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CASE SUMMARIES
WINTER 2014

MEWCA Seminar
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Presented by
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Attorney Crowley summarized the following October cases as part of the December 6, 2013 meeting:

- *Ahmed v. Loop Parking Co.*, WC13-5585 (October 15, 2013)
- *Bitterman v. Safe Way Bus Co., Inc.*, WC13-5581 (October 31, 2013)
- *Villarreal v. AAA Galvanizing*, WC13-5575 (October 4, 2013)
- *Weismann v. Tierney Brothers Construction*, WC13-5583 (October 18, 2013)

OCTOBER 2013 WCCA DECISIONS

***Bell v. State of Minnesota, Dept. of Transportation*, WC13-5579 (October 30, 2013)**

Substantial evidence supported judge's findings regarding delay in PPD payments. The judge did not abuse his discretion when he denied additional penalties where the employer had good faith defenses to parts of the PPD claim.

The employee brought a claim for penalties under Minn. Stat. § 176.225, subds. 1(b), 1(c) and 5 for a delay in payment. The judge awarded a penalty of 25% under Minn. Stat. § 176.225, subd. 5 and a penalty of 5% under Minn. Stat. § 176.225, subd. 1. The judge did not assess additional penalties. The WCCA held the judge has the discretion to decide whether a penalty is appropriate and that penalty's extent. The judge found the delay in the initial PPD payments was unreasonable, but did not assess penalties where the employer raised good faith defenses regarding other parts of the PPD claim.

***Colindres v. ABM Janitorial Services*, WC13-5584 (October 1, 2013)**

Substantial evidence supported the judge's determination the employee had "incapacitating low back pain" contemplated by the treatment parameters. The WCCA held the rules do not require exhausting all conservative treatment options prior to surgery.

After sustaining injuries to his lower back, the employee received chiropractic care and engaged in a home exercise program. The WCCA held while Minn. R. 5221.6200, subp. 2B states conservative treatment options *may* be undertaken. *Specific treatment* is not *mandated.*

***Dahl v. Rice County*, WC13-5572 (October 2, 2013)**

For "rule out" diagnostic testing to be a reasonable medical expense, an actual connection must exist between the symptoms and the work-related injury.

Medical Treatment & Expense – Diagnostic (Neuropsychological) Testing. Substantial evidence supported the judge's denial of employee's and Dr. Cronin's request for diagnostic testing where the testing was to explore possible causes of the employee's alleged cognitive dysfunction, but the cognitive dysfunction was not shown to be a symptom of the employee's work injuries. *Abdelrazig v. American Bottling Co.*,

Dr. Paul Arbisi (IME) opined only a severe TBI, not present in this case, would cause the employee's claimed memory issues. The judge accepted Dr. Arbisi's opinion.

***David v. Bartel Enterprises*, WC13-5567 (October 23, 2013)**

**Argued at Supreme Court 3/3/14.*

Attorney Fees – *Roraff* Fees. Citing *Cahow v. Brookdale Motors*, the judge awarded the attorney $13,000 on a contingency basis assessed upon the value of the medical expenses paid by the employer and insurer, without regard to the reasonableness of the fee. Relying on *Cahow*, the judge strictly applied the 25/20 formula and did not apply the *Irwin* factors. In *Cahow*, the WCCA held an employee's attorney is entitled to attorney fees, pursuant to the 25/20 formula, without applying the *Irwin* factors.

***Gabrielson v. McIntosh Embossing*, WC13-5599 (October 2, 2013)**

The WCCA will apply *Fodness's* Five-Factor Test to determine whether a substantial change occurred to an employee's medical condition.

Vacation of Award – Substantial Change in Condition. The employee established an unanticipated and substantial change in medical condition sufficient to establish good cause under Minn. Stat. § 176.461 to vacate award on stipulation. The employee had three settlements:

- The first settlement compromised the employee's claim for TPD;
- The second settlement closed out PPD to the right shoulder to the extent of the dispute;
- The third settlement was full, final and complete for $100,000 with the exception of some medical expenses.

The employee underwent four additional surgeries post-full final settlement.

The court applied the five *Fodness* factors to determine whether a substantial change in medical condition occurred: 1) change in diagnosis; 2) change in the ability to work; 3) additional PPD; 4) necessity for more costly and extensive treatment; 5) causal relationship. The employee had a change in diagnosis, a change in his ability to work, a change in PPD, four additional surgeries, and the employee's condition continued to cause injury. The employer and insurer argued the matter should be referred to a compensation judge for an evidentiary hearing. The WCCA disagreed because the employee established good cause to vacate under the statute, which is all that is necessary.

***Serrano v. ABM Janitorial Services*, WC13-5563 (October 9, 2013)**

Substantial evidence supported the judge's finding a proposed cervical fusion surgery was not reasonable, necessary, and causally related to the injury. The judge accepted the opinion of Dr. Charles V. Burton (IME) and concluded the temporary condition was no longer a substantial contributing factor to his need for surgery.

While Dr. Burton's opinion was contrary to the opinions of the employee's treating doctors, his opinion was not without foundation.

***Thomley v. RYT Way Industries, LLC*, WC13-5601 (October 28, 2013)**

Substantial evidence supported the judge's determination the employee did not sustain a work-related *Gillette* injury to his low back.

The employee had a history of low back problems before his employment with RYT Way. Prior to his employment, the employee sought treatment for his low back on a

number of occasions with different providers. The judge accepted the testimony of the employee's supervisor over that of the employee regarding the nature of the job and the physical activity required in the job. Dr. Loren Vorlicky (IME) opined no evidence suggested a *Gillette* injury occurred.

NOVEMBER 2013 WCCA DECISIONS

***Ahern v. United Parcel Service*, WC13-5597 (November 27, 2013)**

Employees' own assessments of their performance capacity are not dispositive on whether they should continue to receive TTD benefits. Traversing icy terrain and slippery surfaces is an ordinary activity of daily life in Minnesota for a substantial part of the year and is not a restriction in employment.

The judge accepted the persuasive opinions of Drs. Susan Wood, Scott Fillmore, and Thomas Beniak (IME) who found the employee sustained a TBI as a result of the work-related MVA, but that cognitive problems resolved to "within normal limits" and the employee was capable of regular (full duty) activity from a cognitive standpoint. The WCCA found the opinions had adequate foundation. The employer and insurer demonstrated reasonable grounds to discontinue temporary total disability benefits.

The employee relied on Dr. S. Ross Mangiamele's restrictions, which prevented return to his pre-injury job and other possible employment, related to reported vertigo and memory problems. Dr. Mangiamele recommended the employee "avoid any tasks that present an appreciable risk of further head trauma such as traversing icy terrain or slippery surfaces." The WCCA found traversing icy terrain and slippery surfaces is an ordinary activity of daily life in Minnesota for a substantial part of the year and is not a restriction in employment.

***Braatz v. Parsons Electric Co.*, WC13-5580 (November 18, 2013)**

**Appeal filed 12/17/13.*

Medical expense fee claims under Minn. Stat. § 176.081 are allowed even if the benefit claims are undetermined, potential, or awarded.

Attorney fees – Roraff fees; Statutes Construed – 176.081, subd. 1(a)(3). The judge reviewed the *Irwin* factors, balanced the scope of the benefits awarded versus benefits claimed, amount involved and results obtained, the difficulty of the issues and the responsibility assumed by employee's counsel, and the hours expended on the case. The judge's award of $10,000 in *Roraff* fees was "not so clearly erroneous as to be an abuse of discretion."

Preclusion of award pursuant to Minn. Stat. § 176.081, subd. 1(a)(3) and application of *Dorr v. National Bone Marrow Program*. Minn. Stat. § 176.081, subd. 1(a)(3) is prospective in effect, and does not preclude an award of fees on medical expenses where there are potential, but undetermined or awarded, indemnity benefit claims.

The only benefits at issue in the December 2012 hearing in this case were medical benefits. The WCCA stated the statute requires only that the attorney "file" all outstanding disputed issues (which counsel for the employee did in this case), not that all potential claims for benefits must be tried together regardless of circumstances.

Lodestar Method. The employer and insurer argued the fee awarded to employee's

counsel was unreasonable pursuant to the lodestar method outlined in *Green v. BMW of N. Am., LLC*, 826 N.W.2d 530 (Minn. 2013). The WCCA found the factors applied in determining attorney fees pursuant to *Irwin*, are essentially the same as those outlined in *Green*, and saw no reason to reach beyond workers' compensation law to analyze the reasonableness of the attorney fees.

Implicit in the employer and insurer's argument was how the fee should not exceed the medical expenses awarded; the court found the amount involved is neither the only nor the determinative factor, as *all* of the relevant circumstances must be considered.

Subpoena of Defense Attorney Time and Billing. The judge granted employer and insurer's motion to quash the employee's subpoena for the production of the time and billing records of counsel for the employer and insurer. The employee argued the records were relevant and probative because the employer and insurer put the reasonableness of the time the employee's attorney spent on the case at issue. The judge found the amount of time spent and the hourly rate charged by defense counsel was not material relative to the burden of proof under *Irwin*.

***McCarney v. Malt-O-Meal Co.*, WC13-5596 (November 5, 2013)**

Causation – substantial evidence; evidence – credibility. Substantial evidence supported judge's denial of employee's claim he injured his low back at work where the employee submitted no narrative causation report, his treating physician never explained the basis for his causation opinion, and the judge found the employee lacked credibility.

***Wigant v. Wallboard, Inc.*, WC13-5594 (November 20, 2013)**

The judge is free to evaluate and assess conflicting medical expert reports in determining whether an employee's condition has stabilized.

Substantial evidence supported judge's determination the employee had ongoing work restrictions and had not reached MMI. The judge considered all of the medical evidence and explained in her memorandum why she chose to accept the opinions of Drs. Vijay Eyunni and Kristen Zeller-Hack over that of Dr. Jeffrey Nipper (IME). The judge found it significant that all of employee's treatment with Dr. Zeller-Hack occurred after the IME with Dr. Nipper and there were a number of records from Dr. Eyunni and physical therapist Stephanie Kinsella, which were not available for Dr. Nipper's review. Those records presented a detailed history beyond that in Dr. Nipper's report. Further, the history as described by the employee at a hearing combined with the history in the treating physician's records provided the bases for the medical opinions of Drs. Eyunni and Zeller-Hack.

DECEMBER 2013 WCCA DECISIONS

***Ekdahl v. Independent School District #213*, WC13-5587 (December 24, 2013)**

**Appeal filed 1/21/14.*

The WCCA held the employer and insurer may reduce PTD benefits in proportion to paid retirement benefits under the Teachers' Retirement Association.

The WCCA reversed Judge Penny Johnson, and held after $25,000 in benefits is paid, the employer and insurer are entitled to reduce PTD benefits by the amount of

retirement benefits paid under the Teachers' Retirement Association (TRA). It appears the parties set up the case to take it to the Minnesota Supreme Court.

The employee asserted TRA *disability* benefits or Social Security old age and survivor benefits *only* may be offset from PTD benefits and that nothing in the language of Minn. Stat. § 176.101, subd. 4 allows an employer and insurer to reduce PTD benefits by *retirement* benefits. Citing *Adamski v. Kenneth Setterholm's Farm*, the WCCA stated, it "has long interpreted the language of [subdivision 4] to require the offset from permanent total disability payments not only of federal social security retirement benefits, but also of a variety of state and local government retirement benefits."
The court relied on *Potucek v. City of Warren*, which cites to *Larson's* "the cause of wage loss merely dictates the category of legislation applicable" and noted "[t]he worker is experiencing only one wage loss and, in any logical system, should receive only one wage loss benefit."

The employee argued it is unfair and unconstitutional to reduce the PTD benefits of a *public* employee, but not the benefits of those receiving a *private* retirement pension. The court noted, "it is possible for an injured employee in the public sector to be subject to a different or even opposite offset than an employee in the private sector to accomplish the same goal, that is, coordination of wage loss benefits." While the employee raised an important and significant concern, the court found the argument was essentially an equal protection challenge outside the court's jurisdiction.

While an employee's *workers' compensation benefits* may be reduced by the amount of retirement pension, employee retains 100 percent of the *pension* to which the employee and the government employer contributed. The net effect is the employee receives PTD benefits without reduction until $25,000 in compensation is paid while receiving full retirement pension. Thereafter, the employee continues to receive reduced PTD benefits in addition to full retirement pension.

The WCCA went out of its way to state the Supreme Court has *on more than one occasion* stated "[i]t is for the legislature, not the [c]ourt[s], to judge the social utility of this statutory system, which has no common law counterpart, to balance the interests of employees and employers, and to make whatever adjustments and corrections it deems appropriate." *Parson.*

The offset provision the employee challenged has been in effect for 46 years and the court's interpretation of it has stood for more than 30 years.

***Hartwig v. Traverse Care Center*, WC13-5582 (December 23, 2013)**

**Appeal filed 1/21/14.* This is a companion case to *Ekdahl.*

For government employees, the employer and insurer may reduce an employee's PTD payments under the offset provision described in Minn. Stat. § 176.101.

The employee paid into her PERA pension account with employer (a Minnesota county) from the time she began working. The court stated the terms of a public employee pension are unlike those of a pension provided through a private employer governed by a private contract. *Cole v. Armour & Co.* Also, for simultaneous retirement and PTD benefit payments, private sector employees may be subject to contractual offsets of retirement benefits pursuant to their pension agreements, while

public sector employees are subject to the offset of their PTD benefits pursuant to Minn. Stat. § 176.101, subd. 4.

The employee sought to receive payment of the full amount of her governmental (PERA) retirement pension benefits and the full amount of her PTD benefits. The judge did not err in determining the employer and insurer were entitled to reduce the employee's PTD payments under the offset provided by Minn. Stat. § 176.101, subd. 4.

***Moreira Hernandez v. Four Crown, Inc./Wendy's*, WC13-5612 (December 19, 2013)**

The employee did not establish good cause to vacate an award on stipulation where there was no medical evidence as to the change in diagnosis, ability to work, or PPD, and the employee also failed to submit medical evidence her current condition is work-related.

***Jurva v. M.A. Mortenson Companies, Inc.*, WC13-5588 (December 13, 2013)**

A special term conference, held via telephone conference, is a procedurally sufficient way to evaluate and assess the evidence in determining whether to grant a motion to dismiss.

Jurisdiction. Statutes Construed. Practice & Procedure. The judge reasonably concluded the employee did not meet the jurisdiction requirements of Minn. Stat. § 176.041, subds. 2 and 3 regarding the injury occurring outside of Minnesota.

The employee claimed he sustained a right elbow injury on November 19, 2010, while working as a millwright for M.A. Mortenson Companies, Inc. The employee then worked for several other companies, including Lakes & Plains Construction, Inc. The employee filed a claim petition alleging a right elbow injury against five employers and insurers, including against Lakes & Plains Construction, Inc.

On February 26, 2013, Lakes & Plains filed a motion to dismiss, claiming it was a North Dakota employer and Minnesota lacked jurisdiction to apply Minnesota workers' compensation law. Mortenson filed an objection. The judge conducted and recorded a Special Term Conference on the Motion, held by telephone. No witnesses were called. Lakes & Plains submitted three exhibits into evidence, including a copy of the motion, transcript of the employee's deposition, and an Affidavit from a Lakes & Plains representative. Neither Mortenson nor any other employer/insurer presented witnesses or submitted exhibits. The judge granted dismissal of Lakes.

Procedure. The issue on appeal was whether the court was able to effectively review the disputed facts and legal issues. Mortenson and other appellants argued the judge erred by dismissing Lakes without an "evidentiary hearing," which would have afforded them the opportunity to complete discovery and present formal evidence in "a courtroom setting."

The conference was procedurally sufficient to allow the court to review the judge's decision. No evidence showed the appellants objected to the forum (phone conference) before it was held and notice was duly given to all parties. The parties had ample *time* (2 months) to conduct discovery before the conference, had the *opportunity* to submit exhibits, call witnesses, the hearing was *recorded*, and there was a *transcript* for the appellate court to review.

The judge found the employee, while a Minnesota resident, was hired out of a North Dakota union hall, worked for Lakes & Plains for 7 weeks in North Dakota, did not work for the company in any other location, Lakes & Plains was located in North Dakota, and the employee was dispatched from North Dakota. The employee's paychecks originated from a North Dakota bank account. The appellants did not dispute any of the facts and did not submit any evidence to the contrary. Sufficient evidence supported the judge's conclusion the employee did not meet the requirements of Minn. Stat. § 176.041, subds. 2 and 3 regarding application of the Minnesota Act.

***Kuhnau v. Manpower, Inc.*, WC13-5592 (December 16, 2013)**

The employee's spouse is entitled to reasonable compensation for assistance where she drove the employee, who was not capable of driving himself, due to the effects of his work injury, to necessary medical appointments.

The judge did not err when he concluded the employee's current claim for compensation for his wife's time to drive him to medical appointments was not barred by res judicata or collateral estoppel from a 1995 decision denying "double mileage" for travel in which his wife drove him to medical appointments.

Under Minn. Stat. § 176.135, the employer and insurer's liability with regard to providing reasonable and necessary medical treatment includes the responsibility to provide whatever transportation assistance is reasonably required to allow the employee to obtain proper treatment. The court noted in cases such as this one, where the employee is not able to drive himself, the employee's spouse is not providing nursing services pursuant to *Ross*, but is driving the employee to required appointments which is incidental to the required medical treatment itself, then there is really no basis for denying a reasonable fee to the spouse if the employer would otherwise be liable for the cost of medical or other transport without such help. The court then went on to cite *Ross*: "the help of family or friends in cases such as this one is likely to be less expensive than other forms of transportation," which "is likely to reduce overall costs to the system."

The WCCA remanded for a decision and award of reasonable compensation for the employee's wife's assistance. Time is one factor for the judge to consider, but the judge may also consider payment for meals and mileage separately, or include those in expenses in her decision as to what constitutes a reasonable transportation expense overall.

***Lee v. 3M Co.*, WC13-5590 (December 2, 2013)**

Substantial evidence supported judge's decision the admitted injuries were temporary and did not aggravate underlying spondylolisthesis.

The judge described the employee as a "hard-working, highly motivated worker" and noted he accepted all overtime work available to him, and appeared to be "stoic, not complaining to any degree of physical aches and pains." But the judge also carefully considered the medical evidence and discussed the expert opinions of Drs. Paul Crowe and Rick Davis (IME) in detail. The judge implicitly found the employee's *history* was not credible. The judge adopted Dr. Davis' opinion "the employee's pattern of treatment following the injury was more consistent with the occurrence of a strain/sprain and temporary injury than it was with symptomatic spondylolisthesis."

***Taylor v. City of Fridley*, WC13-5595 (December 26, 2013)**

Even when an employee's respiratory condition fluctuates, a compensation judge may still find that the employee has a sufficient rating for PPD.

Employee sustained an admitted respiratory injury. Dr. Melissa King Biggs, pulmonologist, treated the employee over the years. During that time, most of the test results showed FEV1 measurements ranging from approximately 60-102%, interpreted as normal, mild or moderate obstructive pattern.

In May 2013, Dr. King Biggs explained the rationale for the 78% PPD rating she gave and stated that methacholine challenge testing could not be performed safely because of the employee's condition. As a result, Dr. King Biggs applied Minn. Rule 5223.0560, subp. 3B(14), which does not require a methacholine measurement and the FEV1 is less than 40%. The April 2012 measurement was 39%. Thus, Dr. King Bigg's rated 75% under that rule, and added 3% for persistent steroid inhaler treatment as specified under subpart 3C(1).

The employer and insurer argued the judge prematurely awarded PPD because the employee's medical condition was not stable due to fluctuations in the results of pulmonary function testing, that the employee had not reached MMI, and that the PPD rating accepted by the judge did not comply with Minn. R. 5223.0560.

The WCCA affirmed and found the evidence had no similarity to the factors in *Vierow*: the hearing was more than 7 years after the injury, there was no indication in the evidence any improvement in the asthma could be anticipated, and no further treatment was recommended. Also, Dr. Mandel (IME), stated the condition was stable and employee was likely at MMI. The employer argued 5223.0560, subp. 3A(2) makes methacholine testing an absolute requirement of an award of PPD.

In *Eisenmenger*, the court concluded methacholine testing is not a requirement for all awards of PPD in cases of asthma. In *Eisenmenger*, as in the present case, the medical evidence revealed a *methacholine challenge test*, which seeks to trigger airways constriction, was *unsafe for the employee*. The most disabling asthma condition would not be compensated for functional loss if employer's argument were accepted.

SUPREME COURT

***Dykhoff v. Xcel Energy*, A12-2324 (December 26, 2013)**

Chief Justice Lorie Gildea, writing for the majority, reversed the WCCA and reinstated the judge's decision. The Supreme Court of Minnesota found substantial evidence in the record supported the judge's finding the employee failed to prove her injury arose out of her employment.

The judge found the employee failed to establish she was at any increased risk of falling due to the condition of the floor when she fell. The employee normally wore jeans and casual clothes to work at her worksite in Maple Grove. On the date of her injury, she wore a dress shirt and pants with two-inch heels to a meeting at her employer's headquarters in Minneapolis under an instruction from her employer for her to "dress up." As the employee walked to the conference room, she fell and landed on her buttocks on a marble floor in a hallway. She felt a pop in her left knee when it dislocated because of the fall. The judge found the

floor where the employee fell was highly polished, clean, dry and flat, but not slippery. She found the employee was not walking fast and did not trip before the fall. The judge found the employee did not prove her employment exposed her to a condition that placed her at an increased risk of injury beyond what she would experience in her non-work life.

Arising Out Of. The parties agreed to almost all of the facts, including the fact the injury occurred "in the course of" employment. The only issue before the Court was whether the injury "arose out of" the employment. The phrase "'arising out of' means that there must be some causal connection between the injury and the employment." Citing *Nelson v. City of St. Paul*, 81 N.W.2d 272, 275 (Minn. 1957), the court reiterated an injury arises out of employment where it has its origin with a hazard or risk connected with the employment and flows as a natural incident of the exposure occasioned by the nature of the work. The employee argued she fell because the floor was slippery. The compensation judge found as a factual matter there was nothing hazardous about the floor on which the employee walked when she fell. The Court found the judge's decision was supported by substantial evidence in the form of testimony from Xcel Energy's Facility Operations Manager, the fact the employee walked across the floor without incident immediately prior to the fall, and the uncontested evidence the floor was clean and dry.

Work-Connection Test Rejected. Notwithstanding the judge's finding, the employee argued her injury was compensable because her "employment placed her in a particular place at a particular time exposing her to a neutral risk... existing on [Xcel's] premises." Citing precedent going back 80 years, the Court said it would not make the employer "an insurer against all accidents that might befall an employe[e] in his employment." *Auman*. Further the Court noted the employee's argument, contrary to statute, collapsed the "arising out of" requirement into the "in the course of" requirement. Therefore, it expressly rejected the work-connection test from *Bohlin* because it failed to give effect to the plain language of Minn. Stat. § 176.021, which requires the employee to demonstrate an injury "arises out of *and* in the course of" employment. The work-connection test allows a court to "balance the two factors against each other in a fashion that could relieve the employee of the burden of proof on one element if there is strong evidence of the other element."

The Court found the judge's fact-finding was not clearly erroneous and the judge applied the correct legal test and affirmed.

Dissent. Justice Alan Page, joined by Justice David Stras, dissented stating he would have applied the positional risk test and found the injury compensable. He wrote the Court's decision will "upset the apple cart that is our delicately balanced workers' compensation system[,]" and the decision to deny the employee's claim is based on a "flawed conclusion that she must show her workplace exposed her to an increased risk of injury." He argued the conclusion "[I]s not grounded in our case law, is contrary to the plain language of Minn. Stat. § 176.021, subd. 1 (2012), defies fundamental principles of fairness, and will significantly reduce employees' ability to recover workers' compensation benefits in the State of Minnesota for the larger category of workplace injuries in which the source of the injury is largely unknown."

Justice Page argued the Court violated the canons of statutory construction by applying the increased risk test to *all* types of

"personal injury" under Minn. Stat. § 176.021, subd. 1 (2012). He stated had the Legislature intended the additional increased risk burden apply to *all* types of personal injury, "it knew how to and could have easily done so."

He also noted jurisdictions applying the increased risk doctrine differ whether the employee must show the risk is unique to the employment and listed numerous occasions where the Supreme Court of Minnesota awarded benefits to employees without regard to any showing the employment subjected the employee to an increased risk of injury. He described the Court's decision as palpably ironic and stated, "the only reasonable explanation" he could glean for the contradictory ruling is the Court deems the employee "an underserving plaintiff because she wore shoes with two-inch heels to work the day she was injured." He wrote such considerations "have no place in the no-fault workers' compensation system" which holds employers liable to pay compensation "'in every case of personal injury... without regard to the question of negligence'" under Minn. Stat. § 176.021, subd. 1.

Dissent. Justices Lillehaug and Stras, dissented stating that they would have found a compensable work injury via a different route than Justice Page. Justice Lillehaug agreed with the majority that the balancing test applied by the WCCA cuts against Court's precedent as the requirements of Minn. Stat. § 176.021, subd. 1 are distinct, each of which must be satisfied. He further agreed with the majority that the "arising out of" requirement cases require some causal connection between the injury and employment and that the "arising out of" requirement can be satisfied even when the injury is causally connected to a condition in the workplace not obviously hazardous. *Kirchner v. County. Of Anoka*, 339 N.W.2d 908 (Minn. 1983).

Justice Lillehaug even agreed the facts were largely undisputed, which required a de novo review to apply the law to the facts. He highlighted the fact the employee did not trip on anything, but rather slipped on the floor and her shoes left V-shaped scuff marks at the point where she fell.

Justice Lillehaug found the undisputed facts establish as a matter of law the requisite causal connection between the employment and the injury and such analysis on the question of law requires no deference to the fact-finder. He noted the majority's application of the "arising out of" requirement to the facts is unduly limiting and is inconsistent with *Nelson*, *Foley*, and *Kirchner*. He stated, "[h]ad the majority applied the undisputed facts to the law of these cases, it could have saved for another day (with the benefit of full briefing) the issue of whether Minnesota should join the growing number of jurisdictions that have adopted the 'positional risk doctrine.'" He further observed, "nothing prevents the Legislature from considering whether the 'positional risk doctrine' should be codified, including whether the 'increased risk doctrine' should be limited to occupational-disease injuries..."

JANUARY 2014 WCCA DECISIONS

Adams v. Sodexo, Inc., WC13-5607 (January 9, 2014)

The WCCA denied the pro se employee's petition to vacate an award on find based on allegations of misrepresentations, missing documents, false statements, mistake of fact, and substantial change in medical condition. The court found an insufficient basis to vacate the award on stipulation and thus denied the petition.

***Cayo v. Precision, Inc.*, WC13-5586 (January 3, 2014)**

Substantial evidence supported the judge's finding that the oxycodone prescription was reasonable, necessary and causally to the employee's work injury.

The issues before the compensation judge were the reasonableness, necessity, and causal relationship of the employee's prescription for oxycodone. The judge found for the employee and accepted the opinion of Dr. Jacoby over that of Dr. Randa.

The employer and insurer essentially argued Dr. Jacoby lacked foundation for his opinion. The WCCA noted Dr. Jacoby has treated the employee since 2004, was familiar with the employee's 1997-work injury and low back condition, as well as her treatment and care following her motor vehicle accidents of 2004 and 2009. Dr. Jacoby coordinated the employee's care with other providers throughout the course of approximately nine years of treatment. Under *Grunst v. Immanuel-St. Joseph Hospital*, this level of knowledge establishes a doctor's competence to render an expert opinion.

The WCCA agreed with the judge and noted the issue is not whether the work injury was a sole cause of the employee's ongoing need for oxycodone, but whether the work injury was a substantial contributing factor to the ongoing use of the medication. *Roman v. Minneapolis St. Ry. Co.* Dr. Jacoby specifically stated that the oxycodone prescription causally related to the employee's 1997-work injury, and the judge accepted this opinion.

Finally, the employer and insurer argued Dr. Jacoby's one-sentence causation report was legally insufficient as it lacked any explanation of how the oxycodone is related to the work injury. Under *Henschal v. Federal Express Corp.*, while a detailed explanation of the basis for a doctor's opinion may be helpful in evaluating the respective merits of divergent medical opinions, it is not a prerequisite for the adoption of an expert opinion by the judge. The WCCA found the judge had extensive treatment records of Dr. Jacoby, which provided an adequate factual foundation for the doctor's ultimate causation opinion.

***Fish v. Carlson Trucking, Inc.*, WC13-5606 (January 27, 2014)**

Substantial evidence supported judge's decision the employee's PTD claim was premature. The employee underwent surgery just three months prior to hearing, did not have an opinion from her surgeon as to MMI or her need for restrictions, had only conducted a brief period of job search since the since the injury (2-3 months), and two vocational experts, including her QRC, indicated a conclusion as to PTD would be premature.

Dissent. Judge Hall respectfully dissented and took issue with the categorization of the overall claim. He noted no indication the employee's claim for PTD benefits lacked legal ripeness and there did not appear to be any contingent or legally required future event upon which the claim rested. Judge Hall noted defining the issue actually decided by the judge is important for two reasons: first, there are res judicata consequences to reading the opinion as a determination on the merits and second, the WCCA's review of the judge's actions requires a review of the weight of evidence on the issue. In this case, employee presented substantial evidence to support her claim for PTD benefits but the evidence relied upon by the judge primarily addressed whether the claim was premature. Based on

a review of the record presented, Judge Hall felt there was very little evidence directly supporting a finding the employee was not PTD as of the date of hearing.

***Hillstad v. Havenwood Care Center*, WC13-5617 (January 22, 2014)**

The WCCA remanded for reconsideration and explanation of medications considered excessive where the judge did not specify the basis for his determination that 20% of a prescription medication expense claim was excessive.

The WCCA found the record may be sufficient for the fact finder to analyze the evidence and give the relevant evidence the appropriate degree of weight in order to reach the conclusion he reached, but the judge failed to cite any particular medication expense or drug which was excessive or unreasonable, nor did he adopt any medical opinion or articulate any rationale for denying 20% across the board of the total cost of all prescription medications for all of the employee's conditions. The judge also did not discuss the evidence that certain prescriptions may be excessive by combined use or continued use after a certain period.

***Lehto v. Community Memorial Hospital*, WC13-5629 (January 28, 2014)**

The judge relied on a well-founded medical opinion to determine whether disputed medication was related to the work injury and was reasonable and necessary treatment.

The employee on appeal contended Dr. Starzinski (IME) lacked foundation for his opinion because he never examined or even talked to her about medication and its benefits to her.

The court relied on *Smith v. Quebecor*, and stated, "a review of medical records and a response to a hypothetical question may provide enough information to provide foundation for an opinion." The court found the employee used the medication in dispute for more than 3-4 years. They found it reasonable to conclude any benefit from the use of the medication should be reflected in the medical records of the medical provider supplying the prescriptions. By reviewing the records from the employee's treating physicians, Dr. Starzinski had adequate foundation then for his opinion.

***Morin v. Electric Machinery Company, Inc.*, WC13-5605 (January 21, 2014)**

Substantial evidence, including the opinion of Dr. Gary Wyard (IME), supported judge's determination the employee's need for medical care and treatment was not causally related to her work injury to the low back on October 2, 1989. (At the time of the hearing, the employee was 70 years old, 5'5" tall and weighed 279 pounds.) The judge explicitly adopted the opinion of Dr. Wyard (IME) with respect to the issue of causation and rejected the opinions of Drs. Keane and Kraker. The employee argued Dr. Wyard's ultimate conclusion was inconsistent with her medicolegal history. The court cited *Bossey v. Parker Hannifin*, and stated an expert need not express or even be aware of every relevant fact for his or her opinion to be valid. The court found it apparent in reading the judge's memorandum that her decision rested on her consideration of *all* the medical records submitted at the hearing *in combination with* Dr. Wyard's opinion.

***Small v. St. Louis Park Plaza Healthcare Center*, WC13-5568 (January 2, 2014)**

In this case, a well-drafted stipulation for settlement paved the way for this ruling. After reviewing the language of the stipulation, the WCCA agreed with the judge's determination that the employer and insurer never admitted to a permanent injury such that they owed ongoing PTD and other benefits. All payments made pursuant to the stipulation were made under a reservation of defenses.

The WCCA affirmed the judge's determination the employee's August 17, 1999 knee injury was temporary in nature and resolved by November 18, 1999, along with the judge's subsequent determinations the employee did not sustain a consequential psychological injury and the employee was not entitled to any additional benefits after November 18, 1999.

The employee sustained a knee injury in August 1999 when she worked as a certified nursing assistant. Before her injury, the employee had an extensive history of prior knee problems. The employee also had a significant history of mental health issues. Before the work injury, another doctor prescribed the employee certain anti-depressants for depression, and diagnosed employee with panic attacks and anxiety. Employee also had multiple documented suicide attempts, and attended multiple treatment programs for chemical dependency.

After reviewing all of the evidence presented, including the employee's testimony from the hearing, the judge determined that the employee's work injury resolved by November 18, 1999, when Dr. Allen Hunt released her to return to work with restrictions after the first surgery. The judge concluded in her memorandum that the employer and insurer "had never admitted" to owing permanent and total disability benefits and that Dr. D'Amato's opinions provided a basis for the discontinuance of benefits pursuant to the two stipulations for settlement that were entered into in 2001 and 2002 and one in 2003.

The judge found Dr. D'Amato's (IME) causation opinion more persuasive than that of Dr. Hunt. The judge specifically stated, "it is tempting in this case to find the employee's treatment and disability compensable as a result of a work-related injury because the insurer admitted there was a work injury and paid very large sums of money for wage loss benefits, and for five orthopedic surgeries and dozens of wound surgeries." But based on Dr. D'Amato's conclusion that the effects of the injury were merely a temporary strain, the judge denied the ongoing benefits sought beyond November 1999.

In this case, a well-drafted stipulation for Settlement paved the way for this ruling. After reviewing the language of the stipulation, the WCCA agreed with the judge's determination that the employer and insurer never admitted to a permanent injury such that they owed ongoing PTD and other benefits. All payments made pursuant to the stipulation were made under a reservation of defenses.

The employee argued that by choosing to pay benefits over the years, the employer and insurer clearly relied on their own evaluation of the employee's ongoing condition and concluded the work injury was a substantial contributing factor in the employee's ongoing right knee condition, and they were contractually bound to concede the nature and extent of the employee's injury.

The WCCA rejected similar arguments in a number of cases and noted voluntary payment does not preclude a later denial of liability for those benefits paid. *Getman v. Carlson Holdings*. Under *Getman*, it is settled law that an employer may deny primary liability for an injury, in the absence of prejudice to the employee after making a voluntary payment of benefits.

***Spoelstra v. Wal Mart Stores*, WC13-5611 (January 27, 2014)**

Minn. Stat. § 176.101, subd. 1(i) does not serve as a basis for denial of future benefits where the employee was not receiving TTD benefits when a job offer was made to her.

The judge found the employee's refusal of the job offer was reasonable on two grounds: first, the hours of the job would have required the employee to alter a reasonable and responsible pattern of living and second, the job offer was vague and incomplete regarding the job's work hours and any necessary training. The WCCA affirmed the finding on other grounds. The court found Minn. Stat. § 176.101, subd. 1(i) specifically provides that TTD shall *cease* if the employee rejects a suitable job offer. The statute applies only to situations where the employee is actually being paid TTD at the time the "cessation event" occurs. In *Falls v. Coca Cola Enterprises, Inc.*, if TTD is not being paid, it cannot "cease." The court found the employee was not receiving TTD at the time she refused the job offer, but was instead working full-time for the employer in a light duty position.

The employee is entitled to benefits based on actual wages from post-termination employment where a job offered by the employer was no longer available and, in the absence of any rebuttal evidence showing other or further work actually available to the employee in her disabled condition.

The employer argued the higher wages the employee received in various positions with the employer following her injury, and the wages she would have received in the pharmacy technician job, were a more accurate measure of her post-injury earning capacity than her actual earnings as a part-time housekeeper for the Historic Dayton House.

The employer also construed the refusal of the pharmacy technician job offer as a voluntary resignation by the employee. Therefore, the employer contended any wage loss the employee sustained while working for the Historic Dayton House was merely the result of a personal decision by the employee. The judge found no evidence offered of any other job actually available to the employee after September 19, 2012, that would have afforded a higher earning capacity than the job at the Historic Dayton House.

In *Nitz v. Abbott Northwestern Hospital*, the court stated an employee's wage in a post-injury job has little evidentiary value for purposes of determining earning capacity if the job is no longer available. The court also noted a voluntary quit or involuntary discharge does not constitute a complete bar to workers' compensation benefits rather; termination for reasons unrelated to the work injury merely suspends the employee's entitlement to benefits until the employee re-establishes entitlement by showing a causal relationship between the disability and a loss of earning capacity. The judge reasonably concluded the employer did not rebut the presumption the employee's actual wages were representative of her loss of earning capacity.

***Wiehoff v. Independent School District No. 15*, WC 13-5610 (January 17, 2014)**

In this case, the parties submitted the August 2013 stipulation for settlement attempting to closeout all future medical benefits with respect to an admitted March 2008 cervical injury. Judge Brenden, however, did not approve the stipulation based on the outcome of the 2011 hearing where she presided and found the employee sustained a work injury serious enough to warrant a fusion surgery.

The judge indicated, "the outcome of the 2011 hearing strongly suggests that there is likely to be a need for extensive, expensive medical care in [the employee's] future." The WCCA concluded the judge had sufficient information available to support her determinations that closure of future medical benefits at this time would not be fair and reasonable and in conformity with the Workers' Compensation Act.

The employee also argued the judge improperly considered whether there would be a "cost shifting" between the workers' compensation insurer and some other entity not a party to the litigation (i.e. third party payor). The WCCA noted potential cost-shifting consequences, including those from workers' compensation insurers to other insurance or government programs, are valid considerations for a judge, especially in the case of medical costs where emergency treatment would not be denied by a hospital.

FEBRUARY 2014 WCCA DECISIONS

***Albert v. Dungarvin Minnesota, LLC*, WC13-5609 (February 7, 2014)**

**Previous WCCA decision in this case on 8/10/10.*

The WCCA found the transcript clearly showed the judge did not admit exhibits the pro se employee objected to into the record, but only included them in the case file after the employer and insurer made offers of proof. Further, there was no indication in the judge's decision that he relied on the excluded exhibits in making his findings.

In view of the entire record, substantial evidence supported the judge's decision overall in denying TTD, TPD, medical expenses and medical mileage after as of the date the employee's injury resolved.

The judge did not err by failing to find employer and insurer frivolously denied liability for the employee's injury. The NOPLD stated the reason for denial as "the claim was reported as frost bite, then it was changed to a run over foot and the MD diagnosis was chest pains. Insufficient information to support any work-related injury." Whether or not that statement would later be proven true or false did not render the denial frivolous or lacking in good faith. The employee had the opportunity to dispute the initial liability determination throughout the litigation process. A good faith defense need not be successful in order for a penalty to be denied *Heise v. Honeywell, Inc.*

The WCCA found the judge's refusal to admit several exhibits into evidence by the employer and insurer irrelevant to the issues presented at hearing. While the exhibits would have shown the judge a pattern of behavior by the employee, motivated by ill will, which would have lessened his credibility, the WCCA found no basis for reversal of the judge on the facts presented. The judge, at hearing, reconciled any inconsistencies in the admitted evidence.

***Martinek v. WASP, Inc.*, WC13-5640 (February 6, 2014)**

Substantial evidence supported judge's acceptance of the opinion of Dr. Strand (IME) over that of Dr. Gerdes. Dr. Gerdes' causation report contained an erroneous description of both the mechanism of the employee's injury and the subsequent nature of the employee's complaints as documented in contemporaneous medical records.

Dr. Strand (IME) noted an action of pulling a rack for the employer "was certainly not an action that would cause a herniated disc in the cervical spine, but more likely would cause a shoulder injury." The court found no basis under *Nord v. City of Cook*, to conclude the judge erred in accepting the opinion of Dr. Strand over that of Dr. Gerdes.

***Peterson v. St. Paul Ramsey Medical Center*, WC13-5577 (February 11, 2014)**

The WCCA concluded a reading of the judge's findings and order as a whole showed the judge based her ultimate decision on the appropriate 1981 low back injury. The judge denied everything unrelated to the employee's low back and related the treatments awarded to the 1981 injury; therefore, the WCCA concluded any error present in the case regarding the stipulations was harmless in nature.

The self-insured employer argued the judge's findings with respect to intervention claims failed to adequately dispose of all the claims, were vague, and did not adequately set forth the award. The court found the judge issued sufficient findings to indicate which charges were related to the low back injury and which were not, and she awarded charges relating to the low back and denied all unrelated charges.

The employee produced itemizations of pharmacy charges, which included charges related to both the low back and other unrelated body parts. Therefore, under *Calhoon v. Sportscraft*, the self-employed insurer argued the mileage incurred in relation to the pharmacy charges "was not solely related to her low back, and therefore, the mileage is not compensable." The court disagreed with the interpretation of *Calhoon*. The fact the employee may have purchased other unrelated items at the same location during a trip was irrelevant to whether it was reasonable to award mileage related to the prescriptions.

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