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WORKERS' COMPENSATION CASE LAW UPDATE

The Minnesota Employers Workers' Compensation Alliance

Friday, September 14, 2018

By Nicholas J. Micheletti, Esq.
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CREDITS & OFFSETS

Bruton v. Smithfield Foods, Inc./Safety Nat'l Cas. Corps., admin'd by ESIS
W.C.C.A. May 21, 2018
Compensation Judge: Grant Hartman
Opinion Author: Sean Quinn

The employee sustained an injury on August 25, 2016 while working for Smithfield Foods. Primary liability was denied, and the employee subsequently filed a Claim Petition seeking temporary total disability benefits, medical expenses, and rehabilitation benefits. During the period in which his claim was denied, the employee sought, and ultimately received, short-term disability (STD) benefits through a self-funded plan administered by the employer.

On April 7, 2017, the employer and insurer filed an Amended NOPLD admitting primary liability for the employee's alleged injury, and also for his claim for TTD benefits beginning as of August 26, 2016. In making payment to the employee for TTD benefits owed, the employer and insurer took an offset for all STD benefits previously received by the employee during the time he was also claiming TTD benefits. The employer and insurer alleged that the employee received all payments to which he was due, considering all of the STD, TTD, sick and vacation payments, etc. that he was paid.

The employee objected to the offsets and a hearing was scheduled. The compensation judge found that the employer and insurer were entitled to an offset for the STD benefits paid to the employee, but they were not entitled to an asset for the vacation or sick leave pay. The employee then appealed the offset of STD benefits.

The WCCA found in favor of the employee and reversed the findings of the compensation judge. Despite the fact that the STD plan was self-funded and administered by the employer, the WCCA refused to treat them as the same entity. In fact, the WCCA indicated that without a formal intervention by the STD plan, there could be no reduction of workers' compensation benefits otherwise owed to the employee.

Although offsets have historically been taken by employers/insurers when a self-funded STD plan has made payment to the employee, this decision makes it necessary for employers to actually intervene for reimbursement of STD payments made to the employee.

SANCTIONS – MINN. STAT. § 176.081, SUBD. 12

Ebensteiner v. Klaphake Feed Mill/Westfield Group
W.C.C.A. June 29, 2018
Compensation Judge: Danny P. Kelly
Opinion Author: David Stofferahn

The employee sustained and admitted work-related injury involving his neck and low back on August 21, 2015, while employed at Klaphake Feed Mill. In February 2017, he filed a Rehabilitation Request seeking a change of QRC's. An administrative decision was issued denying said request, and the employee filed a Request Formal Hearing, appealing the preliminary decision. The employer and insurer also filed a Petition to Discontinue on the basis that the employee was refusing to cooperate with rehabilitation efforts. A hearing was scheduled for July 14, 2017. The employee failed to appear for that hearing, advising the court through his attorney that his "condition got to the point where he just physically didn't feel like he could continue the journey."

The employee later testified at his deposition that he had left his house between 7:00 AM and 8:00 AM on the morning of July 14, 2017 for the hearing, and had driven as far as St. Cloud when his back pain made it impossible for him to continue. He also claimed that he and his daughters stopped at the Burger Time restaurant for lunch before returning home.

However, the employer and insurer had scheduled surveillance of the employee for July 14, 2017 and July 15, 2017, and video taken throughout the day on July 14, 2017 showed the employee sitting on the front steps of his house throughout the morning. He did not leave his house or travel as far as St. Cloud, contradicting his deposition testimony.

The employer and insurer filed a motion for sanctions. Following a hearing on September 14, 2017, the compensation Judge determined that the employee acted in bad faith by failing to attend his hearing on July 14, 2017. He also found that the employee had misrepresented to the court, through his attorney, that he attempted to attend the hearing, and gave false testimony at his deposition when indicating under oath that he attempted to drive to the hearing on July 14, 2017. The compensation judge ultimately ordered sanctions totaling $2,344.30 against the employee, to be deducted from future benefits owed. The employee appealed this decision.

The WCCA, citing to *Lees v. G&S Roofing Inc.*, slip op. (W.C.C.A. June 9, 1999), found that substantial evidence supported the compensation judge's conclusion that sanctions were warranted.

VACATION OF AWARD – SUBSTANTIAL CHANGE IN CONDITION

Gelhar v. Universal Hosp. Servs./American Home Assurance Co, adm'rd by Chartis
W.C.C.A. August 7, 2018
Opinion Author: Gary Hall

The employee sustained a work injury on June 3, 2002. Primary liability was admitted and various benefits were paid to and on behalf of the employee. However, the employer and insurer obtained an IME from Dr. Joseph Tambornino, who opined that the employee's injury consisted of a resolved low back strain resulting in no ongoing restrictions or PPD.

An MRI scan taken subsequent to her alleged injury showed only bulging discs without herniation or nerve compression at L2 through L5.

On February 5, 2003, the employee was examined by Dr. Bergman on a surgical referral, and was noted at that time to not be a candidate for surgery.

Ultimately, the parties reached a full, final, and complete settlement, leaving future medical open subject to defenses, on or about April 1, 2004. The employee received $35,000.00 as part of the settlement. At the time the settlement was completed, the employee continued to have symptoms in her low back, as well as ongoing restrictions.

In 2006, the employee underwent an MRI which showed a mild disc herniation at L4 – L5, and she underwent a micro dissection surgery. Another surgery consisting of a revision decompression and stabilization surgery was performed on July 10, 2007. On February 29, 2008, the employee underwent a second revision surgery to remove hardware that had become painful. On September 4, 2008, the employee underwent a left SI joint fusion with installation of hardware. On April 10, 2009, the employee underwent an L3 – L4 fusion. On March 1, 2010, the employer and insurer stipulated payment for the above noted medical care, while reserving defenses.

Yet another surgery took place on September 24, 2010 and the nature of a fusion surgery for the L1 – L3 levels. Another surgery was performed on December 14, 2012 to remove the hardware from that surgery.

The employee then sought to vacate the prior settlement on the basis of a substantial change in her medical condition. The employer and insurer maintained primarily that the potential for worsening of the employee's low back condition was foreseeable, which was the basis for leaving future medical open the time of the prior settlement. As noted by the WCCA, additional surgeries typically given less weight where medical expenses were left open under the terms of the stipulation. *Burke v. F & M Asphalt*, 54 W.C.D. 363, 368-69 (W.C.C.A. 1996).

Nonetheless, the WCCA found in favor of the employee and decided that the employee had provided sufficient evidence to establish a significant change in her medical condition since 2004, allowing for vacation of the prior Award on Stipulation.

ARISING OUT OF & IN THE COURSE OF

Roller-Dick v. CentraCare Health Sys./SFM Mut. Cos.
MN Supreme Court: August 8, 2018
Opinion Author: Anne McKeig

In *Roller-Dick*, the employee was descending an internal stairway on the employer's premises at the end of the day when she slipped and fell to the bottom of the flight of stairs, fracturing her left ankle. At the trial level, the compensation judge denied the employee's claim, finding that she had failed to establish that the risk of injury on the employer's stairway was any greater than that which she would have faced in "everyday life."

On appeal, the WCCA rejected the compensation judge's conclusion, stating that the compensation judge had not used the correct test. Per the WCCA, a "flight of stairs alone increases the risk of injury." Therefore, once the employee established that she had fallen on a flight of stairs, no further proof of an increased risk was required.

Prior to this decision, as a result of *Dykhoff* and its progeny, stairway cases invariably focused upon the presence or absence of some hazardous condition (e.g., absence of handrail, steepness of stairs) or activity (e.g., hurrying) associated with a stairway which resulted in injury. The WCCA's *Roller-Dick* decision, and another WCCA decision, *Lein v. Eventide*, slip op. (W.C.C.A. December 29, 2017), attempted to change the analysis. Specifically, *Roller-Dick* and *Eventide* held that a stairway in and of itself constitutes a "hazard". Thus, according to the WCCA, when an employee is in the course of his/her employment and falls on a stairway, the injury is considered to have arisen out of the employment and the claim is compensable. The employer and insurer appealed the WCCA's decision.

In its recent decision, the Minnesota Supreme Court affirmed the WCCA. Significantly, however, although the Supreme Court found that the employee's injury was compensable, it specifically declined to make a ruling on whether a stairway in and of itself constitutes a "hazard." Footnote 6 of the Minnesota Supreme Court's decision reads as follows:

> We need not hold today, as the WCCA did, that stairs themselves are workplace hazards exposing employees to an increased risk of injury. Rather, we conclude that the now-undisputed factual circumstances surrounding Roller-Dick's injury – established in the record – amount to an increased risk as a matter of law. Whether stairs generally are hazardous is a matter for another case and another record.

The undisputed factual circumstances the Court refers to are that the employee was carrying a plant and not using the handrails of the stairs when she fell. Thus, the court opts to actually perform an increased risk analysis instead of simply finding that there was necessarily an increased risk because the injury occurred on stairs (which is what the WCCA would have preferred, and, as noted in subsequent cases, they continue to push for).

Thus, the Supreme Court has yet to make a determination regarding whether stairs generally are hazardous. Consequently, we retain legal grounds for denying a claimed stairway injury in the absence of some hazardous condition (e.g., absence of handrail, steepness of stairs) or activity (e.g., hurrying) associated with a stairway which resulted in injury.

Of note, *Lein v. Eventide* has been appealed and argued before the Minnesota Supreme Court, so the Court has another opportunity to decide whether stairs, in and of themselves, represent a hazard or create an increased risk.

TEMPORARY TOTAL DISABILITY BENEFITS – JOB SEARCH

Schmidt v. Crow wing and Minn. Counties Intergovernmental Trust
W.C.C.A., August 15, 2018
Compensation Judge: Grant Hartman
Opinion Author: Deborah Sundquist

The employee sustained and admitted injury to his cervical spine occurring on April 29, 2014. The employee was off work for approximately one month, and then returned on a restricted basis. He ultimately returned to work at his full wage on June 23, 2014. However, he continued to have symptoms and was provided with work restrictions.

As of September 24, 2015, the employer was no longer able to provide permanent employment to the employee, and his employment was terminated. Once terminated from his employment, the employee did not formally look for work. He did not complete any applications for employment, visit any workforce centers, or interview for any positions. No vocational rehabilitation for job search assistance was provided by the employer/insurer.

The employer and insurer obtained an IME from Dr. Albert Meric, who opined that the employee's ongoing complaints related solely to a pre-existing condition and not to his alleged work injury. Based on this report, further benefits were denied, and the employee filed a Claim Petition for ongoing indemnity, medical, and rehabilitation benefits.

At the subsequent hearing on November 21, 2017, the employer and insurer denied a causal connection between the claimed medical treatment and the alleged injury, and also denied that the employee was entitled to any TTD benefits as he had not performed a diligent job search. The compensation judge found that the employee's work injury remained a substantial perturbing factor to his neck condition such, but he denied payment of TTD benefits from September 24, 2015 to the present and continuing on the basis that the employee had failed to conduct a reasonable and diligent job search. The employee appealed.

The WCCA found that substantial evidence supported the compensation judge's finding that the employee did not perform a diligent job search after he was terminated from the employer. While he had significant restrictions, there was no medical or vocational opinion that he was totally disabled from employment (and he did not become totally disabled from employment until he went forward with a significant surgical procedure while already off of work.)

An employee bears the burden of proving a connection between his alleged disability from the work injury and his inability to work by showing that work within his restrictions is not available, and this is generally demonstrated by conducting a reasonable and diligent job search. *See Redgate v. Sroga's Standard Serv.*, 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988).

ARISING OUT OF & IN THE COURSE OF

Forrest v. Children's Health Care/Berkley Risk Adm'rs Co., LLC
W.C.C.A., August 16, 2018
Compensation Judge: William J. Marshall
Opinion Author: David Stofferan

In this case, the employee claimed an injury on September 20, 2016 that occurred while she was descending a set of stairs at work. The employee had reportedly been on the sixth floor and was using the stairs to go down to the fourth floor to obtain a medical device. Each flight of stairs had 10 or 12 steps, a landing, and then another flight of 10 or 12 steps. The steps were made of concrete and had treads. At the time of her injury, the employee stated that she was descending the stairs on the left side, likely holding the handrail. She cannot recall if she was carrying anything at the time of her injury. After reaching a landing, she pivoted to the left to descend the next flight of stairs, at which point she felt a sharp pain in her left knee. She was ultimately diagnosed with a patellar chondromalacia and meniscus tear.

The employer and insurer denied this injury pursuant to *Dykhoff v. Xcel Energy*, 840 N.W. 2d 821, 73 W.C.D. 865 (Minn. 2013), asserting that it did not arise out of her employment. The compensation judge found in favor of the employee, and the employer and insurer appealed that decision.

Notably, the WCCA acknowledged that the Minnesota Supreme Court made no specific finding as to whether, absent other circumstances, the use of stairs in the course of employment represents an increased risk of injury. However, they pointed to their previous decision in *Lein v. Eventide*, No. WC17-6101 (W.C.C.A. Dec. 29, 2017) in which it was held that, unlike the neutral risk of traversing a clean flat floor as considered in *Dykhoff*, use of stairs is not a neutral risk but instead represents an increased risk of injury.

In this case, the WCCA "doubles down" on their previous attempt to remove an employee's burden to prove an increased risk when an injury occurs on stairs, finding that the stairs themselves pose an inherent risk of injury.

The WCCA notes concern over the possibility of a comparative fault/negligence analysis in workers' compensation claims. Shouldn't there also be concern about imposing strict liability in such cases?

ARISING OUT OF & IN THE COURSE OF

James v. Duluth Clinic/Berkley Risk Adm'rs Co., LLC
W.C.C.A., August 21, 2018
Compensation Judge: John Baumgarth
Opinion Author: Sean Quinn

The employee appeals from the compensation judge's denial of his claim for benefits relative to a knee injury that occurred on June 6, 2016. On the date of his injury, the employee was working as a nurse anesthetist. Toward the end of a medical procedure being performed that day, the employee turned off in machine, observed the patient for proper breathing, and then rolled his chair backward to get closer to the computer so as to enter information into the patient's chart. To access the computer, Floyd stood and pivoted to his right. As he pivoted, he claimed that his right foot did not move, resulting in his right knee "popping." He was diagnosed thereafter with an ACL rupture that required medical care, including surgery. Primary liability for this injury was denied on the basis that there was no increased risk from the employee's work activities or environment, pursuant to *Dykhoff v. Xcel Energy*, 840 N.W. 2d 821, 73 W.C.D. 865 (Minn. 2013).

The compensation judge agreed with the position of the employer and insurer and specifically found that there was no clear evidence that a substance existed on the floor at the time of the employee's injury that contributed to the incident. Thus, he found that there was no increased risk resulting from the employee's employment, and he denied the employee's claim.

The WCCA relied on *Roller-Dick* and *Erven v. Magnetation, LLC*, 76 W.C.D. 433 (W.C.C.A. 2016) in finding that the compensation judge erred as a matter of law in finding "insufficient corroborative evidence demonstrating a specific factor was both present and operative at the time of the injury."

The WCCA concluded that it was erroneous for the compensation judge to look for any single factor to identify an increased risk. Rather, they found that the "totality of the circumstances" encountered by the employee at his employment increased his risk of injury and provided the necessary causal connection between his injury and employment.

INTEREST – MINN. STAT. § 176.1292, SUBD. 2

Oseland v. Crow Wing County/Auto-Owners Ins. Group
W.C.C.A., August 30, 2018
Compensation Judge: Kirsten Tate
Opinion Author: David Stofferan

The employee sustained a work-related injury on January 10, 1980. Liability was accepted by the insurer and benefits were paid. The employee also received retirement benefits from his employer through the Public Employees Retirement Association (PERA). The employee was determined to be permanently and totally disabled as of July 1, 1987. Thereafter, payment of permanent total disability benefits was initiated by the insurer. Pursuant to Minnesota rule 5222.0100, subp. 4, the insurer took an offset for the employee's PERA benefits. The employee died on February 22, 2013, and PTD benefits ceased as of that date.

Later, in *Ekdahl v. Indep. Sch. Dist. No. 213*, 851 N.W.2d 874, 74 W.C.D. 463 (Minn. 2014) and *Hartwig v. Traverse Care Ctr.*, 852 N.W.2d 251, 74 W.C.D. 795 (Minn. 2014), the Minnesota Supreme Court held that the offsets available under Minn. Stat. § 176.101, subd. 4 applied only to the receipt of Social Security benefits, and not for PERA benefits.

The Department of Labor and Industry advised insurers that, based upon these decisions, it expected insurers to audit each file individually and, more notably, to reimburse employees for any underpayment of PTD benefits that occurred on the basis of an offset for benefits other than Social Security benefits.

The employee's family was advised that there had been an underpayment of benefits to the employee during his lifetime. Although all parties agreed that there had been an underpayment, the amount of the underpayment to be reimbursed to the employee's estate was disputed. The employee's family filed a Claim Petition for the underpayment, as well as for interest and penalties. A compensation judge found that the employer and insurer had accurately calculated the amount of the underpayment, and stated that no additional payment was due. Interest was allowed on the underpayment, but the employee's claim for penalties was denied. The employee's family appealed, and the employer and insurer cross-appealed.

Citing appropriate case law, the court found three criteria for determining when interest is due. These criteria are as follows: 1) the employer and/or insurer must be aware of the claim for benefits; 2) there must be an obligation to pay benefits; and 3) the amount of the benefits owed must be "fixed and ascertainable."

Ultimately, the WCCA found that, pursuant to *Hop v. Northern States Power Co.*, 56 W.C.D. 73 (W.C.C.A. 1996), no accrual of interest in the present matter was appropriate. The insurer took an offset from PTD for benefits paid between 1987 in 2013, pursuant to a rule then in effect. Where that rule was not invalidated until 2014, there was no notice to the insurer of a fixed and ascertainable obligation to pay, and thus no interest accrued.