CASE LAW UPDATE

Minnesota Employers Workers Compensation Alliance (MEWCA)

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Howard Held and Kelly Falsani

FITCH, JOHNSON, LARSON HELD, P.A.

SUITE 100
2021 EAST HENNEPIN AVENUE
MINNEAPOLIS, MN 55413

(612) 332-1023

Minnesota Supreme Court Cases

Intervention Rights

Gamble v. Twin Cities Concrete Products, Case No. A13-1409 (Minn. 2014)

In this case, the Supreme Court of Minnesota held that when a medical provider has not been put on notice of its right to intervene, it is *not* entitled to automatic payment of unpaid charges unless it shows that the lack of notice resulted in prejudice.

The employee claimed that as a result of a work-related low back injury, he was entitled to various workers' compensation benefits including a low back fusion surgery. The employer and insurer denied that the surgery was reasonable, necessary, or causally related to the work injury. The employee underwent the fusion surgery two months before the scheduled workers' compensation hearing. His health insurer paid Lakeview Hospital. The health insurer and various providers were put on notice of right to intervene, but the parties did not realize that Lakeview Hospital had not been put on notice. The compensation judge found that the fusion surgery was related to the work injury, but, citing the IME as well as inaccuracies in the treating surgeon's report, the judge also found that the surgery was not reasonable and necessary. He ordered the Employer and Insurer to reimburse the health insurer for the payments it had made toward the surgery, and further held that the Employer and Insurer could then seek reimbursement from the providers for the unreasonable and unnecessary surgery.

As ordered, the Employer and Insurer reimbursed the health insurer and filed a Medical Request, seeking reimbursement from the providers. Lakeview denied that it was required to reimburse the Employer and Insurer, and further argued that pursuant to the 1979 Minnesota Supreme Court case of Brooks v. Hendrickson, it was automatically entitled to full payment of its Spaeth balance because the parties had failed to put Lakeview on notice of its right to intervene. A second hearing was held in front of the compensation judge, at which Lakeview presented additional evidence regarding the reasonableness and necessity of the surgery. The compensation judge again held that the surgery was not reasonable and necessary, and Lakeview appealed to the WCCA. The WCCA reversed the compensation judge and found that the Brooks automatic reimbursement rule applied. Because the parties had failed to put Lakeview on notice of its right to intervene, Lakeview was automatically entitled to full payment of its Spaeth balance, regardless of whether or not the surgery was reasonable or necessary. The Employer and Insurer appealed.

The Supreme Court of Minnesota reversed the WCCA's opinion. The Court agreed with the Employer and Insurer's argument that Brooks and subsequent cases could be distinguished. In Brooks and in other Minnesota Supreme Court cases, the parties intentionally excluded a health or disability *insurer* from *settlement negotiations*. The Court's aim in Brooks had been to motivate the parties to include such parties in settlement negotiations. The Court provided two main reasons why Brooks should not be extended to Gamble or other cases where a *provider* was not put on notice before a *hearing on the merits*.

First, at the time Brooks was decided in 1979, intervenors and potential intervenors had no remedy to protect their interests when they were excluded from settlement negotiations. Since Brooks, a system of rules and penalties has been promulgated to protect the rights of intervenors and potential intervenors. These rules adequately protect the rights of an interested party such as Lakeview, such that application of the Brooks automatic payment provision is unwarranted.
The Court's second main reason for declining to extend Brooks was that Lakeview was not prejudiced by its absence from the first hearing. In Brooks, the health insurer was excluded from a settlement, and so it was faced with the burden of proving work-relatedness without the employee's cooperation. In Gamble, the employee had already established work-relatedness at the first hearing. At the second hearing, the compensation judge revisited the reasonableness and necessity issue *de novo*, and Lakeview had an opportunity to present new evidence. As such, Lakeview's interests were protected and not materially prejudiced.

Because WCCA reversed the compensation judge on the Brooks issue, it had not addressed Lakeview's argument that the compensation judge's findings regarding reasonableness and necessity were unsupported by substantial evidence. Thus, the Supreme Court remanded the case to the WCCA for consideration of this portion of Lakeview's appeal. The deferential Hengemuhle standard of review will apply to this portion of Lakeview's appeal.

Pension Retirement v. Disability Offset for PTD Claims

Ekdahl v. Independent School District #213, Case No. A14-0089 (Minn. 2014)

This and **Hartwig v. Traverse Care Center**, Case No. A14-0090 (Minn.2014), the companion case, deal with the offset provision of Minn. Stat. §176.101, subd. 4, and whether or not the phrase "Old Age and Survivor Insurance benefits" were to apply to only Social Security retirement benefits under the federal Social Security Act, but also applied to pension retirement benefits through the Teachers' Retirement Association (TRA) and Public Employees' Retirement Association (PERA).

The Minnesota Supreme Court found that the WCCA erred in applying an offset under Minn. Stat. §176.101, subd. 4, for these pension retirement benefits and indicated that the offset is only available when there is a disability pension or disability benefits being received by an injured worker.

The Court discussed the plain meaning of "Old Age and Survivor Insurance benefits" as it applies to any offset and found that the plain meaning only refers to the federal Social Security Act as originally enacted and as modified throughout the years since 1935.

The Court found that because Ekdahl was only receiving retirement benefits and not disability benefits from the TRA, the §176.101, Subd. 4 offset did not apply to the retirement annuity through TRA. The same conclusion was reached in the Hartwig case for PERA pension retirement benefits.

This means that going forward any claim for permanent and total disability benefits in which a worker may apply for pension retirement benefits instead of disability benefits from the pension fund could lead to a situation where a claimant would forego any disability benefits and instead seek retirement benefits so as to not create an offset of permanent and total disability benefits.

Workers' Compensation Court of Appeals Cases

Standing to Petition for Vacation of Award

Mude v. Fox Bros. of Sanborn, No. WC 13-5650 (June 2, 2014)

In Mude, the WCCA found that an insurer who was not a party to the Stipulation for Settlement had not been prejudiced and had no standing to petition for vacation of the Award.

In January 2013, the employee filed a Claim Petition alleging a specific injury to his wrists in 2006, with SFM on the risk, and a Gillette injury culminating on May 23, 2012 where Midwest Family Mutual Insurance (MFMI) was on the risk. Prior to the settlement conference, MFMI notified the parties that they would not consider a settlement unless the employee resigned from his employment. Subsequently, the employee pursued settlement with SFM only.

The employee and SFM filed a Stipulation for Settlement on October 18, 2013 settling the employee's prior injury on a full, final and complete basis and withdrawing the 2012 Gillette claim.

MFMI filed a petition for contribution as well as an objection to the Stipulation for Settlement. Nevertheless, the Stipulation was considered and approved by the Compensation Judge. MFMI subsequently file a notice of appeal seeking vacation of the Award on Stipulation.

Insurers who are not a party to a Stipulation for Settlement lack standing to seek vacation of the Award on Stipulation unless they can show they were actually prejudiced by said Stipulation for Settlement. MFMI asserted that it had been prejudiced because the Stipulation lacked Pierringer language, preserving its potential claims for contribution against SFM.

The WCCA concluded that MFMI was only objecting to the prospect that the employee would pursue a claim for the alleged 2012 Gillette injury. However, since the employee had withdrawn that claim, this does not constitute prejudice. Moreover, the stipulation would not preclude MFMI from seeking a contribution against SFM if any such litigation arose. The appeal was dismissed.

Tribal Immunity

Nugent v. Seven Clans Casino, No. WC13-5649 (June 17, 2014)

The employee brought suit after allegedly sustaining an injury while employed by Seven Clans Casino, which is wholly owned and operated by the Red Lake Band of Chippewa Indians, a federally recognized Indian tribe. The employee was not a tribe member and the tribe had established a Tribal Workers' Compensation Plan as the sole remedy for work injuries.

The tribe filed a motion to dismiss. A compensation judge found the tribe had sovereign immunity, the tribe had not waived that immunity, and that the State of Minnesota lacked jurisdiction to enforce its workers' compensation act against the tribe. Therefore, the dispute could not be heard by a Minnesota workers' compensation judge due to lack of jurisdiction. The employee appealed.

In general, Indian tribes are not subject to suit unless Congress has authorized the suit or the tribe has waived immunity. In this case, the tribe did not waive immunity. The employee argued that Congress authorized the suit because a federal law, U.S.C. § 3172, allowed the State of Minnesota to adjudicate a dispute arising out of an injury claimed to have occurred on land held by the federal government in trust for an Indian tribe. Therefore, the employee argued, there was jurisdiction and the Minnesota Workers' Compensation Act applied.

The WCCA did not agree, and affirmed the compensation judge's decision to dismiss the claim under *Tibbetts v. Leech Lake Reservation Bus. Comm.*, 397 N.W.2d 883 (Minn. 1986), a case stating the federal law in question was "never intended to apply to Indian tribes themselves" and "cannot be read to confer upon states jurisdiction over otherwise immune or exempt parties." *Id.* at 888.

Notice of Injury

Orth v. ABF Freight Sys., Inc., No. WC14-5662 (June 18, 2014).

The employee alleged to have suffered a knee injury while operating a forklift on August 23, 2013. The employee testified that he notified his supervisor that same day of the injury. On September 27th, the employee saw his family physician regarding several weeks of knee pain.

On October 5th, the employee injured his knee once again while walking across his employer's premises. About a month later, the employee underwent a partial medial meniscectomy of the right knee. Unfortunately, the employee did not improve and was offered additional treatment options, which had the potential to lead to a total knee replacement.

An IME was acquired by the employer, which attributed the employee's symptoms to pre-existing, non-work-related degenerative changes. The employee filed a Claim Petition requesting payment of medical and indemnity benefits. The compensation judge found that the

employee had provided notice to the employer and that the employee sustained a continuing work-related injury to his right knee. The employer appealed, arguing that the compensation judge did not have sufficient facts to support the findings.

So long as a reasonable inference can be drawn from the evidence, the decision of a compensation judge will not be disturbed on appeal pursuant to Hengemuehle. The WCCA found that the employee's testimony was sufficient evidence, even in the absence of corroborating evidence, for the compensation judge to infer that a work injury took place and that he provided the employer with due notice. In addition, the compensation judge was free to determine that the treating physician was more credible than the independent medical evaluator's opinion. Therefore, substantial evidence supported the compensation judge's findings, which are affirmed.

Matters at Issue in Request for Formal Hearing

Frederick v. Divine Home Care, Inc. and United Wis. Ins. Co./United Heartland, No. WC13-5654 (July 1, 2014)

The employee allegedly sustained a bilateral wrist injury while working as a home health care attendant. She received temporary total disability benefits for several months following the alleged injury.

Despite substantial medical treatment, her subjective complaints did not correlate with objective findings and there were multiple medical records indicating the employee gave "inconsistent efforts" on grip strength testing. Surveillance also showed the employee performing activities she claimed she could not do based on her condition, such as driving and picking up her dog. An independent medical examination revealed that at most the employee sustained a bilateral wrist sprain, which would have resolved within four weeks. The employer and insurer filed a notice of intention to discontinue benefits as well as terminate the employee's rehabilitation plan. They also asserted the employee had made false representations to her treating doctors about her condition and abilities, and had accepted workers' compensation benefits through fraud.

A few days before the hearing, the employee began treating with Dr. Elghor at the Center for Pain Management. He diagnosed moderate complex regional pain syndrome in both extremities. Despite this diagnosis, the compensation judge allowed discontinuance of her wage loss benefits and termination of the rehabilitation plan, but held the fraud claim had not been established. Additionally, the judge found the employee did not sustain any injuries arising out of and in the course and scope of her employment on the date of injury.

On appeal, the employee argued the judge had improperly expanded the issues at the hearing by finding no work injury occurred. The employer and insurer had not denied primary liability, so the issue of whether or not a work injury had occurred was not an issue. If the employer and insurer had challenged primary liability, the burden of proof would have been on the employee. Instead, the matter came on for hearing as an objection to discontinuance and a

rehabilitation request, and the burden of proof was on the employer and insurer to establish grounds to discontinue temporary and rehabilitation benefits.

The WCCA affirmed the compensation judge's findings and order relative to the discontinuance of wage loss benefits and termination of the rehabilitation plan, but vacated the findings and order to the extent that they went beyond the scope of the issues presented at the hearing. Additionally, the WCCA determined the fraud claim was not established because the employer and insurer did not satisfy the elements of the claim and also did not comply with the procedural requirements of bringing a fraud claim.

Joint Employment

Guevara v. BT-PCE, No. WC14-5660, (July 29, 2014)

This is an interesting case because it analyzes joint employment following a petition for contribution and reimbursement by one employer against another.

The facts are that the liable employer, Salrecon, entered into an agreement with BT-PCE (alleged joint employer) in which BT-PCE found employees for Salrecon, paid them through BT-PCE's payroll service and Salrecon believed that BT-PCE would provide workers' compensation insurance for these employees. Initially, BT-PCE's manager found potential employees for Salrecon, Salrecon interviewed these employees and decided whether or not to hire them. These employees were put on BT-PCE's payroll.

However, the employee in this case was hired directly by Salrecon as he had worked for them in the past Salrecon directed him to go back to Minnesota where they provided him lodging, tools, directed his work, and determined his wage. He was paid by BT-PCE.

Then, BT-PCE required I-9 employment eligibility documentation of all employees, including Mr. Guevara, and informed those employees that it would withhold any paychecks if they did not receive that by a set deadline.

On Nov. 15, 2007, debris fell on the employee and he was rendered quadriplegic. This resulted in well over one million dollars of benefits paid on behalf of or to the employee. Then, Salrecon filed a petition for contribution and/or reimbursement against BT-PCE.

At trial, the main issues were whether or not the employee was employed by BT-PCE or at least jointly employed by BT-PCE and Salrecon, and if so, whether or not BT-PCE was liable for the workers' compensation insurance or there would be some level of apportionment between the two. However, the compensation judge found that the employee was only employed by Salrecon and that there was no entitlement to reimbursement or contribution from BT-PCE.

The compensation judge used a five factor test to determine whether an employer-employee relationship existed, and found that those factors supported that Salrecon was the employer, but not BT-PCE. The most key ingredient to the employment relationship test was the right to

control the performance of the employee's work duties, and BT-PCE had no control whatsoever and simply ran payroll for Salrecon.

Finally, the court rejected Salrecon's argument there is a joint employment relationship in which BT-PCE was acting as the general employer and Salrecon was the special employer. The court found that BT-PCE did not find the employee as is usually the case in a lone servant doctrine/joint employer situation, and the only contact BT-PCE had with him was simply providing payroll services.

Thus, the compensation judge's findings were affirmed, and therefore Salrecon was solely liable for the ongoing permanent and total disability and medical benefits of the employee.

Dykhoff Revisited

Kainz v. Arrowhead Senior Living Cmty., No. WC 14-5701 (Aug. 6, 2014)

The Employee here was a licensed practical nurse who worked at a senior living community. Her job included dispensing medications. On the date of injury, the Employee left the main floor to retrieve medications from a locked cage in the basement. She had to walk down two flights of stairs. While going down the second flight of stairs, the Employee twisted her ankle, causing an avulsion fracture. The Employer and Insurer denied the injury on the basis that it did not arise out of and in the course and scope of her employment.

The compensation judge found the injury did arise out of and in the course and scope of employment. The judge found that the general public was excluded from using that stairway and that the stairway was steep and without handrails on the portion of the stairway where the employee twisted her ankle. So, the judge used the increased risk test.

On appeal, the W.C.C.A. affirmed similar to its earlier decision in Dykhoff before the Supreme Court decision. In its first opinion the WCCA noted the two elements of "arising out of" and "in the course and scope" of employment. The court noted that the compensation judge analyzed the claim under the increased risk test, but the court noted that this is not the only test used in Minnesota to analyze the arising out of element. On its review, the court did not necessarily use the increased risk test and said that because the "arising out of" element is unique in each case, no absolute rule can be established. In most cases, the employee is covered by the workers' compensation act "while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of injury." The court noted that here, the "in the course of" element was very strong. Given the strong "in the course of element", together with the unexplained nature of the injury, the compensation judge did not err by finding that the ankle injury arose out of and in the course and scope of her employment.

However, after the Employer appealed and because of the Dykhoff decision by the Supreme Court on December 26, 2013, the Supreme Court ordered the WCCA's first decision be vacated and remanded for further proceedings consistent with the legal analysis and rule under Dykhoff.

The WCCA noted that the Supreme Court invalidated the "balancing test" and adopted the "increased risk test" as the proper test for evaluating whether an injury "arose out of" and "in the course and scope of" employment. On reconsideration, the WCCA found that the sole issue was whether the injury "arose out of" employment – which requires a causal connection between the working environment and the hazard to which the employee is exposed. The employee must prove that her working environment exposed her to an increased risk of injury greater than that of the general public. This is generally a fact question.

Because the compensation judge had found that the stairway at issue in this case presented at least some increase in employee's exposure beyond that faced in everyday non-work life (steep stairway and no handrails), the WCCA did not disturb that finding which satisfied the "increased risk test." The court also denied the arguments by the Employer and Insurer that the compensation judge made erroneous factual determinations regarding the handrails being present and that the public could use the stairway. The WCCA found the dispositive finding for the "increased risk" was that the stairway was steep and that while certain members of the public (visitors of residents) could use the stairway, it wasn't open to the general public.

This case shows us that even though Dykhoff is helpful, the devil is always in the details and how the case is presented at trial. If possible, investigate the circumstances early on and get statements from the claimant and witnesses that could prove useful for factual disputes on the "increased risk test" at trial.

PPD Threshold for PTD Claims

Allen v. RD Offutt Co., No. WC14-5667, (Aug. 12, 2014)

This is a case in which the compensation judge rejected the employee's claim for permanent and total disability because the permanent partial disability threshold under Minn. Stat. §176.101, subd. 5, was not met. The employee was 48 years old and sustained a low back injury on Sept. 28, 2010.

Judge Cannon found that the employee had no more than 10% permanent partial disability for his low back injury and, because of his age at the time of the injury, he would need to establish a 17% permanent partial disability to meet the threshold for a permanent and total disability claim.

But, the employee did claim an additional 10% permanency as a result of loss of teeth under Minn. Rules 5223.0320, subp. 7, and that this PPD rating could be combined along with the work-related permanent partial disability rating to satisfy the 17% threshold under Minn. Stat. §176.101, subd. 5(2)(a).

Judge Cannon found that the non-work related disability could not be used to meet the permanent total disability threshold and denied the employee's claim for failure to reach the 17% threshold.

This case was reviewed by the WCCA under *de novo* standard of review because it was dealing with a question of law.

The WCCA found that Frankhauser is the appropriate case through which to evaluate this issue and even though the employer agreed with the basic holding of Frankhauser, the employer argued that the permanent partial disability must actually represent a functional loss that affects a claimant's employability before it can be combined with the work-related permanency to meet the threshold for PTD benefits. The employer argued that the claimant did not have any disability due to the loss of his teeth given that he uses dentures and this has no negative impact on his employability. The WCCA noted that PPD ratings and payments are to address loss or impairment of bodily function and there's no pre-requisite to show loss of employability.

The WCCA rejected the employer's request to change longstanding case law and found that because PPD is determined by a schedule and is a function of the statute, any mitigation available such as dentures for loss of teeth doesn't lower the rating. Thus, permanent partial disability for non-work related conditions can be added to work related permanent partial disability to meet the threshold in order to meet the requirements of the permanent total disability statute.

This case was remanded to address the additional requirements and findings necessary for entitlement to permanent total disability benefits.

Culmination Date of Gillette Injury

Hellgren v. St. Mary's Med. Ctr., No. WC14-5672 (July 9, 2014)

Self-insured employer appealed compensation judge's findings regarding the effective date of permanent total disability benefits, among other issues.

The Employee was a food service worker who contended that over the course of her 27-year employment she acquired low back pain, right hip pain, knee pain, and an Achilles tendon injury. She alleged Gillette injuries culminating on December 5, 2011, the last date that she worked for the employer. The employee was awarded social security disability benefits on April 13, 2012. At hearing, the employee testified that as of December 5, 2011, she could no longer stand at work. The compensation judge found that the employee's work activities were a substantial contributing factor to the Gillette injury which did culminate on December 5, 2011.

On appeal, the compensation judge's finding regarding the culmination date of a Gillette injury must be clearly erroneous and unsupported by substantial evidence to be overturned. The self-insured employer challenged the foundation of the employee's vocational expert. Nevertheless, the self-insured employer had no expert opinion to the contrary. In addition, the record included opinions of the employee and the treating physician, which found she was permanently totally disabled as of December 5, 2011. The WCCA found that the compensation judge had substantial evidence to support his findings, which were affirmed.