Minnesota Case Law Update

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"ARISE OUT OF" AND "IN THE COURSE OF"

Walch v. W.L. Hall Co.
(W.C.C.A. Sept. 12, 2013)

FACTS:

The Employee was a union glazier employed to work a particular project in Duluth, Minnesota. The Employee lived in Anoka, Minnesota, over two hours from the job site. The Employer provided lodging for the Employee during the course of the job, but the Employee would return home for weekends after the week's work was complete. Before the start of the second week of the project, the Employee drove up to Duluth on a Sunday night. On the subsequent Monday morning, the Employee was involved in a motor vehicle accident while traveling from the Employer-provided hotel to the job site.

Generally, injuries suffered while coming or going to a place of work are not compensable. However, there is a "traveling employee" exception that has been applied to traveling salesmen, long-distance bus drivers, and over-the-road truckers, among others. The Supreme Court has previously said that such an employee is deemed to be "carrying his work premises with him." *Snyder v. General Paper Corp.*, 277 Minn. 376 (1967). In this case, the compensation judge determined that the Employee was not a traveling employee when he commuted from his motel lodging to the out-of-town worksite.

ISSUE:

When an employee is employed to work ten-hour shifts, Monday through Thursday, at an out-of-town location, does an auto accident on the way from a motel to the job site arise out or occur in the course of the employment?

HOLDING:

An injury sustained while traveling from a temporary residence to the job site, while the employee is not engaged in regular work duties or running a special work errand, does not arise out of or occur in the course of employment. The court went through a litany of case law that illustrates this holding in multiple factual contexts. The construction site is seen as the employer's temporary work premises and the motel is seen as the temporary residence, so injuries while commuting between the two locations are not

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subject to the "traveling employee" exception. The employee urged a theory for recovery based on how close he was to the job site and that he was injured while on the way to the job site, just minutes before his shift was to start. The court said that it "decline[s] to adopt a balancing test" that would require it to determine whether the activity was sufficiently close enough in time, place, or detail to be compensable.

Dykhoff v. Xcel Energy
slip op. (W.C.C.A Nov. 29, 2012)

FACTS:

The Employee was required to attend a computer training session at the Employer's headquarters and was advised to dress professionally. She chose to wear shoes with 2" wooden heels along with more formal clothing. The Employee was walking towards the conference room when she fell, landing on her buttocks on the marble floor in the hallway. She felt a pop in her left knee. She testified that when she fell her right foot "slipped" out from under her and while attempting to catch herself with her left leg her left leg also "slipped" out from under her. The Employee believed that the floor was slippery.

Employer representative credibly testified that he inspected the floor immediately after the fall and found that it was not slippery. The floor was quite highly polished, very clean, dry and flat.

The compensation judge denied the Employee's claim finding that there was no evidence of an increased risk for falling due to the condition of the floor on the date of the injury.

HOLDING:

The WCCA noted that an employee has the burden of proving both that the injury "arose out of" and "in the course of" employment. "In the course of" refers to time, place and circumstances of the incident causing the injury. "Arising out of" requires a causal connection between the employee's injury and the employment, although not proximate cause. The Court noted that there is a blending of these two concepts when analyzing primary liability. If there is a strong "in the course of" fact pattern then the "arising out of" need not be strong and vice versa. The Court noted that while there may not be evidence that the Employee was subjected to an increased risk of injury from slipping and falling than she would have outside of work or than the general public, a positional risk test can be applied. Under the positional risk test, the employee must show that the obligations or incidents of employment place the employee in the particular place and at the particular time that the Employee was injured even though it might have been due to some "neutral" risk or hazard that is not unique or common to the employment. The Court cited the *Duchene* case for the proposition that a strong "in the course of" fact pattern can override a weak "arising out of." The Court held that per the subsequent

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Bohlin case, the "positional risk test" may be applied where the circumstances of the injury, including an unexplained fall on a flat floor, are unknown. The Court noted that under "arising out of," the positional risk standard can be utilized rather than just the increased risk test.

The Court distinguished a long line of cases which have held that idiopathic falls on flat surface are not compensable by indicating in those cases that the fall was caused by some medical condition **personal** to the Employee. The Court distinguished an unexplained injury from the idiopathic injury and found that in unexplained injury the positional risk theory should apply.

In this case, there is no evidence that the Employee had a personal condition (such as a pre-existing knee condition) which caused or contributed to the fall which resulted in her injury.

Due to the exceedingly strong in the course of circumstances here, the Court found the injury to be compensable.

IMPACT:

This case is dangerous in that it appears to be broadly expanding the scope of "arising out of." Previously, the positional risk requirement had applied only to street risk cases. This is now expanding the positional risk to situations of an idiopathic fall on a flat surface where employers traditionally have had strong defenses. Previous cases have defined idiopathic to mean an injury or fall occurring due to a condition personal to the Employee *or due to an unknown condition.* When an Employee had fallen under these circumstances on a flat surface and nothing about the employment exacerbated the effects of the fall, the injury was not compensable.

This case may be setting a harmful precedent on idiopathic fall cases.

Gilbert, Deceased, by Jennifer Nagel Gilbert v. ISD 625
slip op. (W.C.C.A. Jan. 23, 2013)

FACTS:

The Employee was employed as a custodian for the Employer. His scheduled hours were from 8:00 a.m. to 4:30 p.m. While the Employee's hours could be extended beyond 4:30 by a contractor requesting assistance or by supervisor-approved overtime, there is no evidence that this occurred in this case. On the date of the injury, the Employee did not leave the building as he was scheduled to do at 4:30 p.m. The Employee's body was eventually found in an area where he was not supposed to be working.

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The Employee had a significant prior history of diabetes, hypertension, elevated cholesterol, and obesity. He also had a pituitary tumor.

The autopsy report concluded that there was "no anatomic cause of death" and hypertension was identified as an additional contributing condition.

HOLDING:

The WCCA affirmed the lower court's denial of the dependency claim of the Employee's spouse.

The Court noted that the Employee has the burden of proving the injury arose out of and in the course of employment. The Court noted that in analyzing "arising out of" and "in the course of," the Court shall apply a balancing test to these two elements. Where the "arising out of" element is weak and the "in the course of" element is strong, the balancing test may result in the finding of compensability and vice versa.

The Employee argued that the death presumption should apply. As the injury occurred **in the course of** employment at the employment premises, it should be presumed that the injury arose out of and in the course of. This was rejected by the Court because the Employee was, in fact, ***not*** in the course of employment at the time of his death. He did not leave the premises at 4:30 p.m. There was no reason for him to be on the premises at the time of his death several hours after his shift ended. No overtime had been requested nor was there any request by a contractor for the Employee to stay late and assist. Further, the Employee was observed on security cameras shortly before his death and he was not involved in any work activities when observed; he was simply wandering the hallways and sitting or standing immobile for considerable periods of time.

RECEIPT OF PERMANENT TOTAL DISABILITY BENEFITS DESPITE HAVING FOUND GAINFUL EMPLOYMENT - W.C.C.A.

Stevens v. S.T. Services
Slip Op. (W.C.C.A. September 9, 2013)

FACTS:

The Employee was receiving permanent total disability benefits from 1994 through 2011, stemming from work-related injuries in 1984 and 1985. This case arose as a petition for discontinuance of benefits because it was found that the Employee was working for quite gainful employment from the years 2008 through 2010. The Employee worked at a Home Depot giving plumbing advice, and averaged just under $40,000 per year in earned wages. However, in 2010, the Employee once again became unable to work, this time due to back, leg, and arm pain, and symptoms of a stroke.

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The employee agreed to discontinuance of his permanent total disability benefits in October of 2011. He immediately re-petitioned for permanent total disability benefits going forward, while the employer cross-petitioned for reimbursement of benefits paid while the Employee was working at Home Depot.

ISSUES:

Was the Employee entitled to permanent total disability benefits from 2011 and going forward, when he had worked for three years at a Home Depot shortly before his re-petition?
Was the Employer entitled to reimbursement of benefits paid from 2008 to 2010 when the Employee was working at Home Depot?

HOLDING:

The Employee's work at Home Depot constituted enough of an evidentiary basis for the discontinuance of permanent total disability benefits. Additionally, the Employee had not made a showing that he was permanently and totally disabled for the purpose of receiving benefits from 2011 and going forward. Though the employee was 72 years old and had physical ailments, he had not had his physical restrictions reassessed for many years. He likely could have attained employment in a job that was not physically demanding, but the Employee made no showing that he had undertaken a meaningful job search.

As to the reimbursement, the court recited the statute on reimbursement, noting that an employee shall only make reimbursement when benefits are received in bad faith. Here, the employee testified that he notified the workers' compensation insurance investigator about his employment, but the benefit continued to come. The court found that he had not received benefits in bad faith.

VACATURE OF A SETTLEMENT AWARD ON GROUNDS OF CHANGE IN MEDICAL CONDITION OR UNANTICIPATED MEDICAL CARE

Frovik v. High Tech Tune, Inc.
(W.C.C.A. July 3, 2013)

FACTS:

In 1999, the Employee suffered a personal injury in a motor vehicle accident that resulted in temporary total and temporary partial disability benefits being paid from the years 2000 through 2002. Thereafter, the parties reached settlements regarding payment of permanent partial disability payments of six percent disability, and later, thirty-one percent disability. The parties finally reached a full, final, and complete settlement of all benefit claims in early 2006. The employee was paid $90,000, certain

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treatment options were closed, such as psychological and chiropractic care, but future medicals related to the work-related injury were left open subject to defenses.

In the time between the 1999 injury and the 2006 settlement, the Employee underwent numerous medical reviews and treatments. He had not worked from April of 2001 up through the time of this opinion. After the 2006 settlement, the Employee continued to require extensive medical care. Spurred by what he deemed to be unforeseen medical expenses arising after the settlement, the petitioner moved to vacate the 2006 settlement award.

ISSUE:

Did the Employee establish a significant and unanticipated change in his medical condition since the time of a settlement award, such that it would be justified to vacate the award under Minn. Stat. § 176.461 (b)(4)?

HOLDING:

The Employee did not establish a significant change in his medical condition, as both before the settlement was agreed to, and in the time since the settlement, the Employee has always been incapable of holding any employment. Also, any changes in the Employee's medical condition or any further medical procedures that were required after the settlement were not unanticipated. The Employee had numerous medical treatments and procedures in the time immediately leading up to the settlement. Medical evaluations after the settlement evidenced that the Employee was in fact still having pain and symptoms at the time of the settlement that were related to his later medical needs after the settlement.

EVIDENTIARY STANDARD REQUIRED TO ESTABLISH "PERSONAL INJURY" UNDER MINN. STAT. § 176.011 - W.C.C.A.

Colic v. TCF Financial Corp.
(W.C.C.A. July 11, 2013)

FACTS:

The Employee slipped and fell on snow in the Employer's parking lot. Prior to the fall, the Employee was already experiencing some low back pain and had scheduled an appointment to see a chiropractor. At medical checkups after the slip and fall, the Employee was described to have had low back pain and limb pain, and tenderness over the lumbar spine. However, the patient was given no objective medical diagnosis.

The initial treating doctor determined that the Employee suffered a work-related personal injury. After an independent medical examination at the request of the Employer and insurer, a second doctor concluded that because there was no objective diagnosis of injury, there was no evidence that the Employee sustained a work-related

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personal injury. A compensation judge found for the Employer, on grounds that the treating doctor never tied the Employee's pain complaints to a lumbar injury or irregularity resulting from the slip and fall.

ISSUE:

To establish existence of a "personal injury", as defined under Minn. Stat. § 176.011, subd. 16, must an Employee have been given a specific diagnosis of injury?

HOLDING:

Though objective diagnoses are required to establish a permanent partial disability rating, the statute requires no such objective measure to establish a "personal injury." Subjective complaints coupled with the opinion of a medical expert that the employee suffered a work-related injury or aggravation may be sufficient to satisfy the standard. In a case of competing medical opinions, the compensation judge has discretion as to which opinion the decision will rely on, but opinions based on subjective complaints of pain do not conclusively fail to meet the evidentiary standard. The case was remanded for reconsideration.

ATTORNEY FEES - PARTIAL REIMBURSEMENT OF ATTORNEY FEES PER MINN. STAT.§176. 081, SUBD. 7 - W.C.C.A.

Lann v. Stan Koch and Sons Trucking, Inc.
slip op (W.C.C.A. March 6, 2013)

FACTS:

The Employee had earlier pursued a claim for benefits which was awarded. Attorney's fees were payable and the Employee was awarded Subd. 7 fees. The Employer, pursuant to statute, paid the Employee the fee equal to 30% of the attorney's fees awarded less $250.00.

There was subsequent litigation which the Employee prevailed upon. The attorney filed a *Roraff* attorney fee claim and requested partial reimbursement of attorney's fees to the Employee per Minn. Stat. §176.081, Subd. 7.

ISSUE:

For this second award of attorney's fees for the same work injury must the $250.00 be deducted from the Subd. 7 fees payable to the Employee?

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HOLDING:

In awards of Subd. 7 attorney's fees, the $250.00 is deducted only once and thereafter for any subsequent attorney fee awards, Subd. 7s are fully reimbursed without the deduction of the $250.00.

This case was an issue of first impression with the Court and involved discussion of Minn. Stat. §176.081 Subd. 7. The Court noted that under the statute *"all fees for legal services related to the same injury are cumulative."* This language supported their opinion that the $250.00 deducted from Subd. 7 fees should only be deducted once per injury and not for every subsequent award of attorney's fees. Judge Wilson dissented indicating that the attorney fee statute including Subd. 7 fees contemplated a valuation of fees on a claim by claim basis.

IMPACT:

When paying out partial reimbursement of attorney's fees pursuant to Minn. Stat. §176.081 Subd. 7, we can only deduct the $250.00 from the Subd. 7 fees once. Before making payment, you will have to review the claims file to see if the $250.00 deduction has been taken on any other Subd. 7 fee claims for the subject injury.

INTERVENTION CLAIMS - W.C.C.A.

Hansen v. Dayton Hudson/Marshall Field's/Macy's
slip op. (W.C.C.A Jan 22, 2013)

FACTS:

The parties entered into a full, final and complete settlement of the Employee's claims relating to a 1998 injury in 2002. The Stipulation specifically requested that the potential intervention rights of Medica be extinguished for failure to intervene in a timely manner after being given notice of right to intervene. An Award was issued.

Medica filed a Motion to Intervene **after** the settlement was approved. Shortly thereafter, the Employee filed a 2003 Medical Request seeking approval of disputed medical treatment. Medica was identified as having paid expense related to the disputed treatment.

In 2007 the parties again reached a settlement agreement relative to the 2003 Medical Request. An Award on Stipulation was issued. While other intervenors' claims were settled or extinguished by the terms of this Stipulation, Medica was not referenced in the Stipulation at all. The parties knew at the time of settlement Medica had reimbursed some bills. Medica had not intervened.

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In 2008 the Employee filed yet another Medical Request seeking approval of medical treatment. Medica filed a Motion to Intervene which, after revision, included bills for dates of service from 2003 through 2007.

After a hearing, the judge denied Medica's intervention claim. Medica appealed to the WCCA which found that Medica was an intervenor and a party in this matter at the time of the March 2007 settlement and remanded the matter back to the lower court to address whether or not Medica was excluded from settlement negotiations.

On remand, evidence adduced at hearing indicated that between the 2003 Medical Request and the 2007 settlement the parties and their attorneys were aware that Medica had made payments for some of these treatments; however, they did not know how much Medica had paid. There were numerous requests to Medica to itemize their potential intervention claim and Medica never did so. Medica was never advised of settlement negotiations nor was a settlement offer ever extended to Medica.

The judge found that at the time of the 2007 settlement Medica had not been advised of settlement negotiations nor were they made any type of settlement offer. As they were excluded from settlement negotiations, Medica was entitled to full reimbursement of their interest from the Employer.

HOLDING:

The lower court's decision was affirmed. The Employer argued on appeal that they had asked Medica to articulate their claim and Medica had not done so. They argued they had no duty to make an offer to an intervenor that had not asserted a claim. The Court rejected this. The basic rule is that an intervenor who is excluded from participating in settlement negotiations resulting in a settlement *and* who is not a party to the Stipulation for Settlement should be awarded full reimbursement by the settlement award due to the prejudice caused by this exclusion.

It was significant that the parties made no mention whatsoever of Medica's potential interest in the 2007 Stipulation. While Medica may not have itemized its intervention claim, the parties were aware of Medica's involvement and that Medica had made payment on the medical treatment at issue.

IMPACT:

This reinforces the notion that when one settles a claim, the employer should always attempt to ascertain all potential intervenors and try to resolve their interests. If the intervenor fails to intervene in a timely fashion pursuant to statute, this failure to intervene must be specifically mentioned in the Stipulation with supporting documentation and the award must specifically extinguish their interests.

The fact that a potential intervenor may not formally intervene pursuant to statute does not necessarily eliminate the obligation to deal with them. The safe way to proceed is to

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attempt to negotiate a settlement with the intervenor and, if acceptable terms cannot be negotiated, to *Parker-Lindberg* them in the Stipulation.

MEDICAL – APPLICATION OF FEE SCHEDULE - Minnesota Supreme Court

Schatz v. Interfaith Care Center
811 N.W.2d 643 (Minn. 2012)

FACTS:

The Employee suffered an admitted work-related injury in Minnesota. Thereafter she moved to Wyoming, where she received medical treatment for the work injury.

They Wyoming medical providers submitted their bills to the workers' compensation carrier. The workers' compensation carrier paid the bills in an amount provided by the workers' compensation fee schedule in the State of Wyoming.
The Employee, who was being charged with the difference by the medical provider, filed a Medical Request seeking payment of the unpaid balance.

HOLDING:

The Supreme Court affirmed the lower court's decision that the Employer and Insurer are only liable for the balance due subject to the Wyoming workers' compensation fee schedule. The Court rejected the Employee's argument that there was a conflict between two statutory provisions: Minn. Stat. § 176.135, subd. 1, which requires the Employer to furnish *any* medical treatment as may be reasonably required to relieve from the effects of the injury, and Minn. Stat. § 176.136, subd. 1(B)(d), which limits an employer's liability for medical treatment provided by an out-of-state healthcare provider to the payments that would be due under the workers' compensation law of the jurisdiction where the treatment was provided. The Court also rejected the argument that Minn. Stat. § 176.136, subd. 1B(d) improperly extends the jurisdiction of the court to out-of-state medical providers. They noted in this case that the parties had stipulated that the medical treatment was reasonable and necessary and was rendered by an out-of-state provider.

IMPACT:

This case affirms the Employer's right to limit its exposure to the medical fee schedules of the state where medical treatment is rendered for a compensable Minnesota workers' compensation injury. Insurers will want to have access to the Minnesota workers' compensation fee schedules of any jurisdictions where an injured employee seeks treatment.

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SUBSTANTIAL EVIDENCE

Scott Polzin v. Canterbury Park and SFM,
(W.C.C.A. Feb. 20, 2013)

FACTS:

The W.C.C.A. affirmed the compensation judge's Findings and Order denying the employee's claim for wage loss benefits and request for authorization for surgery. In doing so, the W.C.C.A. held that it was reasonable for the compensation judge to accept Dr. Friedland's opinion who performed an IME on behalf of the employer and insurer. The treating doctor, Dr. Falconer's opinion, the W.C.C.A. noted, lacked a sufficient basis to conclude that a diagnostic midcarpal arthroscopy would identify or resolve the Employee's symptoms.

In July 2007 the Employee sustained a left hand injury while working as poker dealer at Canterbury Park. Ultimately, the Employer and Insurer accepted liability for the Employee's left hand injury. Over the following months and years, the Employee underwent multiple treatments to diagnose the cause of his left hand symptoms. Multiple doctors were unable to identify the etiology of the Employee's symptoms, including a Mayo Clinic doctor who offered an opinion that he employee could engage in any activities without jeopardy to the left hand. In light of the unknown etiology, Dr. Falconer recommended a diagnostic midcarpal arthroscopy. Dr. Falconer did acknowledge that previous MRIs and scans should have revealed joint irritation or arthritic damage and, further, that the surgery might not provide lasting therapeutic benefits if it did not identify the cause of the Employee's symptoms. The Employee filed a Claim Petition claiming entitlement to wage loss benefits, a vocational rehabilitation consultation, and approval of the surgery recommended by Dr. Falconer.

The Employee underwent an independent medical examination with Dr. Mark Friedland. Dr. Friedland concluded that the Employee's symptoms were without objective anatomic etiology. Further, he opined that the Employee was not in need of any additional medical care and that he had no work restrictions. Dr. Friedland also concluded that Dr. Falconer's surgical recommendation was not reasonable or necessary.

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HOLDING:

The compensation judge adopted Dr. Friedland's opinion that the Employee had no work restrictions effective June 1, 2010, that the Employee was not entitled to wage-loss benefits as alleged, and that Dr. Falconer's surgical recommendation was not reasonable or necessary. The WCCA affirmed, reiterating the long held view that the compensation judge's choice of competing medical opinions will be upheld unless there is a foundational defect.

Harvey v. Central Lutheran Church
(W.C.C.A. May 28, 2013)

The W.C.C.A. reversed the compensation judges finding that the Employee's admitted low back injury was temporary in nature. At Hearing, an IME report was offered wherein the doctor noted he felt the Employee's subjective complaints were out of proportion to the objective findings and stated she would have reached maximum medical improvement six weeks after her injury. Based on these opinions, the compensation judge found the injury was temporary in nature and resolved within six weeks. The W.C.C.A., however, reversed. In doing so, they pointed out that the IME doctor did not opine that the injury resolved in six weeks. Rather, he opined she had reached MMI within that time frame; and MMI "is a different issue from whether or not an injury has been temporary and has resolved." Because there were no significant gaps in her treatment, she continued to complain of pain even up to the hearing, and the IME doctor gave no specific support for his conclusions, substantial evidence did not support the compensation judge's finding that the injury had resolved. The matter was remanded for further consideration.

HOME MODIFICATION

Washek v. New Dimensions Home Health
828 N.W.2d 732 (Minn. 2013)

FACTS

In 2002, Tessa Washek sustained paralyzing spinal cord injuries in a work-related motor vehicle accident. Washek's paraplegic condition made it difficult for her to navigate her wheelchair and shower chair over the various thresholds in her bedroom and bathroom.

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In addition, Washek regularly sustained skin-shearing abrasions sliding from her wheelchair onto the toilet seat and shower seat. To mitigate these issues, and reduce repetitive lifting trauma to her upper extremities, Washek's accessibility specialist recommended the installation of a remote-controlled, ceiling-mounted motorized lift system that would hoist and transport Washek from her bedroom to the toilet and shower.

New Dimensions and its insurer agreed to pay for the lift system, including installation, under Minn. Stat. § 176.135, which requires employers to "furnish" any medical treatment or apparatus "as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." However, before the system's overhead track could be installed, the existing light fixtures and ceiling fans had to be relocated, blocking needed to be installed in the ceiling along the path of the track, headers over various doors had be made flush with the ceiling, and the bathroom had to be reframed to accommodate pocket doors. New Dimensions and its insurer agreed to cover these additional construction costs under Minn. Stat. § 176.137, which requires employers to furnish "such alteration or remodeling of the employee's principal residence as is reasonably required to enable the employee to move freely into and throughout the residence and to otherwise adequately accommodate the disability." However, because § 176.137 limited alterations to a maximum of $60,000 at the time, and the employer and insurer had already paid out approximately $58,000 in prior alterations, there was only $2,000 left to cover the newly requested alterations.

Washek agreed the preliminary construction work amounted to alteration or remodeling of her residence; however, she argued that the costs should be covered under § 176.135 (which imposes no limits), as necessary to "furnish" her with the already-approved lift system.

<u>HOLDING</u>

The Supreme Court disagreed, stating "[t]he expenditures at issue here are for construction labor and building materials, which do not constitute 'apparatus' or medical treatment under Minn. Stat. § 176.135 and which themselves do not 'cure and relieve from the effects of the injury.'" Because the preliminary construction work clearly constituted "alteration or remodeling" of the residence, versus medical treatment or apparatuses, the Court found that § 176.137, and its limitations, applied.

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