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MINNESOTA WORKERS' COMPENSATION CASE LAW UPDATE

Minnesota Employers Workers Compensation Alliance
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WORKERS' COMPENSATION CASE LAW UPDATE
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Sanchez v. Dahlke Trailer Sales, Inc., Case No. A15-1183 (Minn. June 28, 2017). The employee is an undocumented worker who lived in the United States since his tourist visa expired in 1998. He purchased a false social security number to apply for jobs, and presented that false social security number to the employer when he was hired in 2005. The employee testified that the employer knew that he was undocumented. The employee sustained a work-related injury in 2013 and was paid benefits. The employee subsequently hired a lawyer. The employee testified that a representative at the employer made comments that he hated lawyers and said, "[T]he bridge between us [is] broken." The workers' compensation case settled. When the employee returned to work, the employer asked to see his social security card and asked the employee whether he was "illegal." The employee responded, "[Y]ou know that." The employee testified that the employer told him that he could not work there anymore "because of [his] legal situation," and that he was put on an "unpaid leave of absence" until he could produce paperwork proving that he was legally able to work in the United States. The employee brought suit in district court, raising a claim under the workers' compensation antiretaliation statute, Minn. Stat. § 176.82. The employer moved for summary judgment, and the district court granted the motion, finding that, as a matter of law, the employee's unpaid leave was the result of his immigration status, not his workers' compensation claim. The court commented that the employer was complying with federal law prohibiting employers from knowingly employing undocumented workers. The Minnesota Court of Appeals reversed, holding that undocumented workers are protected by the antiretaliation provision of the workers' compensation law. Further, the Court of Appeals held that the employee had raised a genuine issue of material fact as to whether he had established a prima facie case of retaliatory discharge. The case was then appealed to the Minnesota Supreme Court, which considered the elements of a workers' compensation retaliatory discharge claim. First, it considered whether the employee was "discharged." The Court determined that when the employer put the employee on an unpaid leave of absence, its intent was effectively to end his employment. Second, the Court considered whether the employer discharged the employee "for seeking workers' compensation benefits," determining that that was the case, given the employee's testimony that the employer told him that the "bridge" between them was "broken" after he hired an attorney for his workers' compensation case. Finally, using a preemption analysis, the employer contended that the federal Immigration Reform and Control Act ("IRCA") required it to place the employee on leave due to his immigration status and that the employer cannot be held liable for taking an action required by federal law. The Court determined that the aim of IRCA is to discourage the employment of undocumented workers, not eliminate other statutory protections, reasoning that the removal of labor protections would ironically make the employment of undocumented workers cost-effective. It was therefore held that the workers' compensation antiretaliation statute is not preempted by IRCA. The case was remanded to district court for further proceedings in accordance with this opinion.

APPORTIONMENT

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well-founded and could be relied upon in determining causation and apportionment between two dates of injury, even though some of the medical treatment rendered was after the IME report.

ARISING OUT OF

Hohlt v. University of Minnesota, Case No. A16-0349 (Minn. June 28, 2017). The employee worked for the employer as a building painter, and had worked in a number of buildings on the University of Minnesota campus. On the date of injury, she was painting in a building on campus. She parked in a public parking ramp that was owned and operated by the employer. It was sleeting and snowing that evening, and she walked the sidewalk from the building where she was working to the parking ramp to get to her vehicle. The City of Minneapolis owned the sidewalk, but the employer had the responsibility to maintain the sidewalk, including keeping it clear of snow and ice, pursuant to city ordinance. The employee reached the intersection. As she walked forward onto the sidewalk curb ramp, not yet having reached the street, she slipped on the ice and fell, sustaining an injury. The employer denied primary liability. Compensation Judge Cannon determined that the injury did not arise out of the employment, as the hazard faced by the employee of falling on winter ice or snow was not unlike the hazard faced by the general public. He did not specifically decide the issue of whether the injury occurred in the course of employment, although he implied that the injury would likely have been found to be in the course of. Both parties appealed to the WCCA. The WCCA reversed the compensation judge, holding that the injury occurred in the course of employment, as at the time of the incident, the employee was on the premises of the employer, walking a short distance from where she worked on the most direct route to a parking ramp owned and operated by the employer. It also held that the injury arose out of the employment, as the employee's presence on the employer's premises was not due to her membership in the general public, but was because of her employment, and that is why she encountered the risk of the icy sidewalk.

The case was appealed to the Minnesota Supreme Court. In a 3-2 decision, with Justice Lillehaug writing for the majority, the Supreme Court affirmed the WCCA holding. The Court determined that the facts were essentially undisputed, so the appeal focused on a question of law, which the WCCA and the Supreme Court could consider *de novo*. In analyzing the legal issue, the Court affirmed its previous holdings that the "arising out of" and "in the course of" requirements are distinct, and each must be met for an injury to be compensable. With regard to the "arising out of" element, the Court held that a causal connection must exist between the injury and the employment. The Court held that the causal connection exists because the employee's employment exposed her to a "hazard that originated on the premises as part of the working environment." That "hazard" was the employer-maintained sidewalk. It determined that the sidewalk was part of the employer's premises. The employee was exposed to the icy sidewalk (the hazard) on the employment premises because she was there, not as a member of the general public, but because of her employment. The Court then distinguished the result in the *Dykhoff* case. In that case, the employee fell on a flat, dry, and clean floor on the employment premises. The *Dykhoff* Court determined that there was nothing about the floor that increased the employee's risk of injury. Ms. Dykhoff had failed to show any increased risk or hazard. The Court held that *Dykhoff* "is a case about an unexplained injury." In contrast, the employee in *Hohlt* had fully explained her injury, which was the result of an icy sidewalk, not a clean floor. With regard to the "in the course of employment" requirement, the Court reaffirmed its prior

holdings that an employee is in the course of employment while providing services to the employer, and also for "a reasonable period beyond actual working hours if an employee is engaging in activities reasonably incidental to employment." It noted that the employee slipped and fell shortly after leaving work, which was a reasonable period beyond actual working hours. The direct walk to her car, only four blocks away, was reasonably incidental to employment.

Justice Anderson wrote a lengthy dissent on behalf of the minority. He would have determined that the employee did not satisfy either the "arising out of" or the "in the course of" requirements. With regard to "arising out of," Justice Anderson noted that a causal connection is met when the employment "peculiarly exposes the employee to an external hazard whereby he is subjected to a different and greater risk than if he had been pursuing his ordinary personal affairs." The employment must expose the employee to an increased risk or a special hazard. He would have determined that the employee did not establish that her injury was caused by the employment. She fell on a public sidewalk, and any member of the general public was equally at risk for falling on the same sidewalk due to the same conditions faced by the employee. The risk of falling on an icy sidewalk was not unique or peculiar to the employee's job as a painter, she was not exposed to any greater risk than if she had been walking on the same sidewalk in pursuit of personal activities, and she was not performing any work activities while on the public sidewalk. Also, Justice Anderson reasoned that it was the employee's personal choice to park in the parking ramping. Also, her injury did not occur in the parking ramp, but on a public sidewalk. Justice Anderson also would have determined that the injury did not occur "in the course of employment." The injury occurred four blocks from the building in which the employee worked, which was a significant distance, more significant than any case in which an injury had been awarded before. How far would the Court allow an employee to walk between two parts of the employment premises before it would not be compensable? The majority did not define what "abnormally far" is. The employee in *Hohlt* was not told where to park. The employee chose where to park, and indeed, the employer did not require the employee to even drive to work in the first place. Justice Anderson concluded that fundamentally, this case represented a "coming and going" dispute. Injuries that occur during a commute are typically not compensable. Here, the employee had punched out, was not performing work duties, and was walking on a public sidewalk, simply going home.

Kubis v. Community Memorial Hospital Association, Case No. A16-0361 (Minn. June 28, 2017). The employee injured her shoulder while allegedly rushing up a set of stairs at the end of her shift because she was concerned about working overtime and she needed to respond to the oncoming shift. The claim was denied on the basis that it did not arise out of her employment because there was no increased risk associated with her employment. Compensation Judge Baumgarth found the employee's testimony regarding "rushing" was not credible and held that the injury did not arise out of employment. The WCCA (*en banc*, with Judge Sundquist writing the opinion) reversed, holding that the employee was fatigued and hurrying because of the concern over overtime and her need to check in with the people on the next shift. According to the WCCA, being fatigued and hurrying rose to the level of an increased risk. The WCCA did not address the judge's finding that the employee's testimony was not credible. The case was appealed to the Minnesota Supreme Court, in a decision written by Justice Anderson, reversed the WCCA's decision. The Supreme Court did not address whether the employee's subjective belief was enough to constitute an increased risk, or whether the WCCA misapplied *Dykhoff v. Xcel Energy*. Instead, the Minnesota Supreme Court reversed the WCCA's decision because the

WCCA applied the wrong standard of review. The Supreme Court noted that the compensation judge made a credibility determination and found the employee's testimony regarding rushing was not credible. The compensation judge's decision was supported by substantial evidence that a reasonable mind would accept as adequate and the WCCA was required to affirm the compensation judge's findings. Justice Lillehaug wrote a dissenting opinion in which he indicated he would have given the WCCA deference and affirmed their decision. According to Justice Lillehaug, the compensation judge did not make a determination on the employee's credibility regarding whether she was rushing up the stairs to report to the incoming staff and that this finding was uncontroverted and supported the WCCA's determination that her injury arose out of her employment. Justice Lillehaug argued that the WCCA's decision was thorough, well-reasoned and correct and that the majority should have given deference to the WCCA, but instead substituted its own judgement. Justice Lillehaug also argued that *Kirchner v. County of Anoka* should have been applied to the facts of this case, because the facts were similar in all relevant ways and that the employee should have been awarded benefits. Justice Lillehaug noted that there was difficulty in applying the "increased risk test" and proposed the "positional risk test" as a better alternative.

Keltner v. Spartan Staffing, LLC, File No. WC17-6026, Served and Filed September 5, 2017. The employee died as a result of a fall off a ledge that was 18 or 19 feet off the floor. One side of the ledge was open with no barrier so that forklifts could put pallets in the open space. Hanging above the floor on the third tier were signs that read, "Do not go beyond this point. Wear fall protection." An OSHA investigation revealed that the employee's death was caused by a fall from the ledge. The employer and insurer denied primary liability and the matter went to a hearing. Compensation Judge Grove found that the death arose out of and in the course of the employee's work for the employer. The employer and insurer appealed to the WCCA and asserted three main arguments. First, the employer and insurer contested that this death arose out of the employee's work for the employer because he was not yet scheduled to start work at the time of the fall. The WCCA (Stofferahn, Hall, Sundquist) affirmed the compensation judge's findings that the employee's injury arose out of and in the course of his employment, agreeing that, although the injury occurred before he was to begin his shift, the employee had clocked in, was wearing the required clothing for the job, and was in the area where he previously worked. Second, the employer and insurer argued that the employee's death was not compensable because he was engaged in a prohibited act at the time of the fall. Specifically, he must have passed the point where the warning sign was hanging. The WCCA affirmed the compensation judge's determination that the requirements to prove a prohibited act were not met. This defense requires an employer and insurer to meet a seven part standard. Although the WCCA did not state what part of the standard was not met, it indicated that this was explained in the judge's memorandum. The WCCA then stated in a footnote that it was not making a determination as to the viability of this defense. Third, the employer and insurer argued that the employee's death was not compensable because it was self-inflicted. There were indications from the employee's girlfriend that the employee may have purposefully committed suicide and that he used methamphetamines. The compensation judge did not find this evidence persuasive for various reasons, including that the employee had put on all his gear that he needed for work, and the WCCA affirmed that finding.

ATTORNEY FEES

Weatherly v. Hormel Foods Corp., File No. WC17-6038, Served and Filed June 13, 2017. The employee's attorney, Donaldson Lawhead, appealed from Compensation Judge Cannon's denial of *Roraff* and *Heaton* fees, and the WCCA (Stofferahn, Hall, Sundquist) affirmed. *Heaton* fees are awarded when there is a rehabilitation dispute and the employee is awarded rehabilitation benefits. However, there was no rehabilitation dispute in this case. Similarly, *Roraff* fees are awarded when there is a dispute regarding medical benefits, but it was found that there was no genuine dispute over medical benefits in this case. The employee attempted to supplement the record at the appellate level, but the WCCA denied the employee's motion to supplement the record based on Minn. Stat. § 176.421, subd. 1, which indicates that appeals only deal with the record "as submitted," and not anything that was not heard and considered by the compensation judge.

CAUSAL CONNECTION

Allen v. Trailblazer Joint Powers Board, Served and Filed September 7, 2017. The WCCA (Sundquist, Milun, Stofferahn) found that there was substantial evidence, in the form of medical records from the employee's treating doctors, for Compensation Judge Tate to conclude that the employee's ongoing post-concussion symptoms were causally related to the work injury. The employer and insurer raised particular concern that the employee had not lost consciousness after the work-related head injury, but the WCCA found that proof of loss of consciousness is not a requirement for the existence of the employee's ongoing condition.

Kness v. Kwik Trip, File No. WC17-6048, Served and Filed August 11, 2017. The employee sustained a low back injury at work. She began treating with Dr. Sinicropi, who ultimately recommended surgery. The employer and insurer obtained an independent medical examination with Dr. Deal, who opined that the employee's injury resolved within six weeks post-injury. Dr. Sinicropi authored a narrative report in response to Dr. Deal's report. Based on Dr. Deal's IME report, as well as the fact that the employee refused a job offer, the employer and insurer filed a NOID to discontinue temporary total disability benefits. Compensation Judge Behounek allowed the discontinuance, relying on Dr. Deal's opinion that the employee's injury had resolved. The employee appealed to the WCCA. The employee mistakenly contended that the compensation judge made a specific finding that Dr. Sinicropi's opinion lacked foundation. The employee argued that, since Dr. Sinicropi had reviewed Dr. Deal's comprehensive report, Dr. Sinicropi had the same foundation upon which to base his opinion as did Dr. Deal. The WCCA (Sundquist, Milun, Hall) pointed out that the compensation judge did not make a finding on foundation, and instead found that the preponderance of the evidence supported the discontinuance of benefits. The WCCA, therefore, affirmed the compensation judge's finding that the employee's injury was resolved, finding that substantial evidence, including the adequately founded medical opinion of the independent medical examiner, supported the compensation judge's decision.

Magnuson v. Choices for Children, Inc., File No. WC17-6041, Served and Filed August 2, 2017. The employee contended that Compensation Judge Tate erred by relying on the IME report of the employer and insurer because that opinion was based on facts contradicted by the employee's medical record. The WCCA (Hall, Milun, Stofferahn) disagreed and affirmed the decision of the

compensation judge that the TTD benefits should not be reinstated and that the rehabilitation plan be terminated. The WCCA reasoned that all of the evidence relied upon by the compensation judge required the assessment of conflicting medical evidence, and it upheld her assessment, per the *Hengemuhle* standard.

Trotter v. Metro Transit, File No. WC17-6043, Served and Filed July 31, 2017. The WCCA (Sundquist, Milun, Stofferahn) affirmed Compensation Judge Tate's finding that substantial evidence, including medical records, an expert medical opinion, and video supported the conclusion that the employee did not sustain a specific or *Gillette* work-related injury.

Nelson v. State of Minn./Dep't of Human Servs., File No. WC17-6033, Served and Filed July 27, 2017. The employee appealed from Compensation Judge Marshall's determination that the employee did not suffer from PTSD as a result of his work injury, which resulted from an assault. The compensation judge chose between two conflicting medical opinions and sided with the medical expert of the self-insured employer that the employee did not have PTSD. In line with the *Hengemuhle* standard, the WCCA (Milun, Stofferahn, Hall) upheld the compensation judge, determining that his findings were supported by substantial evidence.

Little v. Menards, Inc., File No. WC17-6036, Served and Filed July 27, 2017. The WCCA affirmed the compensation judge's finding that the employee suffered a consequential left shoulder injury that arose out of his back injury (due to a fall attributed to radicular symptoms), despite the fact that the employee had prior left shoulder surgery that allegedly resolved prior to the work injury.

Akakpo v. Children's Health Care, File No. WC16-5993, Served and Filed June 21, 2017. The WCCA (Sundquist, Milun, Hall) affirmed Compensation Judge Behounek's findings that the employee's 2015 work injury resolved without need for ongoing restrictions and that the employee did not suffer a 2016 work injury. The WCCA found there was substantial evidence, including an expert medical opinion, to support the compensation judge's decision.

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Interveners and Jurisdiction categories.) There was no question in this case that the employee was exposed to silica as a result of his job duties. The issue was whether the exposure to silica caused the employee's kidney failure. Compensation Judge Bouman relied on the employee's expert medical opinion to find that the employee's kidney failure was caused by his exposure to silica and therefore work-related, and the WCCA (Milun, Stofferahn, Sundquist) affirmed, finding that substantial evidence supported that position.

Cochran v. Target Stores, File No. WC16-6013, Served and Filed June 5, 2017. The employee appealed from Compensation Judge Wolkoff's denial of his claim for benefits upon determining that the employee's work injury was temporary and had resolved. The WCCA (Hall, Stofferahn, Sundquist) essentially made a *Hengemuhle* ruling, concluding that the compensation judge found the medical expert for the employer and insurer to be credible as to the question of whether the employee had recovered from his work injury, and detailed his decision in that regard.

COMMON ENTERPRISE

Kelly for Washburn v. Kraemer Construction, Inc., 896 N.W.2d 504 (Minn. 2017). Appellant Jessica Kelly, trustee for next-of-kin of Richard Washburn, sued respondent Kraemer Construction, Inc. in district court, alleging that Kraemer's negligence was the cause of Washburn's death by electrocution at a construction site. Washburn worked for Ulland Brother's, Inc., a general contractor. Ulland subcontracted for Kraemer to provide crane work for the repair of two bridges. The case centers on the placement of two concrete culvers at one of the bridges. For the work, Ulland employees worked on the rigging and Kraemer employee's worked with a crane. Kraemer moved for summary judgment in district court, arguing that it was engaged in a common enterprise with Ulland, and therefore the election of remedies provision in the Minnesota Workers' Compensation Act required dismissal of Kelly's lawsuit as workers' compensation benefits had already been received. The district court denied summary judgement. The Minnesota Court of Appeals reversed and remanded for entry of summary judgment in favor of Kraemer. Kelly appealed to the Minnesota Supreme Court. In a 3-2 decision, with Justice Chutich writing for the majority, the Supreme Court affirmed, holding that Kraemer was in a common enterprise with Ulland as a matter of law requiring dismissal of Kelly's lawsuit. Under Minn. Stat. § 176.061, subds. 1, 4, when a worker is injured "under circumstances which create a legal liability for damages on the part of a party other than the employer . . . at the time of the injury," and the third party has workers' compensation insurance and was engaged in a "common enterprise" with the employer, the party seeking recovery "may proceed wither at law against [the third] party to recover damages or against the employer for benefits, but not against both." There is a three-part test to determine whether the parties were engaged a common enterprise. These factors include: "1) The employers must be engaged in the same project; 2) The employees must be *working together* (common activity); and 3) in such fashion that they are subject to the same or similar hazards." *McCourtie v. United States Steel Corp*, 253 Minn. 501, 93 N.W.2d 552, 556 (1958). The primary issues on appeal were whether there is a genuine issue of material fact regarding whether the employees were engaged in a common activity and subject to the same or similar hazards. Finding that neither crew could have accomplished the day's goal of setting the culvert sections without contemporaneous assistance of the other crew, the Court held that, as a matter of law, the Kraemer crew and the Ulland crew were working together in a common activity. The Court pointed out that the Kraemer crew could not have moved the culvert sections without the Ulland crew positioning, attaching, or maneuvering them, and the Ulland crew could not have placed the culvert sections without the Kraemer crew directing and operating the crane. The Court also found that, as a matter of law, looking at the circumstances surrounding the work the Kraemer crew was subject to the same or similar hazards as the Ulland crew because members of both crews could have been injured by movement of the crane load, failure of the crane, collision with a bulldozer on site, or slipping and falling in the dewatered streambed. Therefore, the Court found that because all three factors were met, the parties were engaged in a common enterprise and the election of remedies applied.

Justice McKeig wrote the dissenting opinion finding that the majority misread the common enterprise jurisprudence, foreclosing a remedy for victims of work-related accidents. Specifically, Justice McKeig found that the majority misapplied the precedent on the issue of whether the workers were engaged in a common activity. In determining whether workers were engaged in a common activity, Justice McKeig points out that they have distinguished between work that is oriented toward a common goal and work that is truly a common activity. Justice

McKeig found that the Kraemer crew executed its duties independent of the Ulland crew, neither required nor requested the assistance of any Ulland employee to complete its function at the site, and that the two crews coordinated their work but did not collaborate. Because the majority's conclusion that the Ulland and Kraemer crews work was independent improperly weakens the "common activity" prong, Justice McKeig, joined by Justice Lillehaug, dissented.

IME

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the Maximum Medical Improvement, Medical Issue, and Rehabilitation categories.) The employee refused to allow the independent medical examiner to touch her arm and hand during and IME for a right upper extremity injury. Thus, the WCCA (Sundquist, Stofferahn, Hall) determined that there was substantial evidence to support Compensation Judge Daly's finding that the employee refused a reasonable request for examination and TTD was suspended until the employee complied with the examination, per Minn. Stat. § 176.155, subd. 3.

INTERVENORS

Hemphill v. Soude Enterprises, File No. WC17-6046, Served and Filed August 1, 2017. The employee sustained an admitted injury, but the nature and extent of the injury was disputed and litigated in 2013. In 2013, the judge issued a decision finding that the employee sustained an avulsion fracture of the left thumb, but denied her claimed injuries to her neck, back and arm. In 2014, the employee filed another Claim Petition and her attorney put a number of providers on notice of their possible right to intervene. The 2014 Claim Petition was stricken from the active trial calendar. The employee filed a request for formal hearing after a medical conference and her QRC filed a rehabilitation request, both of which were consolidated with the employee's Claim Petition. The WCCA opinion noted that it was not clear what entities may have filed motions to intervene. No interveners appeared at the hearing. At the end of the hearing the attorney for the employer and insurer mentioned a letter from Mayo Clinic withdrawing its intervention claim. Compensation Judge Cannon awarded part of the employee's wage loss claim, denied the rehabilitation request, and denied intervention claims because none of the interveners appeared in support of their claims. After the hearing the attorney for the Teamsters Fund wrote a letter to the compensation judge asking for reconsideration because their motion to intervene complied with Minn. Stat. § 176.361 and the Teamsters Fund was not ordered to appear at the hearing. The compensation judge issued an Amended Findings and Order ordering the self-insured employer to pay the intervention claims related to the employee's left thumb injury and avulsion fracture but did not specify the intervenors. The self-insured employer appealed and the WCCA (Stofferahn, Milun, Sundquist) vacated and reversed. The WCCA held that employee's attorneys, attorneys for employers and insurers and compensation judges should ensure that all parties rights, including the rights of interveners, are addressed at the hearing. The matter was remanded to the compensation judge to determine whether intervention interests existed as a result of the work injury.

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Causal Connection and Jurisdiction categories.) The

employee received medical treatment that was paid for by Medicare. A medical provider then intervened in the workers' compensation action for payment of a *Spaeth* balance. The employer and TPA argued that because the medical provider/intervener accepted payment from Medicare, the claims were deemed to have been paid in full and the intervener could not make a claim for additional payments. Compensation Judge Bouman found that she did not have the subject matter jurisdiction to make a decision on this issue and apply federal Medicaid and Medicare law, and the WCCA (Milun, Stofferahn, Sundquist) agreed. The intervener then argued that its acceptance of Medicare or Medicaid payments does not relieve the employer and TPA of their obligation to pay the *Spaeth* balance. The compensation judge ordered the employer and TPA to pay the *Spaeth* balance, and the WCCA affirmed that order. The WCCA reasoned that workers' compensation is primary and, if found liable, Medicare and Medicaid would step out of the process and let the workers' compensation insurer pay. Thus, even when there have been Medicare or Medicaid payments, the employer must still pay reasonable and necessary medical costs for an injured employee. Note: this case has been appealed to the Minnesota Supreme Court.

JURISDICTION

Ansello v. Wis. Cent., Ltd., Case No. A17-0340 (Minn. August 9, 2017). The employee sustained a low back injury in 2006 while performing longshoreman work for the employer. Benefits were paid by the employer and insurer under the Federal Longshore and Harbor Workers' Compensation Act (as opposed to the Minnesota Workers' Compensation Act). The employee aggravated his back at work in 2014 and subsequently scheduled low back fusion surgery. He filed a Medical Request under the Minnesota Workers' Compensation Act to seek payment for medical treatment. The compensation judge held that the Longshore Act provides a basis for fully compensating the employee for medical treatment, and the medical expenses claimed by the employee under the Minnesota Workers' Compensation Act would "supplant, rather than supplement," benefits available under the Longshore Act. Therefore, Compensation Judge Arnold denied the employee's claim based on a lack of jurisdiction. The judge also invoked the doctrine of *forum non conveniens*, concluding that a Minnesota workers' compensation court is not a convenient venue to litigate his current medical claims, since benefits were previously submitted under the Longshore Act. The employee appealed. The WCCA (Judges Milun, Hall and Cervantes) reversed and remanded. The WCCA found that concurrent state coverage under the workers' compensation system is available for employees who receive benefits under the Longshore Act. The WCCA noted that, to avoid double recovery, federal and state benefits must be credited against one another. On appeal to the Minnesota Supreme Court, the WCCA was affirmed. The Minnesota Supreme Court expounded on the *Sun Ship* case from the United States Supreme Court, which held that there is concurrent jurisdiction between the Longshore Act and state workers' compensation laws for injuries covered under more than one law. Regarding the concept of *forum non conveniens*, the WCCA cited federal case law that establishes a strong presumption in favor of the plaintiff's choice of forum. The WCCA determined that there is nothing inconvenient about the employee seeking benefits through the state system, given that he is a Minnesota resident, the injury occurred in Minnesota, and the employer's facility is located in Minnesota. The Minnesota Supreme Court upheld the WCCA on this point, as well, finding that the compensation judge abused his discretion. The Court pointed out that in every case in which the Minnesota Supreme Court has considered the doctrine of *forum non conveniens*, the

two fora were in different states or in different nations. In this case, the choice was between a Minnesota compensation judge in Duluth and a federal compensation judge traveling to hear the case in Duluth.

Gerardy v. Anagram Int'l, File No. WC16-6005, Served and Filed September 15, 2017 (For additional information on this case, please refer to the Temporary Total Disability category.) The WCCA (Milun, Stofferahn, Hall) affirmed the decision of Compensation Judge Behounek not to rule on the employer's alleged negligence, as liability for workers' compensation benefits is determined without regard to negligence. In determining that wage loss benefits were not owed, the Compensation Judge found that the employee was terminated for economic reasons versus his ability to work. The employee believed that he was wrongfully terminated and argued that the Compensation Judge did not have the subject matter jurisdiction to make this determination. However, the WCCA found that there was no error of low in determining the reason for the employee's termination for the purpose of determining eligibility for wage loss benefits.

Gist v. Atlas Staffing, Inc., File No. WC16-6019, Served and Filed June 21, 2017. (For additional information on this case, please refer to the Causal Connection and Interveners categories.) The WCCA (Milun, Stofferahn, Sundquist) affirmed Compensation Judge Behounek's determination that a compensation judge does not have jurisdiction to determine whether federal law precludes a provider who accepts payment from Medicare from seeking additional reimbursement from another source.

MAXIMUM MEDICAL IMPROVEMENT

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Medical Issue, and Rehabilitation categories.) The WCCA (Sundquist, Stofferahn, Hall) affirmed Compensation Judge Daly's determination that the employee had reached maximum medical improvement, based on substantial evidence.

MEDICAL ISSUE

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Maximum Medical Improvement, and Rehabilitation categories.) The WCCA (Sundquist, Stofferahn, Hall) affirmed Compensation Judge Daly's determination that work hardening therapy and a functional capacities evaluation were reasonable and necessary, based on substantial evidence.

Mattick v. Hy-Vee Foods Stores, Case No. A16-1802 (Minn. July 12, 2017). The employee initially fractured her right ankle in 2000, before starting to work for the employer, Hy-Vee. She had two surgeries following the 2000 fracture and was ultimately able to return to work for Hy-Vee, where she spent 40 to 45 hours per week on her feet. In 2004, the employee was diagnosed with post-traumatic arthritis after experiencing a month of pain in her ankle. From 2004 to 2014, she continued to experience minor pain and swelling, mostly related to changes in the weather. Then, on January 18, 2014, the employee twisted her right ankle while working at Hy-Vee. Following the injury, she was diagnosed with a sprain and was able to continue working full-

time. The employee's ankle improved somewhat but she continued to treat through March 2014, when she twisted her ankle again, outside of work. Ultimately, the employee's condition progressively worsened resulting in an ankle fusion. The rationale for the surgery was a diagnosis of advanced degenerative arthritis in her ankle. Hy-Vee and its TPA denied payment for the surgery. At the hearing, the employee submitted expert reports from her treating providers, Dr. Collier and Dr. Ryssman, as well as reports from her independent expert, Dr. Bert. Dr. Collier opined that although the employee's work injury was not the primary cause of her arthritis, it led to the flare up along with the ankle sprain that she received. On the Health Care Provider Report Dr. Collier checked "yes," that the employee's condition was caused, aggravated or accelerated by her work. Dr. Ryssman declined to provide an opinion on whether the employee's work injury aggravated her arthritis but opined that the surgery was reasonable and necessary. Dr. Bert opined that the employee's work injury permanently aggravated her arthritis and substantially contributed to her need for surgery. The employer and TPA submitted their own independent medical examination report from Dr. Fey, who opined that there was no objective basis for finding that the work injury accelerated or in any way modified her arthritic condition. Dr. Fey opined that the work-related sprain was mild and temporary. Compensation Judge Dallner denied the employee's claim for the ankle surgery finding Dr. Fey's report most persuasive. In a 2-1 decision, the WCCA (Judges Hall, Milun, and Sundquist) reversed, finding that Dr. Fey's report lacked adequate foundation and that the compensation judge's finding was not supported by the evidence. Hy-Vee sought review of the WCCA's decision at the Minnesota Supreme Court. With Justice McKeig writing, the Supreme Court reversed the WCCA's decision, reinstating the compensation judge's decision. On appeal to the Supreme Court, the employer argued that the WCCA exceeded the scope of their review, substituting their own findings for those of the compensation judge. The Supreme Court agreed, finding that the compensation judge did not abuse its discretion by relying on Dr. Fey's report and that the WCCA clearly and manifestly erred by overturning the compensation judge's finding that the work injury was not a substantial contributing cause of her ankle surgery which was performed to address a preexisting arthritic condition. The Court reiterated that, under *Nord*, a compensation judge's choice between conflicting expert opinions must be upheld unless the opinion relied on lacks adequate foundation. The Court also stressed that, per the *Hengemuhle* standard, the WCCA's job is to review a compensation judge's decision in order to determine if the findings and order are supported by substantial evidence, or evidence that a reasonable mind might accept as adequate, based on the entire record.

Anderson v. ShopNBC/Valuevision Media, Inc., File No. WC16-6023, Served and Filed August 31, 2017. The WCCA (Milun, Stofferahn, Hall) affirmed Compensation Judge Bouman's findings that the employee did not sustain either specific or *Gillette* injuries to her neck, back, and shoulders, and affirmed the compensation judge's determination that the employee failed to prove a consequential chronic pain syndrome/depression injury.

Hovde v. Vills. of N. Branch, File No. WC17-6040, Served and Filed August 8, 2017. The WCCA (Stofferahn, Milun, Hall) affirmed Compensation Judge Cannon's finding that the employee's work related injury had resolved based on the IME doctor's medical opinions.

Oleson v. Indep. Sch. Dist. #272 Eden Prairie Sch., File No. WC17-6034, Served and Filed July 7, 2017. (Please also refer to the Apportionment category.) The WCCA (Sundquist, Milun, Stofferahn) affirmed Compensation Judge Grove's decision that Dr. Wicklund's IME report was

well-founded and could be relied upon in determining causation and apportionment between two dates of injury, even though some of the medical treatment rendered was after the IME report.

PROCEDURAL ISSUES

Carda v. State of Minn./Dep't of Human Servs., File No. WC17-6030, Served and Filed July 11, 2017. Compensation Judge Tejeda expressly accepted the expert medical opinion of the self-insured employer that the employee was able to work full-time without restrictions, and this was sufficient grounds to discontinue temporary total disability compensation. The employee had a visit with her treating doctor one week before the hearing, and the treating doctor opined that the employee should remain off-work, but the medical record was not produced at the hearing. No party requested that the compensation judge reopen the record for the receipt of this report. However, the employee asked the WCCA to vacate the compensation judge's findings and order, arguing that the judge committed an error of law. The WCCA (Hall, Milun, Sundquist) denied this request to vacate, writing, "While we have previously held that a compensation judge has the authority to hold the record open for post-hearing medical evidence, we cannot conclude that a compensation judge is compelled to do so on his own motion where no party has so requested. Accordingly, we decline to hold that the judge committed an error of law in this case." The employee went on to argue that even in the absence of an error of law, the interests of justice require that the judge's findings and order be vacated. The employee cited a Minnesota Supreme Court case, *Horan*, where that court considered post-hearing affidavit "in the interests of justice." The WCCA noted that it is a limited, administrative body, whereas the Minnesota Supreme Court has equitable powers that are inherent to the judiciary. Therefore, the WCCA did not deem itself to have the authority to vacate the compensation judge's findings and order in the absence of a factual or legal error.

REHABILITATION

Halvorson v. B&F Fastener Supply, Case No. A16-0920 (Minn. September 20, 2017). The employee injured multiple body parts while working for the employer and was unable to return to work with the employer. She underwent two surgeries. Eventually, she began working for a new employer within similar restrictions as prior to her latest surgery. The employer and insurer filed a request to terminate the employee's rehabilitation benefits because she was no longer a "qualified employee" under Minn. Rule 5220.0100, subp. 22, as her job at McDonald's was suitable gainful employment, and there was "good cause" to terminate her rehabilitation under Minn. Rule 5220.0510, subp. 5, because she would not likely benefit from further rehabilitation services. At the hearing, however, the only issues the parties argued were: (1) whether the employee was still a qualified employee; and (2) whether she had returned to suitable gainful employment. Compensation Judge Behr held that the employee's new job was suitable gainful employment and that she was not a qualified employee under Minn. Rule 5220.0100, subp. 22, and he allowed the rehabilitation plan to be terminated. The employee appealed arguing that the compensation judge committed an error of law by finding the employee's work was suitable gainful employment and that he improperly expanded the issues at hearing to include whether there was good cause to terminate her rehabilitation services. The WCCA (Judges Sundquist, Milun and Stofferahn) reversed, holding that it was necessary to evaluate the plain language of the statute and rules for vocational rehabilitation services, that the compensation judge had

improperly expanded the issues at hearing, and that the compensation judge also applied an incorrect standard to terminate rehabilitation benefits. The Minnesota Supreme Court, in an opinion authored by Justice Stras, agreed with the WCCA. Under Minn. Rule 5220.0100, subp. 22, the definition of "qualified employee" does not provide a specific provision to terminate rehabilitation benefits. In addition, Minn. Stat. §176.102, subd. 6(a), which addresses an employee's initial eligibility for rehabilitation services, does not provide an independent mechanism for an employer to terminate rehabilitation benefits. Instead, to terminate rehabilitation benefits, the standards are found under Minn. Rule 5220.0510, subp. 5 (stating that to terminate or suspend rehabilitation benefits, the employer and insurer can bring a rehabilitation request for good cause under one of four criteria), and Minn. Stat. §176.102, subd. 8 (stating that to terminate rehabilitation, one of five different criteria can be met to meet "good cause"), but none of the factors laid out in this rule or statute were raised at the hearing. Because the proper standards for terminating rehabilitation benefits were not before the compensation judge, the Minnesota Supreme Court upheld the WCCA's reversal of the compensation judge's decision to terminate rehabilitation benefits.

George v. Cub Foods, File No. WC17-6039, Served and Filed September 7, 2017. (For additional information on this case, please refer to the IME, Maximum Medical Improvement, and Medical Issue categories.) The WCCA (Sundquist, Stofferahn, Hall) affirmed Compensation Judge Daly's determination that the employee's restrictions were causally related to the work injury, and therefore, a rehabilitation consultation was appropriate.

SETTLEMENT

Allan v. Kolar Buick GMC, File No. WC17-6028, Served and Filed June 22, 2017. The WCCA (Hall, Milun, Stofferahn) affirmed Compensation Judge Arnold's interpretation of the stipulation for settlement concluding that the claim against a specific employer was closed out pursuant to the analysis under *Ryan*. The WCCA held that the fact that the employee did not identify a separate date of injury until well after the settlement did not alter the analysis because the condition at issue was known to the parties at the time of the settlement.

Dahl v. AG Processing, Inc., File No. WC17-6032, Served and Filed June 21, 2017. In following the *Ryan* case, the WCCA (Sundquist, Stofferahn, Hall) held that there was substantial evidence to support Compensation Judge Baumgarth's determination that the prior stipulation closed out treatment related to the cervical spine. The compensation judge found the cervical spine injury was contemplated by the parties at the time of the prior stipulation.

TEMPORARY PARTIAL DISABILITY

Petzel v. DS Agri Constr., File No. WC16-6020, Served and Filed May 16, 2017. The WCCA (Sundquist, Milun, Stofferahn) affirmed Compensation Judge Behounek's decision that the employee's work was sporadic and insubstantial and that the employee was not gainfully employed so he was not entitled to TPD benefits.

TEMPORARY TOTAL DISABILITY

Gerardy v. Anagram Int'l, File No. WC16-6005, Served and Filed September 15, 2017 (For additional information on this case, please refer to the Jurisdiction category.) The WCCA (Milun, Stofferahn, Hall) found that there was substantial evidence in the record that supported Compensation Judge Behounek's determination that the employee was not entitled to temporary total disability benefits because the work injury resolved prior to the time period of the claimed benefits.

VACATING AWARDS

Kellogg v. Phoenix Alternatives, Inc., File No. WC17-6035 and File No. WC17-6047, Served and Filed September 14, 2017. The employee claimed that he settled his case under the assumption that he would receive SSDI benefits, but he did not. He sought to vacate the stipulation based on mutual mistake of fact. The WCCA (Hall, Milun, Stofferahn) denied the petition to vacate on this basis, given that there was no mistake of fact at the time of the stipulation. Instead, the employee was making a false assumption. A separate argument was made by the employee to vacate the stipulation based on a substantial change in medical condition. The employee's original injury was a low back injury, and he asked the WCCA to vacate his stipulation based the assertion that he now had an SI joint condition. The WCCA refused to vacate the stipulation, determining that the SI joint condition was part and parcel of the low back, and therefore the SI joint condition was anticipated at the time of the settlement.

Hartzell v. State of Minn., Dep't of Trial Courts, File No. WC17-6037, Served and Filed August 4, 2017. The WCCA (Milun, Stofferahn, Hall) found that the employee failed to demonstrate a causal relationship between her work injury and any current disability, or a substantial change in her medical condition. Therefore, the WCCA denied the employee's petition to vacate award on stipulation.

Logan v. New Horizon Acad., File No. WC17-6031, Served and Filed June 30, 2017. The WCCA (Stofferahn, Milun, Hall) reversed Compensation Judge Tejeda's vacation of a portion of the stipulation addressing *Roraff* fees which was, allegedly, inadvertently included in the stipulation. The WCCA found that the compensation judge had no authority to issue an order vacating a portion of the stipulation.

Hudson v. Trillium Staffing, File No. A16-2017 (Minn. June 7, 2017). The employee was injured at work and the parties settled his claims. The employee's treatment was extensive prior to the settlement, but none of the doctors gave him a permanent partial disability rating. About one year later, the employee filed a petition to vacate the settlement, based on a new medical opinion from Dr. Ghelfi that he had a 75 percent permanent partial disability rating and was unable to work because of his injuries. The WCCA (Sundquist, Stofferahn, Cervantes) relied on Dr. Ghelfi's opinion and determined that the employee's condition had substantially changed and, therefore, vacated the award. The employer and insurer appealed to the Minnesota Supreme Court, arguing that the medical evidence from Dr. Ghelfi was insufficient to vacate the award. The Minnesota Supreme Court reversed the WCCA. In a decision written by Justice Stras, the Supreme Court held that the WCCA did not scrutinize Dr. Ghelfi's factual foundation enough and that in order

for an expert's opinion to be admissible the expert must have adequate factual foundation. Dr. Ghelfi's opinion was flawed because she did not specify what facts led to her giving the employee a 75% PPD rating for his traumatic brain injury, and she did not explain how she calculated the rating. The Court also concluded that the facts as submitted were not sufficient to qualify for a 75% PPD rating under Minn. Rule 5223.0360, Subp. 7(D)(4) in that there was nothing to show that the employee needed to be sheltered and be supervised on all activities. In fact, the evidence showed that he was substantially independent.

Holtslander v. Granite City Roofing, Inc., File No. WC16-6009, Served and Filed May 24, 2017. The employee sustained an admitted injury to numerous body parts, including his low back, on August 11, 1997. He sustained subsequent admitted injuries to numerous body parts, including his low back, on January 7, 1998, with the same employer and insurer. A few years later, he again sustained various admitted injuries to various body parts, including his low back, while working for the same employer, who was then insured by a different insurer. The employee filed a claim petition for medical benefits and attorney's fees and one of the insurers filed a petition for contribution. The parties eventually settled out his claims, except for limited medical benefits to his low back, right shoulder, right elbow and cervical spine. At the time of this settlement, the employee was not working and the parties agreed he was not capable of returning to his pre-injury job as a roofer. After the settlement, the employee underwent three fusion surgeries, had hardware removed once, received a spinal cord stimulator and it was also recommended he receive a replacement spinal cord stimulator. He filed a petition to vacate the award on stipulation. The employee argued at the time of the settlement he thought his condition was stable, that he would not require additional medical treatment, and that he would have fewer work restrictions and be able to obtain other employment. He argued that the stipulation should be vacated because of a mutual mistake of fact and because of a substantial change in his medical condition. The WCCA (Milun, Stofferahn, Hall) determined that there was no mutual mistake of fact. The WCCA held that there was a substantial change in the employee's condition because he had undergone numerous surgeries since the settlement, he had applied for and began receiving social security disability benefits and thus was no longer able to work, he likely had additional permanent partial disability benefits, he had undergone extensive and costly treatment since the settlement, and the parties initial settlement did not address the potential that he would become permanently and totally disabled as a result of his work injuries in the future.

MINNESOTA EMPLOYERS WORKERS COMPENSATION ALLIANCE: QUARTERLY CASE LAW UPDATE

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MINNESOTA SUPREME COURT

Gianotti vs. vs. Independent School District 152, (Minn. 2/8/17)
Compensation Judge: Baumgarth

The Minnesota Supreme reversed the WCCA's decision to reverse a compensation judge's denial and instead award benefits in a head injury claim. The Court held the WCCA (1) erred when it ruled on an issue not raised on appeal; (2) erred when it reversed the compensation's judge's determination that there was adequate foundation for a psychologists opinion; and (3) erred when it substituted its view of the evidence for that adopted by the compensation judge.

The compensation judge relied heavily on the opinion of the employer's IME, Dr. Arbisi, and found the employee had not suffered a concussion and post-concussive syndrome. He denied her claims for treatment for emotional and/or psychological conditions and found the insurer could discontinue wage loss benefits. The WCCA reversed the compensation judge's findings reasoning: (1) Dr. Arbisi was not competent as an expert; (2) he lacked factual foundation for his opinion because he did not review a video of the injury; and (3) all other evidence indicated that the employee suffered from a post-concussive syndrome. The Minnesota Supreme Court reversed the WCCA holding the WCCA should not have ruled on Dr. Arbisi's competence to render an opinion regarding the employee's injures because the employee never raised that issue on appeal. Next, the court found the WCCA improperly reversed the compensation's judge's determination there was adequate foundation for the psychologist's opinion. The court stated that the law on whether an expert's opinion has the proper foundation is well settled: the fact on which an expert relies for an opinion must supported by evidence and the adequacy of foundation for an expert is a decision within the discretion of the trial judge, subject to review for abuse of discretion. The court quickly dispensed with the notion the video was determinative of an adequate foundation for a medical opinion. The court noted the WCCA did not explain why it credited the opinion of treating doctors who also did not view the video. The court found Judge Baumgarth had not abused his discretion in finding Dr. Arbisi's opinion had adequate factual foundation. Finally, the Court reiterated the compensation judge has the discretion as the trier of fact to choose between the competing and conflicting medical experts' reports and opinions. The court repeated its admonition that the WCCA cannot "substitute its view of the evidence for that adopted by the compensation judge if the compensation judge's findings are supported by evidence that a reasonable mind might accept as adequate."

What should we take away from this case? Gianotti breaks no new legal ground. It represents the Minnesota Supreme Court's latest reminder to the WCCA of its limited scope of review. Compensation judges are granted wide discretion in weighing the evidence, making factual determinations, determining witness credibility and choosing between expert opinions. On appeal, the WCCA's job is to determine whether the compensation judge's decisions on these

matters have substantial evidentiary support. If they do, the WCCA, even if it may have weighed the evidence differently and come to different conclusions, must affirm.

Gilbertson v. Williams Dingmann, (Minn. 5/3/2017)

The Minnesota Supreme Court affirmed the Minnesota Workers' Compensation Court of Appeals' (WCCA) decision reversing a discontinuance of TTD based on a refusal to accept a job offer from the date-of-injury employer. The court held that under Minnesota § 176.101, subd. 1 (i) (2016), an offer to return to work with the same employer is not "consistent with" a plan of rehabilitation which states the employee's vocational goal is to return to work with a different employer in the same industry. In reversing the compensation judge's discontinuance based on a refusal of a suitable job offer, the WCCA concluded the employer could not discontinue TTD benefits because its job offer was not "consistent with the employee's plan of rehabilitation" to return to work with another employer. The employer appealed the WCCA's decision to the Minnesota Supreme Court, arguing that consistency with the rehabilitation plan requires consideration of the totality of the circumstances not just the box checked on the R-2 Rehabilitation Plan form. The Minnesota Supreme Court affirmed the WCCA stating the plain language of Minn. Stat. § 176.101, subd. 1 (i), which provides TTD shall cease if the employee refuses "an offer of work that is consistent with a plan of rehabilitation", was clear and unambiguous. The Court reasoned that nothing in the rehabilitation plan to which all parties agreed required the employee to accept a job offer from the date-of-injury employer. The court stated it could not conclude the WCCA erred in holding the employer's job offer contradicted the employee's rehabilitation plan.

What should we take away from this case? R-2 Rehabilitation Plans must be read carefully to protect employer and insurer's future interests. The court emphasized that in reaching its decision, it was simply enforcing the terms to which the parties *agreed*. Here, the parties agreed that the employee would return to a job with a different employer, not the date-of-injury employer by simply checking a box on the basic R-2 form. The employer, the court reasoned, had an opportunity to object to the terms of the rehabilitation plan, but it did not and is therefore bound by the terms of the agreement.

Hudson v. Trillium Staffing, A16-2017 (Minn. 6/7/17)

The Minnesota Supreme Court reversed the WCCA's vacation of an Award on Stipulation based on an unanticipated substantial change in medical condition. The employee sustained an admitted injury to his neck, low back, and in the form of traumatic brain and psychological injuries on April 16, 2014. The parties entered into a full, final and complete settlement leaving future medical benefits open to the neck and low back in June 2015 (presumably medical benefits for the TBI and psychological injuries were closed). Prior to settlement the employee had been assigned disputed permanent partial disability ratings to the neck and low back, but the

psychological condition had not been rated due to the employee not completing treatment with his treating psychologist. Following settlement the employee began treatment with a new psychologist who assigned 75% PPD and opined the employee could not work. In July 2016, the employee filed a Petition to Vacate the Stipulation (*pro* se) based on this opinion, arguing his medical condition had substantially changed since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award. The WCCA *agreed* and allowed the vacation due to the "far greater" PPD rating that had been assigned. On appeal, the employer argued the medical evidence relied on by the WCCA was legally insufficient. The Supreme Court agreed and held the employee had not satisfied his burden of establishing a substantial change in medical condition. They felt the WCCA failed to sufficiently scrutinize the factual foundation of Dr. Ghelfi's opinion. Upon their review of the records, the Court felt Dr. Ghelfi's opinion was descriptively flawed because it never indicated what facts formed the basis for her opinion the TBI warranted a PPD rating of 75% and it did not explain how she calculated such a high rating. The factual support for the rating of the employee requiring "sheltering" and "some supervision of all activities" was also lacking as there was nothing in the record indicating this was needed. Rather, the record showed the employee had considerable independence in daily activities, lived on his own, cared for his son and managed his own finances and medications. This demonstrated the employee was capable of caring for himself without supervision of any activities, "let alone *all* activities." The Court therefore concluded Dr. Ghelfi's PPD rating was manifestly contrary to the facts in the record and the WCCA's reliance on it was an abuse of discretion in vacating the Stipulation.

What should we take away from this case? This case represents another case in the Supreme Court's trend of reversing the WCCA.

WORKERS' COMPENSATION COURT OF APPEALS

Torgusson v. Lutheran Soc. Servs, slip op (WCCA 2/27/2017)
Compensation Judge: Grant Hartman
WCCA Panel: Stofferahn, Milun, Sundquist

The employee appealed the determination her work injury was temporary and resolved. The employee had a history of low back pain since 2007 with extensive treatment from 2009-2013. The employee argued she had MRI findings of an injury but presented no opinion that the MRI findings were caused by the injury or that the findings were the cause of her symptoms. Dr. David Carlson (IME) opined the 2015 work injury was a temporary injury that lasted no more than 4-8 weeks. The Compensation Judge agreed with the IME and the WCCA affirmed.

Sirian v City of St. Paul, slip op (WCCA 2/27/17)
Compensation Judge: Ralph Hagen
WCCA Panel: Sundquist , Milun, Hall

The employee sustained a significant injury in 1993 and was deemed permanently and totally disabled in 2008 (by stipulation). Following a 2012 hearing, the compensation judge awarded home nursing services provided by a family member. In 2015 the spouse requested a 10% increase in the reimbursement received for home nursing services. The employee's expert concluded a 3.7% annual increase was a fair and conservative estimate of the rate paid to home care workers. The employer's expert (Nancy Mitchell) concluded the cost of care had increased from zero to 21%. The compensation judge adopted the 3.7% annual increase, applied it retroactively since the 2012 decision and to future services. The employer appealed and the WCCA affirmed the 3.7% rate, but vacated the award of prospective raises noting the annual raise did not take into consideration the type of services that might be provided in the future.

Fisher v. Jim Lupient Auto Mall, slip op (WCCA 3/1/17)
Compensation Judge: James Kohl
WCCA Panel: Hall, Milun, Sundquist

The employee appealed the denial of a three-year retraining plan; the WCCA reversed. The employee was a long-term employee, having worked for the employer for 28 years before a 2011 low back injury. At the time of his injury he worked as an automobile repair technician and earned $72,000 per year plus pension and benefits. Following a two level low back fusion and a FCE, the employee was unable to return to work for the employer but found a full-time sales and services position at a bicycle shop. Within six months the employee went from an hourly employee to a salaried assistant manager earning $35,000 per year. A retraining plan was proposed for the employee to complete his bachelor's degree at St. Thomas University at an estimated cost of $194,381-$207,246. The employer's vocational expert (David Berdahl)

concluded the retraining plan was not appropriate but after reviewing the Poole factors, the WCCA reversed the compensation judge and awarded the retraining plan. The WCCA noted that during the 29 months of job search the QRC made 1,464 cold calls, submitted 63 resumes for the employee, and provided 328 job leads and the employee made 115 phone calls, submitted 459 applications, made 13 in-person contacts, had 17 interviews, and none of this effort resulted in a job offer. Also at issue was whether less expensive programs should be considered, but the WCCA noted there was no obligation to award a "less expensive but qualitatively inferior plan." The employer argued a bachelor's degree was not a necessity, but the QRC suggested a bachelor's degree is the "new high school diploma" and many employers prefer candidates with bachelor's degrees. The QRC also suggested the employee's age (he would be 55 years old when he finished the program) would not be a deterrent to his ability to find employment but rather his stability, work history, and management experience would make him a good job applicant.

Leal v Knife River Corp., slip op (WCCA 3/3/17)
Compensation Judge: Sandra Grove
WCCA Panel: Hall, Milun, Stofferahn

Three medical intervenors failed to appear at the hearing and the compensation judge granted the employer's motion to dismiss the intervenors' claims. The employee's attorney then presented the bills as part of the employee's claim and the compensation judge awarded payment of the bills. The employer appealed and the WCCA reversed noting absent evidence the employee's attorney was retained to represent the intervenors the attorney could not present the intervenors' claims. The employer also appealed the award of temporary total disability benefits (TTD) from 11/2015 to 4/2016 arguing the employee failed to conduct a diligent job search. The WCCA affirmed the award of TTD noting the employee was on a seasonal lay-off, the employee received a letter from the employer about a raise that would be effective 1/2016, and the rehabilitation plan indicated the goal was for the employer to return to work for the employer. The WCCA noted the employee had a "reasonable expectation" of returning to work with the employer and that was all that was required to avoid the requirement of conducting a job search. Finally, the employer also appealed an award of temporary partial disability benefits (TPD) arguing the employee failed to show his reduction in earnings was causally related to his injury and that his wages fluctuated before the injury just as his earnings did after the injury. The compensation judge found the employee missed time from work for medical appointments and his restrictions and awarded TPD. The WCCA affirmed concluding the employer had not presented evidence to rebut the presumption that the employee's actual earnings were an accurate reflection of his reduced earning capacity.

Peterson v. Midwest Machine Tool Supply, Inc., slip op (WCCA 3/7/17)
Compensation Judge: James Kohl
WCCA Panel: Stofferahn, Milun, Sundquist

The employee appealed the denial of a Gillette low back injury from sitting at work all day long (7.5 hours/day). The employer's expert (Dr. Richard Strand) opined there was no evidence that sitting in a chair at work caused the employee's low back condition. On appeal the employee argued Dr. Strand's opinions lacked foundation because he had not been provided with a MRI that showed a mild disc bulge eccentric to the left at L5-S1. The WCCA noted the treating doctor concluded the MRI findings did not explain the employee's symptoms but "more importantly" the WCCA noted the employee did not present a medical opinion indicating the work injury was a substantial contributing cause of the employee's complaints. The WCCA affirmed the denial noting Dr. Strand had adequate foundation.

Gerhardson v. Indus, Inc., slip op (WCCA 3/15/17)
Compensation Judge: Rykken
WCCA Panel: Milun, Stofferahn, Hall

The WCCA upheld the denial of the employee's claim for permanent total disability benefits. The compensation judge relied on the independent vocational opinion of Kate Schrot from Stubbe & Associates who opined the employee retained the ability to obtain sustained gainful employment. This opinion was adopted over the opinion of QRC Laura Hokeness. The WCCA held there was substantial evidence to support the judge's decision and affirmed.

Koll v. Ind. School Dist. 345, slip op (WCCA 3/16/17)
Compensation Judge: Tate
WCCA Panel: Hall, Milun, Stofferahn

The WCCA affirmed the compensation judge's finding the employee sustained a traumatic brain injury, post-concussive syndrome, neck, mid back and low back injuries after a slip and fall. The compensation judge relied on the treating providers' Drs. Noran, Halsten, and Rutledge opinions on the extent of the employee's injuries over those of the independent medical examiners Drs. Strobl and Beniak. The WCCA reiterated they will not disturb a judge's choice between medical experts on appeal and conflicts in medical expert testimony are to be resolved by the compensation judge.

Duehn v. Connell Car Care, Inc., slip op (WCCA 3/20/17)
Compensation Judge: Rykken
WCCA Panel: Sundquist, Stofferahn, Hall

The WCCA affirmed the compensation judge's denial of a work injury on August 21, 2013, for failure to provide timely notice within 180-days. Where the employee testified he did not want to make a big deal of the injury and told providers he was not bringing a workers' compensation claim, the assertion the employer knew about his condition was not enough to establish notice was provided (the employer testified they were not aware of the alleged injury). This injury was therefore denied. **However**, when the employee texted his supervisor following a claimed November 18, 2014, injury indicating he could no longer do certain job duties due to the worsening of his condition following the performance of those duties, the employer had actual knowledge of the injury and therefore notice was properly established. The WCCA held the employer's knowledge of the employee's pre-existing condition and the statement he was doing too much work, would put a reasonable person on inquiry that an injury or disability is work-related, establishing actual notice. In yet another turn of events, the compensation judge then denied the claim for temporary total disability benefits once the employee was released following surgery finding he failed to conduct a diligent job search. Although the employee testified to his job search activities, the judge felt the lack of documentation of that search in the form of job logs or other documentation did not support his testimony. The WCCA affirmed, holding this is a question of fact and given the employee's minimal detail and failure to substantiate his testimony with other records, the compensation judge's decision was not unreasonable. Finally, the WCCA reversed the compensation judge's award of payment of medical expenses to a provider who was given notice of their right to intervene but filed their motion after the 60-day period outlined in Minn Stat. § 176.361, subd. 2(a). The WCCA strictly applied the 60-day deadline and if a motion is filed after it expires, it is not timely and must be denied. Interestingly, they reasserted the holding in Adams v. DSR Sales noting that if the intervenor had not intervened, the employee may bring a claim for the provider's expenses directly. Once the intervenor elects to intervene however, this principal no longer applies.

Cruz v. Express Employment Professionals, slip op (WCCA 3/24/17)
Compensation Judge: Jeffrey Jacobs
WCCA Panel: Sundquist, Milun, Stofferahn

The employee's appeal was denied and dismissed for failure to pay the $25 filing fee. The WCCA affirmed.

Mohammed v. Minn. Veterans Home, slip op (WCCA 4/4/17)
Compensation Judge: James Cannon
WCCA Panel: Milun, Stofferahn, Sundquist

The pro se employee appealed the compensation judge's finding his claim was barred by the statute of limitations. The insurer denied primary liability for a June 29, 2002, injury by letter dated January 14, 2004. The employee did not file a claim until 2010, outside the 6 year statute of limitations.

Noga v. Minn. Vikings Football Club, slip op (WCCA 4/20/17)
Compensation Judge: William Marshall
WCCA Panel: Milun, Stofferahn, Cervantes, Sundquist

Defensive lineman Alapati Noga played for the Minnesota Vikings from 1988 to 1992. He claimed his use of his shoulders and head in making tackles resulted in headaches and wooziness, which he reported to his trainer or team doctor during or after the game who gave him over the counter medication, a blanket and/or told him to rest. In 2007 he claimed memory loss, blackouts and vision loss from these head injuries resulting in concussions and dementia. In 2015 the employee filed a Claim Petition for Gillette injuries to the head. Judge Marshall found the employee established he sustained a Gillette injury culminating in December 1992 (the last day he worked for the Vikings), the employer had notice of the injury and the statute of limitations had been tolled due to the employer providing medical care for the complaints. On appeal, the WCCA remanded for further consideration and analysis of whether the evidence supported a finding the employee's work activities during his employment with the Vikings were, in and of themselves, a substantial contributing factor to his injury. The Court pointed out the employee went on to play for other football teams after leaving the Vikings and the medical expert relied upon by the compensation judge does not specifically discuss or address the specific time period the employee worked for the Vikings. Instead he discusses the "multitude" of concussions sustained while playing football, presumably over his entire career. The Court felt the employee must present evidence specifically indicating the work activities during the years spent with the Vikings were a contributing cause of his disability, but the evidence presented and analysis by Judge Marshall did not make this clear. The Court therefore remanded.

Bolstad v. Target Ctr., slip op (WCCA 5/5/2017)
Compensation Judge: William Marshall
WCCA Panel: Milun, Stofferahn, Sundquist

The employer and insurers appealed the compensation judge's apportionment determination, denial of a consequential Gillette injury, rejection of a superseding, intervening injury, and award of temporary partial disability benefits. The employee involved three admitted right shoulder

injuries and one admitted left shoulder injury. Four IME doctors (Drs. Salovich, D'Amato, Wyard, and Wicklund) and Dr. Wengler offered varying opinions regarding the nature and extent of the injuries and apportionment of liability. The compensation judge rejected the apportionment opinions and apportioned liability equally to all four injuries; the WCCA affirmed. The WCCA also affirmed the determination that all four injuries were responsible for temporary total disability benefits following two left shoulder surgeries, concluding the right shoulder injuries played a role in the employee's overall disability. The compensation judge rejected the 1990 insurer's argument it should not be held responsible for the temporary partial disability benefits because the employee's earnings following his 2009 and 2010 injuries exceeded the 1990 average weekly wage; the WCCA affirmed, citing Brink v. Metro. Waste Control Comm'n, in which the WCCA held an injury that contributes to an employee's wage loss should not escape liability for the injury's apportioned share of wage loss even though the employee's current wage was greater than the wage at the time of the injury.

Parker v. Foley Locker, slip op (WCCA 5/11/2017)
Compensation Judge: Stephen Daly
WCCA Panel: Milun, Stofferahn, Sundquist

The employer and insurer appealed the award of benefits in connection to an admitted 2015 low back injury. Dr. David Fey (IME) opined the work injury was temporary and resolved but Dr. Robert Wengler opined the injury was permanent. The compensation judge adopted Dr. Wengler's opinion and the WCCA deferred to the choice of expert. The WCCA also affirmed Dr. Wengler's Weber rating (13% permanent partial disability rating for a sacral fracture).

Younghans v. Johnson Bros. Liquor, et. al., slip op (WCCA 5/12/2017)
Compensation Judge: William Marshall
WCCA Panel: Stofferahn, Milun, Sundquist

The employee appealed the compensation judge's finding his 1988 injury was not a substantial contributing factor to the employee's neck condition. As a result of his 1988 injury the employee underwent a cervical fusion and was able to return to work, fishing, hunting, golfing, and playing hockey. The employee sustained a second work injury in 2014 after which a MRI revealed a stable fusion. Drs. Friedland, Monsein, and Zeller offered varying opinions, with Dr. Zeller being the only doctor to conclude the employee's 1998 was not a substantial contributing factor to the neck symptoms the employee experienced in 2015. The WCCA affirmed deferring to the compensation judge's choice of expert medical opinion.

Petzel v. DS Agri Constr., slip op (WCCA 5/16/2017)
Compensation Judge: Kathleen Behounek
WCCA Panel: Sundquist, Milun, Stofferahn

The employee appealed the denial of his claim for temporary partial disability benefits arguing the employer and insurer failed to rebut the employee's post-injury earning capacity. The WCCA affirmed the denial noting the employee attempted to put the "cart before the horse" and the employee failed to prove the $80/month the employee's father paid him to help out of the family farm was not sporadic and insubstantial income.

Robertson v. Manpower Temp. Services, slip op (WCCA 5/16/17)
Compensation Judge: Rolf Hagen
WCCA Panel: Sundquist, Milun, Stofferahn

The employee claimed a prior Stipulation for Settlement closing benefits on a full, final and complete basis for carpal tunnel syndrome, did not foreclose a claim for RSD because it was not specifically identified in the Stipulation. The compensation judge disagreed and dismissed the current Claim Petition based on the Minnesota Supreme Court's recent Ryan case, which holds conditions that are reasonably contemplated at the time of the settlement need not be specifically identified in a Stipulation to be considered closed out by the settlement. The WCCA agreed and affirmed.

Titchenal v. Prairie River Home Care, slip op (WCCA 5/18/17)
WCCA Panel: Hall, Milun, Sundquist

The WCCA granted the employee's petition to vacate a 2006 Stipulation for Settlement based on an unanticipated substantial change in medical condition. The WCCA agreed with the employee that two additional surgeries since the time of the settlement resulting in a 5-level cervical fusion in 2015, compared to a 1-level fusion at the time of settlement, was sufficient to be considered a change in diagnosis. The Court also felt she had experienced a change in her ability to work with new limitations restricting her to only part-time work, compared to only minimal full time work at the time of settlement.

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