2009 incident. Second, Dr. Hood opined that the employee did not sustain any neck injury on 6/16/2009, because he would have immediately reported his symptoms from that type of injury, given the C5-6 and C6-7 disc protrusions with left neuroforaminal stenosis.

The employee obtained an IME report from Dr. Downs, who opined the employee had a whiplash type injury from the beam hitting him with force and causing his neck to accelerate and decelerate, which left him with a permanent partial disability rating of 23 percent, plus need for a likely fusion surgery.

Judge Arnold adopted Dr. Hood's opinion, but Finding 26 states "[t]o the extent employee suffered any injury to his cervical spine on June 1, 2009, it was temporary in nature and resolved within 3 months." But, Judge Arnold's Order 5 denies the claim for a cervical spine injury entirely, so there is some discrepancy in the Findings and Order.

The W.C.C.A. affirmed the Findings and Order of Judge Arnold based on substantial evidence and the well-established rule that choosing between conflicting medical opinions is the function of the compensation judge pursuant to Nord v. City of Cook, 360 N.W.2d 337, 342, W.C.D. 364, 372-73 (Minn. 1985). Of course, these opinions must have proper foundation and supported by substantial evidence. The W.C.C.A. noted that Dr. Hood's opinion was well supported by review of all the medical treatment records, examining the employee, and proper experience in that field.

Even though there was some discrepancy between the Finding 26 and Order 5, the W.C.C.A. noted that the pertinent issues at trial were if the employee sustained a cervical spine injury, permanency and entitlement to ongoing medical treatment the cervical spine. Because Judge Arnold adopted Dr. Hood's opinion and found only a temporary injury, if any, the employee's claims for permanency and ongoing treatment were denied regardless of whether there was no injury or simply a temporary injury.

A lesson from this case is that the medical records directly after an injury are very important for pinning down any and all body parts injured and the significance of any of those injuries.

Attorney Fees

Watson v. Wil-Kil Pest Control, No. WC12-5445 (W.C.C.A. Nov. 1, 2012)

This case involved a dispute over Roraff fees. The employee had an admitted right foot and ankle injury in 2008, and the employer and insurer had paid for multiple surgeries. In the summer of 2011, an additional surgery was recommended. In June 2011, when the insurance representative found out the surgery was scheduled, her repeated requests for information about the surgery and the rationale behind the doctor's recommendation were unanswered. The surgery was performed as scheduled on August 15, 2011, and the employee put it under his health insurance. The employer and insurer scheduled an independent medical examination, and the employee then filed a claim petition on August 26, 2011, seeking approval for the surgery. The records attached to the claim petition constituted the first time the insurer had received any indication of the doctor's rationale for recommending the surgery. The employee canceled a September 17, 2011 IME, and attended a rescheduled IME on October 12, 2011. In his report of November 10, 2011, the IME doctor agreed that the surgery was reasonable, necessary, and related to the work injury. The insurer then agreed to pay for the surgery. The employee's attorney filed a statement of attorney's fees (including a claim for Roraff fees and subdivision 7 fees), but the compensation judge declined to award any attorney's fees since he found that there had not been a genuine dispute.

The W.C.C.A. affirmed the compensation judge. The failure of the treating surgeon to provide the insurer with information about the surgery, and the employee's cancellation of the first IME appointment, were the causes of the delayed approval. The surgery was not an emergency procedure, and it was not delayed by the insurer's actions. The insurer had not taken an unreasonable amount of time to take a position on liability for the surgery, considering the sequence of events.

The takeaway from this case is that where there is difficulty in obtaining information about a proposed procedure or obtaining a second opinion IME, which causes a delay of approval of that procedure, it is important to document the attempts to obtain the information from the doctor's office. That way, in the event the employee's attorney claims Roraff fees, the documentation can be used to show that there was no dispute and that the insurer was having difficulty obtaining information about the procedure through no fault of its own.

Olsen v. Mackay/Minn. Envelope, No. WC12-5476 (W.C.C.A. Dec. 12, 2012)

The Employee prevailed at a hearing, after which time he and the two insurance companies involved entered into a stipulation for settlement. The employee later filed a petition to vacate the prior Award because it had closed out future Roraff fees, and so he could not find an attorney to represent him with respect to ongoing medical treatment, which had been left open. The W.C.C.A. vacated the Award solely with respect to the portion that closed out future Roraff fees, because it was against public policy to effectively prevent the Employee from obtaining the effective assistance of counsel. Because medical benefits were left open, it is apparent that the parties intended for the Employee to continue to receive medical care. The closeout of attorney

fees significantly and negatively affected his ability to receive this ongoing care. The W.C.C.A. therefore determined that the provisions closing out Roraff fees should be vacated, but the rest of the settlement should remain in effect.

Evidentiary Dispute

Majerus v. Rochester City Lines Co., WC12-5458 (W.C.C.A. Jan. 2, 2013)

The main issue in this case was whether the compensation judge erred in admitting into evidence a reinstatement agreement between the employee and the employer. The employee, a bus driver with a history of low back problems, claimed he injured his low back on or about June 30, 2011 while wheeling a wheelchair-bound client into the bus. The employer terminated the Employee because they claimed he fabricated his claim. They had checked the videotapes from the claimed date of injury, and the employee had not even had a wheelchair-bound client that day (although the date of June 30, 2011 was the employee's estimate of the day his injury had occurred). Also, the employee's supervisors said that the employee limped at work, but outside of work, they observed him walking without a limp and acting outside of his restrictions.

The employee and his union representative reached an agreement with the employer for the employee's reinstatement. Pursuant to the agreement, one of the preconditions for his reinstatement was to win his workers' compensation case. The employee introduced this agreement into evidence at the hearing, and the compensation judge admitted it into evidence over the objection of the Employer and Insurer. The compensation judge then found for the Employee.

The employer and insurer appealed on two grounds. First, they argued that the compensation judge erred by admitting the reinstatement agreement into evidence. First, they argued it was not relevant to the issue of primary liability. Also, they argued that the admission of the agreement was prejudicial because it created an extra incentive for the judge to find for the employee because she knew that the employee would only be reinstated if he won his workers' compensation case. The W.C.C.A. noted that pursuant to Minn. Stat. § 176.411, subdivision 1, the common law and statutory rules of evidence do not apply in workers' compensation hearings. Further, the admission of the reinstatement agreement was not prejudicial because the compensation judge did not even discuss the reinstatement agreement in her Findings and Order, and therefore there was no evidence that she even gave the reinstatement agreement any weight or that she was improperly influenced by its admission.

The employer and insurer also argued that the compensation judge erred because substantial evidence did not support the finding that the Employee had sustained a work-related low back injury, but the W.C.C.A. disagreed and held that the testimony and medical records provided substantial evidence to support the compensation judge's determinations. Therefore, the Compensation Judge's decision was affirmed.

One important thing to note in this case is that requiring an employee to win his workers' compensation case before being reinstated opens the door to potential penalty claims under

Minn. Stat. § 176.82 for retaliatory discharge and/or refusal to offer continued employment. There could also be potential claims under federal employment laws. Under these various laws, the Employee could end up being awarded tens of thousands of dollars. In this case, the employer believed the discharge was justified because they claimed the Employee fabricated his claim and committed fraud, but findings of fraud are rare in workers' compensation cases. The compensation judge disagreed that the Employee's claim was fraudulent and actually believed that it was compensable and awarded benefits. The fact that the union approved the agreement may have led the employer to believe that the agreement was sound, but the union approval does not change the fact that the employer should not have required this provision in the reinstatement agreement.

Defense to Penalty Claim

Demarais v. United Parcel Servs., Inc., No. WC12-5465 (W.C.C.A. Jan. 3, 2013)

The Employee settled his workers' compensation case with the Employer and Insurer. The parties submitted a Stipulation for Settlement to the Office of Administrative Hearings, and an Award on Stipulation was then served and filed. The proof of service attached to the Award indicated that it was sent to all of the parties, including the Employer, the Insurer, and the Employer and Insurer's attorney. The Employer and Insurer did not issue payment within 14 days as required by law. The employee's attorney sent a copy of the Award to the defense attorney. The Insurer then immediately issued the checks, and the Employee and his attorney received the checks two days after the Employee's attorney had contacted the defense attorney.

The Employee filed a claim petition seeking penalties for late payment of benefits, pursuant to Minn. Stat. § 176.225. The compensation judge found that the Employer, Insurer, and their attorney did not receive the Award until the date it was sent to them by the Employee's attorney. Because the Insurer promptly issued the payments once it received the Award, there had been no unreasonable delay in payment, and the Employer and Insurer were not liable for a penalty under Minn. Stat. § 176.225. The Employee appealed.

The W.C.C.A. found that substantial evidence supported the compensation judge's findings. This evidence included the testimony of the employer, insurer, and their attorney that none of them had received a copy of the Award until the day the Employee's attorney sent it to them. It is up to the compensation judge to determine whether the testimony of a witness is credible. Further, the W.C.C.A. disagreed with the Employee's argument that the Employer and Insurer had an affirmative duty to inquire into the status of the issuance of the Award. The W.C.C.A affirmed the compensation judge's decision that no penalties were due.

Wage Loss Claims

Garner v. Mobile Washer, et. al., No. WC12-5441 (W.C.C.A. Dec. 4, 2012)

This case is very good for Employers and Insurers because it supports the case law that denies an employee temporary total benefits during a period of incarceration. The employee had an admitted right ankle injury and the employer and insurer paid for multiple surgeries and wage loss benefits prior to the employee being incarcerated at Lino Lakes Correctional Facility. He even had a subsequent surgery while incarcerated.

The employer and insurer filed a petition to discontinue benefits alleging his incarceration constitutes a withdrawal from the labor market pursuant to Minn. Stat. §176.101 Subd. 1(f), but the compensation judge denied the petition because the employee's removal from the labor market was primarily because of his medical condition after injury and surgery.

On appeal, the W.C.C.A. overturned the compensation judge and found that this issue has been considered in Hutchins v. Champion Int'l Corp. and what matters most is that incarceration is a withdrawal from the labor market regardless of the employee's work restrictions or being totally disabled to work medically – even after surgery.

This case reiterates a bright-line rule that an incarceration of the employee – who otherwise might be able to claim wage loss benefits – is a withdrawal from the labor market plain and simple and discontinuance is appropriate.

Arbach v. Stevens Cnty. Ambulance Serv., No. WC12-5459 (W.C.C.A. Dec. 18, 2012)

This is an interesting case because the W.C.C.A. affirmed the compensation judge' decision to deny the employees claim for temporary partial disability benefits after two low back injuries on 9/10/2008 and 11/16/2009, both of which were admitted injuries. The employee worked as an EMT and a full-time training coordinator at the time of both injuries with a substantial weekly wage. The reason for fairly high average weekly wage was that the employee worked significant overtime before both injuries.

Subsequently, the employee's job as an EMT was terminated because the County decided to contract with an outside service for those services.

Ultimately, the employee's claims for TPD benefits were denied because the employee failed to conduct a diligent job search, even though she remained employed after both injuries and after leaving the County. She obtained a job for North Memorial Health Care System in August 2010, and worked full-time, but had a claim for ongoing wage loss of about $200.00 per pay period.

This was a substantial evidence case in which the compensation judge found that the employee's actual earnings were not an accurate reflection of her earning capacity and in essence, the presumption was rebutted by the employer and insurer, based on the failure to conduct a diligent job search. The compensation judge found that because the employee had worked significant

overtime prior to both injury dates, but then after leaving the County job, she had not continued to work overtime once she obtained other employment.

Here, the compensation judge requires that the employee look for or attempt to work overtime if her date of injury weekly wage included significant overtime. However, had the employee shown that she continued look for work, work as much overtime as was available in her new position, or that she diligently followed the rehabilitation plan, the employee likely would have prevailed on her claim for temporary partial disability benefits.

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