THE ALLIANCE MARCH 2024 MEETING

JLO CASE LAW UPDATE

(December 2023 to February 2024)

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***Trebil v. Legacy Assisted Living*, WCCA (12/19/23)**

On February 22, 2020, the employee was injured while taking a resident's garbage to a trash bin in the parking lot. She slipped on ice, landing on her outstretched hands. She sustained fracture injuries to both hands and wrists.

The employee underwent significant treatment, including multiple surgeries. One of the treating doctors, Dr. Jay, provided an opinion that the employee was permanently and totally disabled from a medical standpoint. The QRC testified that the employee was permanently disabled from a vocational standpoint.

The Workers' Compensation Court of Appeals held that there was substantial evidence in the record supporting the finding that the employee was permanently and totally disabled.

The WCCA did vacate the finding of the compensation judge regarding the onset date of PTD as of January 20, 2022. There was evidence that the employee worked from January 20, 2022 through June 20, 2022. They concluded that there was not sufficient evidence in the record regarding the employee's work and earnings from January 20, 2022 through June 20, 2022 to determine whether that work and earnings were "substantial" during that period of time. The WCCA then remanded the matter for further findings relative to the onset date of PTD.

***Chandler v. Driveline Specialists, Inc.*, WCCA (12/20/23)**

Issue 1

The Employer and Insurer appealed the compensation judge's finding that Mr. Chandler's admitted left upper extremity injury continued to contribute to his disability. This was purely a factual issue, which the WCCA affirmed under the *Hengemuhle* standard of review.

On November 2, 2021, while using a pry bar and sledgehammer to loosen a part in a motor vehicle suspension, Mr. Chandler's left wrist was struck by a spring-loaded control arm. He jerked back and struck his left elbow on the end of the vehicle's bumper. He has been off work ever since.

As of the hearing, he was restricted to no use of his left wrist and hand, and no lifting over ten pounds with his left arm. Mr. Chandler worked most of his adult life working in automobile repair, which the parties agreed he could not do with his restrictions.

At the request of the Employer and Insuer, Mr. Chandler saw Dr. David Carlson for an IME on February 3, 2022. Dr. Carlson reviewed the post injury medical records, and assessed lateral epicondyle of the left elbow and indicated there was no evidence of a pre-existing disability. He attributed his diagnosis to the work injury.

Initially, the rehabilitation plan called for a return to work with the date of injury employer after he was released to full duty. However, pursuant to the Employer and Insurer's request, the plan was amended to include job placement, which began in May 2022. However, shortly thereafter the treating physician recommended surgery.

On August 30, 2022, at the request of the Employer and Insurer, Mr. Chandler saw Dr. William Call for an IME. Dr. Call assessed a healed wrist fracture due to the work injury. He also assessed ulnar neuropathy and recommended work restrictions. However, Dr. Call attributed Mr. Chandler's neuropathy to a pre-existing condition, and not his work injury.

In attributing Mr. Chandler's current disability to his work injury, the compensation judge relied on the opinion of Dr. Carlson, and portions of the medical records. On appeal, the Employer and Insurer argued Dr. Carlson's opinion lacked foundation because he did not have the pre-existing medical records, which referenced left arm pain and Lyme's disease. The WCCA disagreed with the Employer and Insurer and noted Mr. Chandlers' pre-existing history was minimal, and that there were references to his prior history in the more recent medical records reviewed by Dr. Carlson.

Issue 2

The Employer and Insurer also appealed the award of TTD and rehabilitation benefits on the grounds they claimed Mr. Chandler failed to conduct a diligent job search, withdrew from the labor market, and failed to comply with the rehabilitation plan. However, the compensation judge did not rule on this issue based on jurisdictional grounds.

The matter came before the compensation judge on the Employee's Objection to Discontinuance and Request for Formal Hearing. The Employee filed both following an administrative conference in which rehabilitation and TTD benefits were discontinued based on Dr. Call's causation opinion. The parties did not agree to expand the issues for purposes of the formal hearing. Therefore, the compensation judge held he did not have jurisdiction to decide the additional issues, and the WCCA agreed.

***Melius v. Acme Tuckpointing & Restoration, Inc.*, WCCA (12/22/23)**

This matter came before the Workers' Compensation Court of Appeals on the employee's petition to vacate and set aside a 2015 stipulation and award.

The employee sustained significant work injuries on July 28, 2011, when he was struck on the head by a piece of sheetrock that had fallen from several stories above. He underwent extensive treatment for the head, neck and upper back, including a cervical discectomy at C6-7 and a fusion at C4-7.

In late 2015, the employee reached a settlement agreement with the self-insured employer. The employee's claims were resolved on a full, final and complete basis in exchange for $175,000.00, with future medical expenses left open.

The employee's symptoms worsened following the 2015 settlement. In 2022, he underwent another surgery consisting of a discectomy, decompression, and fusion at C3-4 and plate removal from the 2015 procedure at C4-7. The second surgery apparently did little to improve the employee's condition and the employee's condition deteriorated such that he was unable to ambulate independently and had begun using a motorized wheelchair.

The WCCA vacated the prior settlement. The WCCA concluded that the parties did not and could not reasonably have anticipated that the employee's condition would substantially worsen to such an extent back when the matter was settled in 2015. They noted that the employee had undergone a cervical fusion prior to the settlement, and that arguably, degeneration of the adjacent segment was or could reasonably have been anticipated. However, following the February 2022 surgery, the employee's condition had worsened to such an extent that he has been diagnosed with quadriplegia/quadriparesis and requires the use of a hospital bed and wheelchair.

***Ortega v. Installed Building Solutions*, WCCA (1/8/24)**

Mr. Ortega suffered an admitted slip and fall injury on March 1, 2021. He landed on his back, buttocks, and right arm. The Employer admitted a temporary injury to Mr. Ortega's right arm. Mr. Ortega also claimed a low back injury. The Employer denied the back claim based in part on the fact the medical records did not reference an injury to his low back until six weeks later, and Mr. Ortega had a substantial pre-existing history, including a lumbar discectomy in 2019.

Mr. Ortega appealed the compensation judge's finding that he did not sustain a work related injury to his **back**. This was purely a factual issue, which the WCCA affirmed under the ***Hengemuhle*** standard of review.

In addition, Mr. Ortega appealed the compensation judge's denial of TPD benefits arguing that the judge overlooked the restrictions he received for his **admitted right arm** injury. The WCCA also affirmed this factual finding. The WCCA noted that Mr. Ortega continued to work full time and he testified that any variations in his wages were due to fluctuations in the availability of work. The WCCA also noted that the compensation judge adopted the IME opinion that Mr. Ortega did not require restrictions for his right arm.

***Faughn v. N. Improvement Co.*, WCCA (1/10/24)**

The Workers' Compensation Court of Appeals affirmed the compensation judge's finding that the employee's out of state work injury fell under the jurisdiction of the Minnesota Workers' Compensation Act.

Generally, injuries which occur outside the State of Minnesota are not subject to the Minnesota Workers' Compensation Act. However, per Minn. Stat. 176.041, subd. 5a, if an employee is hired in Minnesota by a Minnesota employer and receives an injury while temporarily employed outside of the state, such injury is subject to the Minnesota Workers' Compensation Act. Under this statute, for a work injury to fall under the jurisdiction of the Minnesota Workers' Compensation Act the following three elements must be met:

1. The employee must be hired in Minnesota;
2. By a Minnesota employer; and,
3. Must be injured while temporarily employed outside of Minnesota.

The compensation judge and WCCA concluded that the employee was hired in Minnesota because the job offer was made to the employee by telephone and that the employee was in the state of Minnesota at the time of the job offer.

The compensation judge and WCCA concluded that although the employer's primary operations, and where the employee worked, were in North Dakota, the employer was a Minnesota employer. The employer leased two gravel pits in Minnesota, and that even though those pits had nothing to do with the work that was done by the employee, the fact that the employer had employees working at those pits and maintained Minnesota workers' compensation insurance coverage was deemed sufficient to conclude the employer was a Minnesota employer.

The compensation judge and WCCA concluded that the third element, that the employee was temporarily employed out of Minnesota, was also met. They concluded that the employee had no permanent worksite because he moved from project site to project site for the employer. They also concluded that the work was "temporary" because the employee was hired as a seasonal worker.

***Gurrola v. Metro. Council*, WCCA (1/16/24)**

The Self-Insured Employer appealed the compensation judge's finding that the Employee's January 13, 2021 right shoulder injury caused or substantially contributed to his rotator cuff tears and surgery. This was purely a factual issue, which the WCCA affirmed under the ***Hengemuhle*** standard of review.

The compensation judge adopted the causation opinion of the surgeon over the opinion of the IME. On appeal, the Employer argued the surgeon lacked foundation because he had not reviewed all the medical records and the history the Employee provided to the surgeon was inaccurate. The WCCA disagreed and concluded that sufficient evidence in the record supported the surgeon's opinion.

***Martinez-Cruz v. Metro Transit Police*, WCCA (1/26/24)**

Mr. Martinez-Cruz worked for the Metro Transit Police Department as a licensed police officer. While working at this job, he often encountered and at times pursued or physically subdued people engaging in threatening or assault behavior, sometimes experiencing potential danger to his own personal safety. He also occasionally encountered situations where people had sustained very serious injuries.

The employee's conduct off duty while drinking eventually resulted in two incidents that led to disciplinary action by the employer. Following imposition of a disciplinary suspension, the employee consulted with a therapist. He was subsequently diagnosed with PTSD.

The employee underwent an independent psychological evaluation on behalf of the employer. The evaluator concluded that he did not meet criteria for PTSD and had not sustained or developed PTSD caused by his work activities.

The compensation judge found that although the employee met the requirements for application of the PTSD presumption under Minn. Stat. § 176.011, Subd. 15(e), the employer had rebutted the presumption. The compensation judge also found that the employee's problems stemmed from an event that happened with internal affairs, and that the employee had failed to prove compensable mental impairment in the nature of PTSD.

The Workers' Compensation Court of Appeals affirmed the compensation judge's decision. They indicated there was substantial evidence and records supporting the conclusion that the employee's PTSD condition resulted from disciplinary action which rendered the employee's claim non-compensable, and that the compensation judge did not err in adopting the independent psychological evaluator's opinion that the employee did not have PTSD.

***Bauer v. Flint Hills Res.*, WCCA (1/26/24)**

Mr. Bauer appealed the compensation judge's holding that he had not rebutted the age 67 permanent total disability retirement presumption under Minn. Stat. § 176.101, subd. 4, which applies to injuries from October 1, 1995 to September 30, 2018. This was purely a factual issue, which the WCCA affirmed under the ***Hengemuhle*** standard of review.

Mr. Bauer injured his right knee on June 6, 2016, while working as an aircraft mechanic. At the time, he was 60 years old. He had been working for the Employer for 17 years. He underwent reconstructive surgery and received permanent restrictions, which the Employer could not accommodate. The parties stipulated that Mr. Bauer was permanently and totally disabled, subject to applicable adjustments and defenses.

On Mr. Bauer's 67th birthday, the Employer and Insurer discontinued PTD benefits based on the retirement presumption. Mr. Bauer's attorney then filed a Claim Petition asserting that he rebutted the presumption, and was entitled to benefits through age 72. In denying Mr. Bauer's claim, the compensation judge relied, in part, on his earlier testimony that he intended to retire at age 67, the fact that he and his wife had made financial arrangements to do so, and the fact he had not looked for work or pursued other ways to supplement his retirement income.

In addition to upholding the compensation judge's factual findings, the WCCA held that the 2018 legislative changes to Minn. Stat. § 176.101 were not retroactive. The changes removed the retirement presumption for PTD benefits and instead set an age cap. The WCCA held the cap only applied to injuries on or after October 1, 2018.

***Thompson v. Minnesota Trial Courts – Dist. 4*, WCCA (1/26/24)**

Mr. Thompson worked as a court operation's supervisor in the Hennepin County Government Center. On December 23, 2021 he and other court staff were instructed to work offsite for the rest of the day due to a verdict announcement on a high profile case. The next day the employee sustained injuries when he slipped and fell on a patch of ice on a sidewalk adjacent to the Hennepin County Government Center. At the time he was carrying a briefcase containing his laptop and other items he had brought home for work. However, he testified that carrying the briefcase did not contribute to his fall.

The compensation judge found that the employee's injury did not arise out of and in the course of his employment and denied the employee's claims.

On appeal, the Workers' Compensation Court of Appeals affirmed the Compensation Judge's finding that the employee's injury did not arise out of and in the course of his employment. They applied the rule that an injury sustained during an employee's commute to and from work is ordinarily not compensable.

The WCCA rejected the employee's argument that his injury fell under at least one of three exceptions:

1. Arising from exposure to a "special hazard"
2. Sustained while engaged in a "special errand"
3. Arising from exposure to a "street risk"

The "special hazard" exception did not apply because the hazard which occasioned the employee's injury, ice on a sidewalk, was not present due to any reason associated with his employment.

The "special errand" exception was not applicable because the act of returning work equipment on the day he fell was merely incidental to his regular commute to work.

The "street risk" exception did not apply because the employee was brought into the street by the act of commuting to work and was not called into the street by a duty of his employment.

***Cienfuegos v. Lucky's 13 Pub*, WCCA (2-1-24)**

The Employee appealed the compensation judge's holding that his work injury on December 30, 2014 was temporary and that he did not sustained a consequential mental health injury. This was purely a factual issue, which the WCCA affirmed under the ***Hengemuhle*** standard of review.

At the time of the injury, the Employee was standing on a grill to clean the grill hood. He fell backwards and landed on his buttocks and right side. He also hit his right elbow on the grill as he fell. In denying the Employee's claim, the compensation judge relied on an IME from Dr. Friedland in which Dr. Friedland concluded the Employee at most suffered a lumbar strain from which he fully recovered by January 13, 2014. Dr. Friedland noted that the Employee did not treat for eleven months following his initial ER visit. The Employee also continued to work full time without restrictions.

Almost four years after his injury, the Employee began receiving mental health care at the Associated Clinic of Psychology. He complained of depression beginning with his work injury. He claimed he was worried about being off work for surgery, sexual disfunction affecting his marriage, and gaining weight. He was diagnosed with major depressive disorder. He returned to the clinic for additional mental health services in January 2021. During these visits, he expressed suicidal thoughts and an increased concern that his marriage would end in divorce. On May 14, 2021, the treatment ended due to several no shows. The Employer obtained a report from Dr. Paul Arbisi denying causation of the Employee's mental health claim. The Employee did not produce an expert opinion to the contrary.

The WCCA noted that the IME report from Dr. Friedland and the IPE report from Dr. Irbisi provided sufficient factual support for the compensation judge's finding that the Employee's injury was limited to temporary injuries to his neck, low back, and right arm, which resolved within approximately two to four weeks, and that he did not sustain a consequential mental health injury.

***McKissic v. Bor-Son Construction, Inc.*, WCCA (2-14-24)**

The Employee's brother appealed from the compensation judge's decision that the Employer and Insurer's direct deposit of money into the Employee's bank account for nursing services provided by the brother was not an overpayment. He also appealed the compensation judge's finding that he was not prejudiced by the fact that he did not receive notice of his right to intervene. The WCCA reversed.

The Employee sustained multiple severe injuries following a fall from scaffolding on July 9, 1999, and was deemed permanently and totally disabled. He filed a claim petition seeking payment of nursing services provided by his parents. On October 4, 2004, the compensation judge awarded nursing services and ordered payment to be made directly to the Employee's parents.

In 2018, after the Employee's parents passed away, the employer and Insurer discontinued paying for nursing services. The Employee meanwhile moved in with his brother and his brother took over his care.

The Employee filed a medical request seeking payment of services provided by his brother. Following a formal hearing, the compensation judge awarded payment for the services, but did not indicate who should receive payment. The Employee's brother was not a party to the case, and was not served notice of the right to intervene.

The Employer and Insurer proceeded to make a direct deposit in the Employee's account in the amount of $79,067.77. Subsequently, counsel for the Employer and Insurer asked the Employee's attorney whether payment should be made to the Employee or his brother. Counsel said payment should go to the brother. However, the Employer and Insurer continued to make four additional monthly direct deposits into the Employee's account in the amount of $1,663.38 per month for nursing services. Thereafter, the payments went directly to the brother.

The Employee's brother filed a Motion for Determination that he had not received notice of his right to intervene, and the Employer and Insurer filed a Petition to Discontinuance seeking reimbursement for payment of nursing services on the grounds the Employee received them in bad faith. The Motion and Petition were consolidated.

The compensation judge held the Employee knew the payments were for nursing services and that he paid his brother $27,500. The judge did not rule on whether the receipt of the payments was not in good faith, but determined that no overpayment had occurred.

The compensation judge also held that the brother did not receive notice of the hearing on the Employee's Medical Request seeking payment for the services provided by his brother. However, the judge further held that the brother was not prejudiced by the lack of notice.

On appeal, the brother claimed the payments to the Employee should be deemed an overpayment that were received by the Employee in good faith, and therefore, subject to a credit from future benefits under Minn. Stat. § 176.179.

The WCCA noted that the compensation judge held the Employee knew the payments were for nursing services, but did not indicate whether they were received in bad faith. The WCCA held it

was unclear from the record when the Employee became aware, and therefore, the WCCA reversed the compensation judge finding that the payments were **not** an overpayment, which meant the Employer and Insurer had to pay the brother for past services he had not been paid for, and would have to rely on a future credit to recover the prior payments to the Employee.

In light of its holding on the first issue, the WCCA determined the second issue was moot, pertaining to whether the brother received proper notice of his right to intervene.