Minnesota Workers' Compensation 2010 Case Law Upate

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MINNESOTA WORKERS' COMPENSATION 2010 CASE LAW UPDATE

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CASE LAW UPDATE

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APPORTIONMENT/MINN. STAT. §176.101, SUBD. 4(A)

Rabideaux v. Minnesota Power/ALLETE, Inc., File No. WC09-4988, Served and Filed January 6, 2010. The employee claimed a 62.41% PPD rating relative to his work-related injuries on April 4, 2003. The employer argued that the 62.41% PPD rating was due, in large part, to the employee's pre-existing low back condition dating back to the mid-1980s. Specifically, the employer interpreted the words "pre-existing disability" in Minn. Stat. §176.101, subd. 4a, which allows apportionment of permanent partial disability "only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury", to refer to any disability that preexists the personal injury and is a substantial and contributing cause of permanent disability which arises subsequent to the personal injury. The employer contended that apportionment of a portion of the 62.41% permanency to the preexisting condition was appropriate, even though the pre-existing condition was idiopathic in nature. Compensation Judge Mesna rejected this argument and awarded the employee the full 62.41%. The WCCA (Johnson, Wilson, and Stofferahn) affirmed, finding that the employer was essentially seeking equitable apportionment, which does not apply to non-work-related pre-existing disabilities. Since the work injury was a substantial contributing cause for the 62.41% permanency rating, all of the permanency was attributable to the work injury.

ARISING OUT OF

Van Buren v. City of Willmar, File No. WC09-5012, Served and Filed April 30, 2010. The employee sustained an injury while on an unpaid lunch break when he was playing basketball in a garage on the premises of the employer. Several years prior to the incident, a supervisor at the employer installed a basketball hoop in the garage from materials he had at home. Since then, employees had commonly shot baskets or played informal basketball games during the unpaid lunch break. Compensation Judge Patterson found the injury compensable, citing Larson's Treatise and indicating that recreation or social activities are within the course of employment when they occur on the premises during a lunch or recreation period as a regular incident of employment. The WCCA (Judges Stofferahn, Johnson, and Rykken) reversed. The WCCA ruled that Larson's Treatise was inconsistent with Minnesota law. It specifically cited Minn. Stat. §176.021, Subd. 9, which states, in part, that "injuries incurred while participating in voluntary recreational programs sponsored by the employer, including health promotion programs, athletic events, parties, and picnics, do not arise out of and in the course of the employment even though the employer pays some or all of the cost of the program." The WCCA found that, although the statute does not specifically apply to the case, since the employer did not sponsor the basketball playing, the statute provided "guidance" in this matter. The WCCA reasoned that, if the employer had set up teams, provided jerseys, organized games and kept scores, the resulting recreational program would be exempted from coverage by the statute. "Since the legislature intended that active sponsorship of recreational activity does not impose liability, we do not think it could have intended that actions far short of sponsorship would impose liability." The WCCA rejected various arguments of the employee, such as the personal comfort doctrine and horseplay. With regard to the personal comfort doctrine, the WCCA ruled that playing basketball for ten to twenty minutes during lunch is not a slight or brief deviation from work duties,

required by the personal comfort doctrine, and was not an act which was "necessary to life, comfort or convenience while at work." It rejected the horseplay analogy since activity which is labeled as "horseplay" is activity which usually carries such obvious risk of injury that a prudent employer would be expected to prohibit the activity.

CAUSAL CONNECTION

Kristofferson v. Arctic Cat, Inc., File No. WC09-4969, Served and Filed March 8, 2010. (For additional information on this case, please refer to the Permanent Partial Disability category.) The employee died of a morphine overdose allegedly related to his work-related left inguinal hernia injury, requiring removal of a testicle. The employee had a long-standing history of abusing street drugs and had been incarcerated on a number of occasions for drug use and trafficking. He was found dead at home surrounded by drug paraphernalia used for smoking marijuana and other illegal substances. The police officers on the scene also located what appeared to be marijuana and possible meth and heroin. An autopsy was performed and the cause of death was determined to be morphine overdose, which could have resulted from morphine or heroin, which rapidly metabolizes into morphine. The autopsy report also documented several marks on the employee's arms, legs and abdomen, suggestive of injection sites or flea bites. Compensation Judge LeClair-Sommer found that the employee's death was not related to the work injury and denied the estate's claim for a $60,000 statutory death benefit. The WCCA (Judges Pederson, Stofferahn, and Rykken) affirmed.

EXCLUSIVE REMEDY

***Lundebrek v. S.J. Louis Construction, Inc.*, File No. AO9-1270, Filed April 20, 2010.** Appellant was an employee of Hard Drivers Corporation, a concrete block manufacturer. He was contacted by S.J. Louis Construction, Inc. (SJLC), to create a retaining wall for Salzl. He went to the job site to instruct the crew how to fit the concrete blocks together and to install the wall. During the operation, Salzl operated the skid loader and in the process the appellant's hand was injured when struck by the bottom of the skid loader. Appellant filed a claim for and received workers' compensation benefits from Hard Drivers and its insurer. He subsequently filed suit against SJLC for negligence on the part of Salzl. SJLC asserted his claim was barred by the exclusive provision of the Minnesota Workers' Compensation Act, as they were engaged in a common enterprise. The District Court judge granted SJLC's motion for summary judgment, not only on exclusive remedy, but on the loaned servant doctrine. The Court of Appeals (Judges Halbrooks, Schellhas, and Crippen) reversed. Citing the requirements of common enterprise, i.e., the employers must be engaged on the same project, must be working together on a common activity, and are subject to the same or similar hazards, the Court held that these elements were not met. Beyond delivery of the blocks and the brief installation instructions, Hard Drivers was not involved in the installation of the retaining wall. In terms of common activity elements, Hard Drivers and SJLC, in the Court's view, were performing entirely different types of work -appellant was providing instruction on setting the blocks together and SJLC was installing a retaining wall. As to the third element of being exposed to similar hazards, this element was met; however, for common enterprise to exist, all three elements must exist. As to the loaned servant argument, liability for an employee's negligent acts shift from the general employer to the borrowing employer. SJLC argued that Salzl was a loaned servant of Hard Drivers. The Court did not agree with the District Court and reversed and

balanced the two tests. First, whose business was being furthered and secondly, who had the right of control or direction. It was SJLC's business that was being furthered at the time of the installation of the retaining wall. Nothing about Hard Drivers' business was furthered by the proper installation of the blocks at SJLC's site. Secondly, while SJLC was correct that appellant was briefly instructing Salzl at the time of the accident, Salzl testified that he was in charge of the project. SJLC continued to control Salzl's actions at the time of the accident and therefore, the second element of the loaned servant doctrine test was not met.

FARMS

Gorres v. Duncan & R. Duncan Farms, File No. WC09-5011, Served and Filed April 26, 2010. Roger Duncan ran a farm and also ran a business known as Duncan Trailers ("the trailer operation"), located on the farm property. In 2006, Roger sold the farm to his son Brett. Brett maintained an office for the farm, in addition to an office for the trailer business, at the farm site. Gorres worked on a seasonal basis for the farm when it was owned by Roger. In April 2007, Brett offered Gorres a year round laborer job on the farm. When the farm job did not require him full time, Gorres was allowed to pick up hours at Roger's trailer operation. Brett paid Gorres for both his farm work and for his work at the trailer operation. It was understood by all parties that Gorres was employed exclusively by Brett and that Brett was his only boss. Gorres chose to supplement his hours by working at the trailer operation when farm work was slow. On October 4, 2008, a large piece of farm machinery broke down. Brett sent Gorres to assist with the repair. While there, Gorres got into a physical altercation with Roger. Gorres missed a few days of work after the fight, but returned to his job at the farm. Brett terminated him from employment in November 2008. Gorres claimed entitlement to workers' compensation benefits due to the injuries he sustained in the October 4, 2008, fight with Roger. Brett had a farm liability insurance policy, but carried no workers' compensation insurance. Compensation Judge Behr concluded that R. Duncan Farms qualified as a family farm within the meaning of Minn. Stat. §176.041, subd. 1(b) and Minn. Stat. §176.011, subd. 11A, and therefore, Gorres' workers' compensation claim was excluded from coverage. The WCCA (Judges Wilson, Johnson, and Rykken) affirmed. Citing Minn. Stat. §176.041, subd. 1(b), the WCCA found that Gorres did not meet the earnings exception and the farm earnings were under the annual wage requirements; Duncan had the requisite farm liability insurance policy. Gorres also argued the exclusion did not apply because he worked for both the farm and trailer operations. Judge Behr rejected this argument. The WCCA agreed noting that the operations were separate entities and Gorres' injury occurred while performing farm labor.

GILLETTE INJURIES

Lopez v. Dura Supreme, Inc. Case No. WC09-4991, Served and Filed April 8, 2010. The employee alleged a work-related injury in the nature of bilateral carpal tunnel syndrome. She sought wage loss benefits from the date of the alleged injury, which was the date of termination as a result of a layoff. Compensation Judge Cannon held that the employee sustained a *Gillette* type bilateral carpal tunnel syndrome injury. The WCCA (Judges Pederson, Rykken, and Johnson) affirmed. The date on which minute trauma culminates in a *Gillette* injury is not so much a medical question, as a question of ultimate fact for the compensation judge. While causation may have been thin (with respect to the employee's job duties toward the end of her

employment), the WCCA held that the judge apparently resolved any apparent inconsistencies in the employee's testimony in her favor. This assessment of credibility is uniquely the function of the trier of fact, and due weight must be given any such decision. While additional information regarding a particular *Gillette* injury date from the treating physicians would have been helpful, the employee's claim was nevertheless adequately supported by the treating physicians' reports. There was no error in dating the injury on the date of lay off. The employee alleged an increase in symptoms, beyond a mere manifestation of her pre-existing symptoms, less than two weeks before the layoff.

Satrum v. City of Minneapolis Public Works, Case No. WC09-4982, Served and Filed March 9, 2010. The employee sustained an admitted injury to the left lower back, thigh and left hip. Surgery was performed on the left hip in January 2007. The employee was terminated in March 2008 because there was no work within her restrictions. She testified that she was experiencing pain in her right hip at the time of her termination. She first treated for right hip pain in March 2009. Surgery was recommended. It was opined the right hip condition was related to her injury. The employer denied liability for the right hip condition. The employer did not get an independent medical examination. The employee was the only witness at the hearing. Compensation Judge Behr determined that the employee failed to establish her right hip condition and need for surgery was related to her employment. The WCCA (Judges Stofferahn, Johnson, and Wilson) reversed. The judge was essentially inserting his own medical opinion on causation. The judge referred to various factors (age, smoking history, arthritic change in her spine, and lack of reported right hip symptoms), which the WCCA determined were of no medical significance to the matters in dispute. The compensation judge did not specifically adopt the medical record relied upon by the employer. Regardless, this medical opinion seemed to lack in foundation because it was based, at least in part, on an incorrect history of a prior injury. The judge is not free to disregard unopposed medical testimony, because such testimony concerns issues not within the realm of knowledge of the fact finder. *See Ruether v. State of Minn.* In the absence of any contrary medical opinion, there was no basis for the judge to reject the employee's expert's well-founded opinion. The judge cannot question the employee's treating physician's opinion on the basis it did not cite medical studies, diagnostic testing, clinical findings or subjective complaints, as this would impose a burden of proof not required by *Steffen.* Under the compensation judge's rationale, it would be impossible to know what evidence would be deemed sufficient to prove a *Gillette* case.

Anfinson v. Anamax Corporation, File No. WC09-4976, Served and Filed March 8, 2010. The employee sustained an admitted injury to both elbows in January 2004, while working for Anamax. Thereafter, he modified the way he performed his job, and he testified that as a result of these modifications he began to develop bilateral shoulder pain. The employee testified that his shoulder pain gradually increased throughout his employment with Anamax. He stopped working for Anamax in July 2006. During the course of his employment with Anamax, there was only one medical record referencing shoulder pain. In March 2007, he went to work for Root River Valley Transfer. He worked for Root River for only a few weeks before seeking medical treatment for bilateral shoulder pain. He testified that the work for Root River was not heavy work. Shoulder surgery was recommended, and the employee filed a claim petition seeking benefits from both Anamax and Root River. There were multiple medical opinions regarding the cause of the employee's shoulder condition. Compensation Judge Ertl concluded that the

employee sustained bilateral shoulder injuries, culminating on March 26, 2007, and apportioned 100% to Anamax. Anamax appealed contending that the judge needed to choose a date of injury within the employment with Anamax, or that if the date of injury is really March 26, 2007, then some liability must be apportioned to Root River. The WCCA (Judges Rykken, Stofferahn, and Pederson) affirmed, but modified the findings to change the date of injury to July 14, 2006, the last date the employee worked for Anamax. The WCCA noted that it is not necessary for a *Gillette* culmination to occur on the last date of employment, and that there can be other "ascertainable" events, e.g., the date that the employee can no longer do his work, alters his work activities, or the date of medical treatment. Further, the WCCA noted that the last employer/insurer on the risk on the date of injury is typically deemed liable for the *Gillette* injury, but that this rule is subject to a showing that the work activities during the last period of employment are a substantial contributing factor to the disability. *See Gray v. Sears*. In this case, the work activities for the last employer did not represent a substantial contributing factor to the development of the shoulder condition. The WCCA found that March 26, 2007 was not the right date of injury for the shoulder condition, noting that a date of injury nearly nine months after the last date worked for Anamax would not accurately reflect an injury date. The WCCA modified the date of injury to use the last date worked for Anamax, July 14, 2006.

INSURANCE COVERAGE

Martin v. Morrison Trucking, Inc., File No. WC09-4970, Served and Filed February 11, 2010. The employee was employed by an over-the-road trucking company located in Wisconsin. In 2001, the employer applied for workers' compensation coverage through the Wisconsin Workers' Compensation Insurance Pool (the Pool). The employer was issued a Workers' Compensation Insurance Pool binder. In December 2001, Travelers issued a Workers' Compensation and Employers Liability Policy to the employer, specifically stating "IMPORTANT! IF YOU BEGIN WORK IN ANY OTHER STATE OTHER THAN WISCONSIN, YOU MUST OBTAIN INSURANCE COVERAGE IN THAT STATE...." An account manager for Travelers issued the policy, which specifically provided Wisconsin Limited Other States coverage for all states except Minnesota. Minnesota was excluded because it was assumed that the employer had operations in Minnesota. The employee's truck drivers did, in fact, initiate trips from Wisconsin, pick up loads in Minnesota, and deliver the loads to Utah. In July 2002, the employee was injured while delivering a load in Minnesota. Travelers processed the claim and paid Wisconsin benefits to the employee. In 2005, the employee filed a claim in Minnesota seeking benefits under the Minnesota Workers' Compensation Act. Travelers denied the claim contending the employer had no coverage and was uninsured for workers' compensation benefits in Minnesota. The Minnesota Special Compensation Fund became liable for benefits due the employee. The Fund then brought a claim against the employer seeking reimbursement for any benefits the Fund owed the employee and seeking penalties under Minn. Stat. §176.183. The employer moved to join Travelers as a party, and ultimately the employee, employer, Travelers and the Fund entered into a partial settlement. The parties' remaining claims were tried before Compensation Judge Dallner, and it was determined, in part, that the reasonable expectations doctrine did not invalidate the exclusion of Minnesota contained in the insurance policy issued by Travelers. Accordingly, she found the Fund was entitled to reimbursement from the employer, and found the employer owed a penalty. The WCCA heard the appeal and a decision was issued on October 29, 2008, in which it concluded the employer

was entitled to Minnesota coverage under the reasonable expectations doctrine, and reversed the compensation judge. Travelers appealed to the Supreme Court, which reversed and remanded for reconsideration in light of *Carlson v. Allstate Insurance Company*, 749 N.W.2d 41 (Minn. 2008). The issue before the WCCA on remand was whether the exclusion of coverage for Minnesota workers' compensation benefits in the Travelers policy was valid and enforceable. The WCCA (Judges Johnson, Rykken, and Stofferahn) reversed, and ordered the penalty assessed against the employer be vacated. In determining the validity of the exclusionary endorsement in this case, the WCCA found that: (1) a review of *Carlson* was unnecessary; (2) the Wisconsin Workers' Compensation Act requires a Wisconsin employer to obtain insurance, and the insurer to provide insurance, for workers' compensation liability to the full extent of the employer's liability to its employees. Accordingly, the exclusion of Minnesota was inconsistent with the mandatory coverage provisions of the act and is contrary to public policy. The WCCA found the purported exclusion arbitrary and invalid, and determined it could not be enforced to prevent coverage of the employer's liability to the employee in Minnesota.

INTERVENERS

Gebrekidan v. LSG Sky Chefs, Inc., File No. WC09-4966, Served and Filed January 29, 2010. Following a work injury in 2007, benefits were paid, including rehabilitation assistance with PAR, Inc. An IME was conducted by Dr. Ghose, who stated that the employee did not require any further medical treatment or work restrictions. The employee filed a medical request seeking payment for a pain clinic. The insurer objected, and also filed a rehabilitation request to discontinue further rehabilitation services. The employee never filed a rehabilitation response, and no action was ever taken on the insurer's rehabilitation request. PAR continued to provide services. The employee's medical request was denied at an administrative conference, and the employee requested a formal hearing. A settlement was then reached on a full, final, and complete basis, leaving medical expenses open. This stipulation foreclosed outstanding intervention claims, and the employee agreed to hold the employer and insurer harmless for such claims. PAR filed a rehabilitation request seeking payment of its outstanding bill of $5,600. It then asked for the request to be dismissed, and advised that a *Parker/Lindberg* hearing would be requested. Prior to the stipulation being submitted for an award, the insurer offered $400 to settle the rehabilitation bill. PAR was not mentioned in the stipulation. No action was initially taken on the request for a *Parker/Lindberg* hearing, and PAR made another request. Compensation Judge Mesna sent a letter to PAR advising that he could not grant the request for a *Parker/Lindberg* hearing, as such hearings are for interveners, and PAR never intervened in the case. The WCCA (Judges Stofferahn, Rykken and Pederson) held that the judge erred in stating that PAR was not an intervener. Citing *Schumacher*, the WCCA held that by filing a rehabilitation request seeking payment of its bills, a rehabilitation provider becomes a party to the action, and it is not necessary for it to file a motion to intervene. PAR should have been addressed in the stipulation. The claims of a party cannot be eliminated without its participation. Its request for a *Parker/Lindberg* hearing should have been granted. The WCCA then made its own findings, noting that PAR had been excluded from settlement negotiations, as the only offer that had been made to it was after the stipulation was already drafted and signed by the other parties. All of the other parties knew that PAR had an outstanding claim and was seeking to recover payment. The WCCA ordered the insurer to pay 100 percent of the PAR bill.

JOB OFFER/SUITABLE JOB

Hodgin v. Xcel Energy, File No. WC09-4993, Served and Filed April 5, 2010. For a summary of this case, please refer to the Medical Issues category.

JURISDICTION

Madson v. Minneapolis Police Department, File No. WC09-5021, Served and Filed April 20, 2010. The employee sustained an injury arising out of his employment as a police officer. The City of Minneapolis paid the employee's medical expenses for treatment and evaluation on the date of the injury, January 5, 2007. On January 10, 2007, the employee underwent a stress echo test. The employer refused to pay the medical bill for the test. The employee filed a claim in Hennepin County Conciliation Court against the City, seeking payment of the bill for the stress echo test. The case was scheduled for trial on February 6, 2009. Counsel for the employer appeared at the hearing, but the employee did not appear. On February 9, 2009, a Notice of Judgment was issued by the Conciliation Court stating that the claim against the City was dismissed with prejudice, so no new action could be started. The judgment was stayed by statute to allow time for an appeal, but no appeal was taken. On January 16, 2009, while the Conciliation Court case was pending, the employee filed a Medical Request seeking payment for the stress echo test. Following an Administrative Conference, the matter was heard by a compensation judge at the Office of Administrative Hearings. Compensation Judge Cannon concluded that the Hennepin County Conciliation Court lacked jurisdiction to adjudicate the employee's workers' compensation claim, and concluded the doctrine of *res judicata* did not bar the employee's claim before the compensation judge. The WCCA (Judges Johnson, Stofferahn, and Peterson) affirmed. Minn. Stat. §491A.01, Subd. 4. The WCCA found that the Conciliation Court does not have jurisdiction where jurisdiction is vested exclusively in another Court or Division. Minn. Stat. §176.021 provides for exclusive jurisdiction in the workers' compensation system for claims related to a work injury, and Hennepin County Conciliation Court did not have jurisdiction to determine the employee's claim.

Swenson v. Michael Nickaboine, d/b/a Northland Quality Builders, File No. WC09-4977, Served and Filed January 26, 2010. The employee sustained an injury while working for the employer on the reservation of the Mille Lacs Band of Ojibwe (MLBO). Among other defenses, the insurer denied the employee's claim under Minn. Stat. §176.041, subd. 5(a), asserting that Minnesota lacked jurisdiction over the claim. Compensation Judge Patterson determined that the employee had entered into a consensual employment relationship with the tribal employer working on tribal land, and accordingly no jurisdiction was found and the claim was dismissed. The WCCA (Judges Stofferahn, Rykken, and Johnson) reversed. Citing *Nevada v. Hicks*, it concluded that the MLBO reservation lies within Minnesota for the purposes of Minn. Stat. §176.041, subd. 5(a), and that work on the reservation is not an out-of-state injury under the workers' compensation statute. Subsequently, the WCCA looked to 28 U.S.C. §1360, and 40 U.S.C. §3172 in determining that Minnesota workers' compensation law applied to the case. Applying the principles of comity to determine whether the exercise of jurisdiction in a workers' compensation tribunal was appropriate, the WCCA determined that the civil remedies provided to workers under the Minnesota workers' compensation act are laws of general application to private persons both on and off tribal lands. The MLBO had not, as far as the WCCA was able

to ascertain, acted to legislate in the area of workers' compensation, and thus the exercise of Minnesota jurisdiction in this case did not interfere with any workers' compensation scheme enacted by the MLBO.

MEDICAL ISSUES

Jackson v. Minneapolis Public Schools, Special District #1, File No. WC09-5027, Served and Filed April 8, 2010. The employee sustained an injury to his low back. He treated several times with a physical therapist and underwent two surgeries. At the referral of his treating physician, he filed a medical request for a Tempur-Pedic bed he had tried at a furniture store. The employer denied the request. Following an administrative conference, a compensation judge denied the employee's request, noting the medical treatment parameters disqualify mattresses as a treatment for back injuries. Compensation Judge Mesna presided over a hearing and found that the provision of a Tempur-Pedic mattress and box spring was medically reasonable and necessary treatment. He further found that a departure from the treatment parameters was warranted based on a documented medical complication consisting of the employee's pre-existing sleep apnea coupled with stenosis, extensive fibrosis, and potential arachnoiditis associated with the work injury. The WCCA (Judges Stofferahn, Wilson, and Pederson) affirmed. It noted that under Minn. R. 5221.6050, Subp. 8(A), a departure from the parameters is permitted where there is a documented medical complication. Citing *Smith v. Country Manor Health Care*, 60 W.C.D. 1 (WCCA 2000), it concluded that "medical complication" within the rule includes situations where a work injury, in combination with a pre-existing condition, causes a more complicated course of symptoms, disability and treatment results. Accordingly, the determination that the employee had a documented medical complication was a permitted departure from the parameters. The WCCA noted that the question of reasonableness of medical treatment is one of fact for the compensation judge to determine, and it found substantial evidence to support the compensation judge's determination that the Tempur-Pedic bed was reasonable and necessary to alleviate the employee's symptoms.

Hodgin v. Xcel Energy, File No. WC09-4993, Served and Filed April 5, 2010. The employee sustained an admitted right knee and shoulder injury. At the time of the injury, he was five feet, seven inches tall and weighed 350 pounds. The day after the injury, he began receiving nursing services. He underwent an open rotator cuff repair to the right shoulder. Following surgery, he purchased a mechanical lift chair to assist with getting in and out of a seated position. The employer offered the employee a full-time job, but the employee refused because he was unable to get to and from work. Public transportation was not available and taxi services were too expensive. A hearing was held before Compensation Judge Milun on the employer's discontinuance of the employee's temporary total disability benefits based on the employee's refusal of the job offer, as well as on the employee's claims for payment of nursing services and the mechanical lift chair. Judge Milun denied the employer's request for discontinuance and awarded the employee nursing services and payment of the mechanical lift chair. The WCCA (Judges Johnson, Wilson, and Stofferahn) affirmed that the employee did not unreasonably refuse the job offer because public transportation was not a reasonable option for the employee. The WCCA also affirmed the award of nursing services, but reversed the award for payment of the mechanical lift chair on the basis that it was outside the treatment parameters and did not qualify as a "rare case" exception to the treatment parameters. The WCCA noted that the "rare

case" exception did not apply because the employee's case did not present "exceptional circumstances." The WCCA indicated that, although it was reluctant to overturn a factual determination of a compensation judge, fact issues are not immune from review. The employee's treating doctors did not provide an explanation of why a lift chair was medically necessary. Also, the employee was not working, so a lift chair had no bearing on his ability to return to work or continue working.

NOID

Powell v. Stein Industries, Inc., File No. WC09-5038, Served and Filed May 11, 2010. The employee claimed a *Gillette*-type injury on October 31, 2008. Primary liability was admitted, and temporary partial disability benefits were being paid. An IME then indicated that the effects of the work injury had been temporary and were no longer a substantial contributing factor in the ongoing disability. The insurer filed a NOID of TPD benefits for reasons other than a return to work. No factual or legal basis for the discontinuance was listed on the NOID. The IME report was stapled to the NOID. The employee filed for an Administrative Conference, at which point a judge permitted the discontinuance based on the IME's report. The employee filed an Objection to Discontinuance. At the Hearing before Compensation Judge Mesna, the employee requested dismissal of the original NOID on the basis that it was statutorily defective pursuant to Minn. Stat. §176.238 and Minn. Rule 5220.2630, subpart 4B. Judge Mesna agreed and dismissed the NOID from the bench. The WCCA (Judge Johnson, Wilson and Stofferahn) reversed. The WCCA agreed with the employee that the NOID was statutorily deficient. However, pursuant to the rationale set forth in *Woelfel v. Plastics, Inc.*, 371 N.W.2d 215 (Minn. 1985), the WCCA noted that even though statutorily deficient, a NOID is not fatally defective so long as the employee and her attorney have sufficient notice to allow them to take the necessary steps to protect the employee's claim to ongoing wage loss benefits. In this case, the employee had exercised her administrative remedy and filed an Objection to Discontinuance, entitling her to a *de novo* hearing. The WCCA found no prejudice to the employee in considering the merits of the case. The case was remanded for hearing.

Comment: Employers and insurers are reminded that the statutory requirements for an NOID should be followed. Both a factual and legal basis should be set forth in the appropriate spot on the NOID itself. However, even in cases in which there is technical deficiency, this case confirms that the underlying issue is going to be whether the employee has sufficient notice of the discontinuance to allow her to exercise her rights to protect her ongoing benefits.

PERMANENT PARTIAL DISABILITY

Bissonnette v. Koochiching County, File No. WC09-5029, Served and Filed May 11, 2010. The employee sustained an injury in 2007 involving her shoulder and upper back. A prior hearing led a previous compensation judge to conclude that the employee's physical work injury did not cause or substantially aggravate her pre-existing condition of depression and insomnia. The employee filed a claim for permanent total disability benefits and asserted that the injury was a substantial contributing factor in her entitlement to such benefits. Compensation Judge Olson denied the claim for PTD benefits, stating that the employee did not qualify for such benefits, as she did not meet the threshold requirement of having at least a 15 percent whole body

impairment rating, as required by Minn. Stat. §176.101, subd. 5(2)(ii). The WCCA (Judges Johnson, Pederson, and Stofferahn) reversed and remanded the matter for reconsideration. The WCCA ruled that the judge's reliance on the opinion of psychiatrist Dr. Rauenhorst was misplaced. It referred to the fact that the employee was not examined by Dr. Rauenhorst and he offered no diagnosis of her condition. The WCCA also found, as faulty, Dr. Rauenhorst's opinion that the employee's symptoms were not severe enough to qualify her for a PPD rating because she did not require the intervention of a "caregiver" at any time. The WCCA found that the employee required medical care to prescribe medications to treat her depression and that this medical care constituted intervention by a caregiver within the meaning of Minn. Rule 5223.0360, Supb. 7D. Therefore, it concluded that Dr. Rauenhorst's opinion that the employee has no PPD is contrary to the evidence. The WCCA also rejected the judge's reliance on psychologist John Graham, who performed an evaluation as part of the employee's application for Social Security Disability benefits. Mr. Graham's conclusion that the employee's psychological problems would not cause significant problems with attention, concentration, persistence, or pace, at entry level work-life tasks, led the judge to conclude that the employee does not have a "functional" loss due to her psychological problems. The judge also concluded that the evidence at the hearing did not support that the employee's psychological problems functionally affected the employee's ability to work. The WCCA ruled that it is not a defense to a claim for PPD benefits to assert that the employee is able to work. PPD benefits are intended to compensate the employee for permanent loss or impairment of bodily function and are in no way dependent upon wage loss or ability to work. If an employee qualifies for a PPD rating, the employee is presumed to have a functional impairment, although that impairment may not impact employability. Finally, the WCCA rejected the judge's finding that the employee failed to prove that her psychological problems were unlikely to improve with treatment. The judge had concluded that a PPD rating was premature. The WCCA acknowledged the employee's long standing problem with depression, dating back to at least 1993. Although the employee acknowledged that her depression improved with medication, she testified to continuing emotional problems and insomnia. The WCCA, therefore, indicated that there was not substantial evidence to support a conclusion that a PPD rating is premature because the employee's condition may improve.

Olson, Matthew v. Sky High Crane Rental, Inc. WC08-256, Served and Filed May 1, 2009. The employee sustained fractures to his left tibia and fibula when he was thrown to the ground by a co-worker in the course of his employment. He was diagnosed by Dr. Wengler with compartment syndrome and closed fractures of both bones. Dr. Wengler performed surgery that included fasciotomies with skin grafts. Dr. Wengler opined the employee sustained 2% PPD as a result of a post-traumatic valgus deformity, 5% for an open reduction of the tibial shaft fracture, 3% for a leg length discrepancy, and 10% for a skin disorder. In justifying the 10% PPD rating for the skin disorder, Dr. Wengler opined the employee had limitations in performance of activities of daily living, including going outside into the sun. The employee testified that he applies Lubriderm lotion two to three times each day to the area of the skin graft, always keeps the leg wrapped in an elastic bandage, and never wears shorts or otherwise exposes the leg to the sun. The employer disputed the 10% PPD rating for the skin disorder and the 2% rating for the valgus deformity. Compensation Judge Eckersen awarded these PPD benefits based on Dr. Wengler's opinions. The WCCA (Judges Pederson, Rykken, and Johnson) affirmed. Under the rule for 10% PPD (Minn. Rule 5223.0630, subp. 2(C)), "intermittent treatment" is required for

PPD to be awarded based on the skin condition. The WCCA determined that the self care by the employee, including applying lotion to his leg and keeping the leg wrapped in an elastic bandage to protect it from bumps and sunlight, was sufficient treatment to meet the "intermittent treatment" requirement. The WCCA was not persuaded by the employer's argument that "intermittent treatment" implied professional medical treatment. The WCCA determined that Dr. Wengler's testimony (that if the employee did not follow the lotion and wrapping regimen his condition could deteriorate and he would require professional medical treatment) was sufficient to support the employee's position that these activities were, in effect, a prescription by Dr. Wengler for that treatment. The WCCA affirmed the 2% valgus deformity rating based on Dr. Wengler's testimony that he performed measurement of the deformity via a "very accurate x-ray measuring device on the computer." Dr. Segal, the IME, did not claim any comparable computer assistance, and the WCCA therefore deferred to the judge's choice between medical experts as not unreasonable.

Kristofferson v. Arctic Cat, Inc., File No. WC09-4969, Served and Filed March 8, 2010. (For additional information on this case, please refer to the Causal Connection category.) The employee sustained a work-related left inguinal hernia injury, requiring surgical removal of a testicle. He claimed 30% permanent partial disability after developing chronic pain syndrome pursuant to *Weber* (where the WCCA held that non-scheduled injuries resulting in permanent impairment could not be excluded from coverage by the PPD schedules.) Compensation Judge LeClair-Sommer denied the employee's claim for PPD for chronic pain syndrome on the basis that he had not demonstrated any specific entitlement under *Weber*. The WCCA (Judges Pederson, Stofferahn, and Rykken) affirmed, finding that the 30% rating issued by the employee's doctor did not reference the workers' compensation PPD schedules at all and only generally the American Medical Association Guidelines. The WCCA agreed with the finding that the rating was unclear as to what was included. There was no evidence of any doctor documenting a functional loss of use or impairment of function that the employee might have sustained as a result of any "chronic pain syndrome," which would be a psychological loss or impairment separate and distinct from the physical loss or impairment as a result of the hernia injury itself.

PERMANENT TOTAL DISABILITY

Tambornino v. Health Risk Management, File No. WC10-5045, Served and Filed March 18, 2010. The employee was injured on February 26, 1997. Subsequently, the parties stipulated that the employee was permanently and totally disabled, effective June 25, 2002. A Stipulation for Settlement was filed indicating that the insurer agreed to "continue to pay to the employee permanent total disability benefits from and after September 30, 2005, as her condition may warrant, and shall continue to reduce said ongoing benefits on a dollar-for-dollar basis, by reason of her receipt of Social Security Disability Insurance benefits." On the employee's 67th birthday, the insurer filed a Petition to Discontinue Permanent Total Disability Benefits on the basis of the retirement presumption in Minn. Stat. §176.101, subd. 4. This was the appropriate procedure to follow. *See Ramsey*. The WCCA (Judges Johnson, Rykken, and Stofferahn) denied the Petition to Discontinue. The language of the Stipulation for Settlement did not specifically incorporate into the settlement agreement the provisions of Minn. Stat. §176.101, subd. 4, which include the retirement presumption at the age of 67. The Stipulation simply indicated that ongoing PTD

benefits would be paid "as the employee's condition may warrant." The WCCA, therefore, ruled that the insurer had waived its statutory defenses to ongoing permanent total disability benefits contained in Minn. Stat. §176.101, subd. 4, as the settlement did not specifically reserve those defenses. *See, e.g., Stephenson.* The WCCA ruled that the only way that benefits could be discontinued would be on the basis that the employee's physical condition no longer entitled her to PTD benefits. The retirement presumption had no applicability.

Comment: This case points out the importance of insurers specifically reserving potential statutory defenses within the stipulation language. The WCCA noted the *Stephenson* case, relating to subrogation. In that case, the courts had ruled that since the insurer did not specifically reserve its subrogation rights in the language of the Stipulation, those rights were deemed to have been waived. As a result, most stipulations these days contain a specific paragraph reserving subrogation rights. Similarly, stipulations regarding ongoing payment of PTD benefits should specifically reserve not only defenses based on the employee's physical condition, but also all statutory defenses pursuant to Minn. Stat. §176.101, subd. 4.

Vandervoort v. Olinger Transportation, Inc., File No. WC09-4983, Served and Filed January 4, 2010. For a summary of this case, please refer to the Retirement category.

PROCEDURAL ISSUES

Wolf v. Boston Scientific Corporation, File No. WC09-4994, Served and Filed April 12, 2010. The employee's claim was the subject of repeated pretrial conferences and various pleadings related to discovery disputes. Following a pretrial conference, Compensation Judge Brenden issued an order striking an upcoming hearing date and setting specific deadlines for the parties to request reinstatement of the claim on the active trial calendar. Judge Brenden warned the employee that failure to comply with the court's order would result in dismissal of her claim with prejudice. After the deadlines outlined in the order passed and the employee had not sought reinstatement, Judge Brenden issued an order dismissing the employee's claim petition with prejudice. The WCCA (Judges Rykken, Stofferahn, and Johnson) reversed and remanded for reinstatement of the claim, finding that the prejudicial effect on the employee outweighed the concerns of the employer and insurer over the employee's cooperation with discovery requests, attendance at an independent medical evaluation, and deposition scheduling. The WCCA acknowledged that the employee raised legitimate arguments that she complied with discovery, that she no longer had certain requested documents, that she was ready to proceed to hearing, and that the employer and insurer had not sought dismissal with prejudice.

Goerdt v. Dwayne Young, Inc., File No. WC09-5028, Served and Filed March 25, 2010. The employee filed a claim petition in June 2009, claiming an injury sustained while employed by the employer. The employer admitted that the employee had sustained lacerations to the fingers and hand while working for the employer, and that medical expenses had been paid. The employer denied that the work injury was a substantial contributing factor in the employee's claimed disability and need for medical treatment. The employer filed a motion to dismiss the claim petition against them, contending that the employee had failed to provide medical support for his claim as required by Minn. Stat. §176.291. The motion was denied, but the employee was ordered to produce medical support for the claim. The employee produced medical support, and

Compensation Judge Ertl deemed the medical support insufficient to support the claim against the employer and dismissed the employer as a party from the claim. The WCCA (Judges Stofferahn, Wilson, and Pederson) affirmed. The employee contended that medical support is not always necessary for a claim and that an employee's testimony alone may provide the evidentiary basis for an award of benefits. Agreeing with the employee's contention, the WCCA nonetheless determined that the employee had provided no support with his claim petition which would connect the work injury with the present claim for medical expenses, permanent partial disability, and wage loss benefits.

REHABILITATION/RETRAINING

Christensen v. Northwest Airlines Corporation, File No. WC09-5004, Served and Filed April 30, 2010. The WCCA (Judges Johnson, Rykken, and Stofferahn) affirmed the decision of Compensation Judge Brenden, awarding to the employee a retraining plan leading to a two-year associate degree from Argosy University as a histotechnician. The WCCA found that the judge properly applied the *Poole* factors in establishing that: (1) the retraining plan was reasonable compared to job placement activities; (2) the employee had an interest and ability to succeed in the proposed course of study; (3) the retraining plan is likely to produce an economic status as close as possible to that which the employee would have enjoyed without the disability; and (4) the retraining is likely to result in reasonably attainable employment. The WCCA then addressed the argument of the employer and insurer that an alternative plan at North Hennepin Community College, which was less expensive, should have been approved. The requirement to consider an alternative plan was established by the Minnesota Supreme Court in the case of *Varda v. Northwest Airlines Corp.*, 692 N.W.2d 440 (Minn. 2004). The WCCA affirmed the rejection of the alternative plan. It found that the program at North Hennepin Community College had offered the histotechnology program for only a short period of time and they had no placement results. No other evidence was provided by the employer and insurer with regard to employment prospects for students in the program. Finally, the employer and insurer did not submit information documenting the total cost of the program for the purposes of comparison. The WCCA concluded by stating that "the employer and insurer failed to submit evidence to support their contention that the NHCC program would be equally effective in returning the employee to employment or that the difference in cost is so substantial as to outweigh the apparent advantage of enrollment in the Argosy University program."

RES JUDICATA

Nguyen v. Anderson Automatics, Inc., File No. WC09-5000, Served and Filed March 8, 2010. The insurer filed a Notice of Intention to Discontinue Benefits seeking to discontinue temporary total disability and rehabilitation benefits. The employee requested an administrative conference. Compensation Judge Knight allowed both discontinuances. The employee did not request a formal hearing and subsequently filed a claim petition alleging entitlement to temporary total and permanent total disability benefits. The insurer filed a motion to dismiss the claim petition and asserted that the administrative conference decisions were final and that the employee's claims were barred by *res judicata* and collateral estoppel. Compensation Judge Rieke denied the motion. The WCCA (Judges Stofferahn, Pederson, and Rykken) affirmed. The WCCA noted that *res judicata* and collateral estoppel apply only to issues specifically litigated and decided in

prior proceedings. The WCCA noted that it has also decided that unappealed decisions from administrative conference may have *res judicata* effect in certain situations. However, the WCCA explained that as there is no testimony and no exhibits, as the rules of evidence are not followed, it is difficult to determine what issues were litigated and what findings were made in the conference. The orders from the administrative conference did not indicate what information was reviewed and the compensation judge made no findings on issues that may have been raised by the parties. The WCCA concluded that, "all that can be said with confidence is that the compensation judge allowed benefits to be discontinued." Accordingly, the WCCA found that the claims were not barred by *res judicata*.

Massood v. Denny's Restaurant, Case No. WC09-4967, Served and Filed March 8, 2010. The employee was assaulted by a co-worker in February 1992. Primary liability was admitted and benefits were paid for neck and low back injuries. A hearing in 1994 resulted in a finding that the somatization disorder was incurred as a result of the work related injury, however, the employee did not establish that he suffered from PTSD at that time. (That decision was affirmed by the WCCA in a prior decision.) The employee subsequently received ongoing treatment for depression, including somatoform disorder, dysthymia and PTSD. The parties later entered into a full, final and complete settlement, excluding future medical expenses. The employee continued to treat for physical and psychological conditions. He was diagnosed with anxiety, major depression and PTSD. Compensation Judge Hall held that the 1992 injury was not a substantial contributing cause of the employee's current psychological condition and need for treatment. The WCCA (Judges Rykken, Pederson, and Stofferahn) vacated and remanded for reconsideration. The compensation judge's decision appeared to indicate he felt constrained or limited by the earlier determination (regarding the PTSD condition) in the type of psychological condition that the judge could consider at this subsequent hearing. However, there was no *res judicata* because the employee's circumstances had changed since the 1994 Hearing. The matter was remanded for reconsideration of all issues, as it was unclear whether the compensation judge felt precluded from determining that the injury was a substantial contributing cause of the need for psychological treatment. The judge may consider additional arguments at his discretion.

RETIREMENT

Vandervoort v. Olinger Transportation, Inc., File No. WC09-4983, Served and Filed January 4, 2010. Following a work injury in 2004, the parties stipulated that the employee had been permanently and totally disabled since January 2006, and that the employer and insurer were entitled to offset SSDI benefits as of December 2006. The parties further agreed that PTD benefits would cease on the employee's 67th birthday, but that he retained the right to rebut the presumption of retirement contained in Minn. Stat. §176.101, subd. 4. The insurer subsequently discontinued PTD benefits on the employee's 67th birthday, and the employee filed an Objection to Discontinuance. Compensation Judge LeClair-Sommer found that the employee failed to rebut the retirement presumption. The WCCA (Judges Wilson, Stofferahn, and Johnson) reversed. In determining whether the employee has rebutted the retirement presumption, six factors need to be looked at: (1) the employee's expressed intent to retire or continue working; (2) his application for Social Security retirement benefits; (3) evidence of a financial need for employment income, including the adequacy of a pension or other retirement income; (4) whether he or the employer had initiated a discussion of retirement; (5) whether he had sought

rehabilitation assistance; and (6) whether he had actively sought alternative employment or was working. *See Davidson.* The WCCA then did an independent analysis of the facts, concluding that four of these six factors had been met by the employee in this case, and therefore, he was entitled to ongoing PTD benefits.

SETTLEMENT

Munn v. Travel Host of Duluth, File No. WC09-5039, Served and Filed May 4, 2010. The employee sustained an injury in 1985, resulting in several surgeries to the low back. Interspersed with the treatment of the low back, the employee was also treated for problems associated with urinary incontinence. The parties entered into a Stipulation for Settlement in 1991, closing out all claims "which the employee may now have or may have at any point in the future arising out of his compensable injury", with the exception of reasonable and necessary medical expenses. The employer and insurer also stipulated to pay outstanding medical expenses, which included medical expenses from Duluth Urology for treatment of his bladder and urinary incontinence. The employee subsequently filed a Claim Petition, seeking permanent partial disability in the amount of 30 percent whole body impairment, related to his bladder condition. Compensation Judge Arnold determined that the 1991 Stipulation for Settlement barred the employee's claim. The WCCA (Judges Wilson, Rykken, and Pederson) affirmed. The WCCA rejected the arguments of the employee that the claim was not barred, since claims of bladder and urinary incontinence were not specifically mentioned in the Stipulation for Settlement. It stated that, although no medical records were attached to the Stipulation for Settlement, records submitted at the hearing in the current proceeding reflect that the employee had received treatment for bladder problems from each of the providers whose bills were attached to the original Stipulation for Settlement. Given that fact, the WCCA concluded that, "the employee had obviously been claiming medical bills related to treatment for a bladder condition at the time of the Stipulation and those claims were in fact resolved by the settlement." The WCCA also concluded that the parties knew that the employee had been undergoing treatment for a bladder condition at the time of the Stipulation and that one of the physicians treating the employee prior to the settlement had related the employee's bladder condition to the work injury. Finally, the prior Stipulation included payment of medical bills for treatment of the bladder condition.

Tambornino v. Health Risk Management, File No. WC10-5045, Served and Filed March 18, 2010. For a summary of this case, please refer to the Permanent Total Disability category.

TEMPORARY PARTIAL DISABILITY

Shepard v. Loram Maintenance of Way, File No. WC09-4974, Served and Filed January 5, 2010. The employee sustained an admitted work injury. Thereafter, he began working for a friend, Paul Byrnes, at PRB Trucking. The employee had no set work hours, and he worked on Fridays and Saturdays, after which he reported his hours "on the honor system." He was paid an hourly rate. At times, the employee would perform a job and Mr. Byrnes would assign a dollar amount for wages, as opposed to calculating pay by the hour. The employee earned $20-25 per week for the few hours he worked in January and part of February 2009 while working for PRB Trucking. He did not work in late February because there was no work available. He occasionally helped Byrnes at his home with yard work and assisted with the construction of a shed for which Byrnes

paid him in cash. The insurer filed a Notice of Intention to Discontinue (NOID) temporary partial disability benefits on the basis that the employee's earnings were "so sporadic and insubstantial they do not qualify as gainful employment." Compensation Judge LeClair-Sommer determined that the employee's part-time employment at PRB Trucking represented more than sporadic employment resulting in an insubsubstantial income and constituted gainful employment that provided wages on which TPD benefits could be calculated. The WCCA (Judges Rykken, Johnson, and Stofferahn) reversed, citing *Krotzer* and *Dorn*, where the employee must show an actual loss of earning capacity causally related to the disability. While the employee's actual post-injury earnings are presumed to be an accurate reflection of employee's earning capacity, the presumption may be rebutted by evidence establishing that post-injury earnings are not an accurate reflection. An employee must be gainfully employed engaged in more than "sporadic employment resulting in an insubstantial income." The WCCA found that the record did not support that employee's employment during the five weeks at issue represented gainful employment and that the employee's earnings from that employment were simply too insubstantial to establish entitlement to TPD benefits.

VACATING AWARDS

Benoit v. Max Gray Construction, Inc., File No. WC09-4984, Served and Filed March 9, 2010. The employee sustained a shoulder injury in 2002. In the fall of 2006, the parties entered into a stipulation for settlement for a full, final and complete settlement, except for future medical expenses. In June 2009, the employee underwent arthroscopic revision Bankart reconstruction surgery for continuing shoulder pain. In August 2009, he filed a petition to vacate the award on stipulation based on a substantial change in condition. The employee contended: (1) he had now been diagnosed with unstable shoulder, a condition of which he was unaware at the time of settlement; (2) at the time he settled his claim, he understood that his shoulder condition should not present an impediment to future employment; (3) he has sustained additional permanent partial disability since the time of stipulation for settlement; (4) he reasonably relied on the assurances of his doctor, prior to settlement, that he would not need further surgery and that he could continue to work as a carpenter; and (5) he received a "relatively modest sum" to settle his case. The WCCA (Judges Wilson, Pederson, and Stofferahn) denied the employee's petition to vacate based on substantial change in medical condition, as the employee failed to establish a substantial change in his medical condition that was "clearly not anticipated and could not reasonably have been anticipated at the time of the award."

Hergott v. Rahr Malting Company, Case No. WC09-5007, Served and Filed February 12, 2010. When the hearing was held, the employee's symptoms were largely, if not entirely, confined to the right lower leg and foot. The compensation judge awarded medical benefits and 10% permanent partial disability benefits. Subsequently, the employee filed a claim petition seeking permanent total disability benefits and 80% permanent partial disability benefits. An independent medical examination by Dr. Bushara revealed that the employee was suffering from ALS. Dr. Bushara opined the ALS was not related to the work injury. Further, Dr. Bushara opined that the employee's disability was the result of the ALS. The employee's treating physician referred him to the ALS Clinic. The ALS Clinic physician opined it was likely that the employee was suffering from ALS, which was opined to be unrelated to the work injury. The WCCA (Judges Wilson, Stofferahn, and Pederson) determined the employer and insurer demonstrated good

cause to vacate the Findings and Order. There was newly discovered evidence that required the Findings and Order to be vacated. A great deal had changed since the hearing that led to the Findings and Order at issue in this matter. Further, at the oral argument on the Petition to Vacate, the employee's counsel declined to concede the employee had ALS. He noted that additional testing was still pending. However, no evidence had been submitted that supported any treating physicians still believing the employee was suffering from the effects of the work related injury. While it may still be possible for a connection to exist between the ALS and work related injury, there was no such evidence presented. There was no evidence that a definitive diagnosis of a motor neuron disease (ALS) could, or should have, been made prior to the hearing. The physicians opined the employee would have been in the very early stages of ALS at the time of the hearing, and that it is a difficult disease to diagnose with any certainty. Vacation is justified based on the development of new facts about the injury after the Findings and Order, or the subsequent discovery of facts in existence but unknown at the time the award was made. It was simply too early at the time of the hearing to accurately assess the nature of the employee's condition. Fairness is the overriding principle in deciding whether or not to vacate. However, this decision should not be read as involving any determination either as to the employee's diagnosis or the question of causation, both of which remained to be resolved.

Slaight v. Exceptional Homes, File No. WC09-4999, Served and Filed February 10, 2010. The WCCA (Judges Pederson, Stofferahn and Wilson) concluded that the employee had not shown good cause to vacate the findings and order of Compensation Judge Hall. The employee filed a petition to vacate based on mutual mistake of fact and newly discovered evidence. In support of the petition to vacate the employee's attorney submitted an affidavit indicating that at the time Judge Hall issued his findings and order, the employee had not disclosed that he had a second job and that additional records were obtained subsequent to the hearing documenting entitlement to a higher average weekly wage. The WCCA found no evidence to show a *mutual* mistake of fact. The employee's failure to consider a second job as part of his date-of-injury wage was a unilateral mistake, and there was no basis for a petition to vacate. The WCCA also determined that the employee's failure to obtain or uncover employment and wage records through reasonable investigation prior to the hearing did not make it "newly discovered" evidence. Therefore, the employee had not established good cause to vacate the findings of the compensation judge.

Tudahl v. Beverly Enterprises, File No. WC09-180, Served and Filed January 11, 2010. The employee sought vacation of a 1999 Stipulation based upon an alleged substantial change in her condition. As a result of an admitted 1996 injury, she was diagnosed with multi-level degenerative disc disease, and in 1997 underwent a one-level fusion surgery. She was ultimately placed at MMI with permanent restrictions, and given a 22.5% PPD rating. In 1999 the parties entered into a full, final and complete settlement, with future medical expenses open. At that time, the employee's claims included a claim for a consequential psychological injury, wage loss benefits, PPD, and rehabilitation/retraining. Following the settlement there was a gap in medical treatment between 2000 and 2006. In 2006 she reported an increase in her low back and left leg symptoms. Diagnostic studies showed grade II spondylolisthesis above the level of the prior fusion, which was then diagnosed as adjacent segment degeneration as a consequence of the prior surgery. It was recommended that the employee's fusion be extended to include the level above the prior fusion, and following an IME, the employer and insurer paid for this surgery.

The second surgery did not resolve the employee's symptoms. She then applied for, and was granted, SSDI benefits. She petitioned to vacate the 1999 settlement. The employer and insurer argued that there was not an unanticipated substantial change in the employee's condition. This position was based upon the IME reports of Dr. Dick, indicating that adjacent segment degeneration is common after fusion surgery and that it would not have been unreasonable to expect ongoing degeneration. The WCCA (Judges Stofferahn, Johnson, and Rykken) granted the request to vacate. It first reviewed the *Fodness* factors for determining whether there has been a substantial change in condition. The WCCA concluded that there was a change in diagnosis (a new diagnosis of grade II spondylolisthesis at the level above the fusion.) It found that the change in ability to work was a mixed factor, and relatively ambiguous, but that the fact that she was now on SSDI mildly supported her claim. There was no question that there was an increase in the employee's PPD. She had required additional medical treatment, however, this was left open by the stipulation and paid for by the employer and insurer. Finally, the WCCA noted that there was a causal relationship between the employee's current condition and the injury. The WCCA then addressed whether the degeneration at the level above the admitted fusion surgery was reasonably anticipated at the time of the 1999 settlement. It acknowledged that medical science, and maybe even the employee's physicians, may have anticipated this type of change in the employee's condition, but determined that the question is the understanding *of the parties* at the time of the settlement. The WCCA found that there was no indication in the medical records or the language of the stipulation that the employee was specifically advised that she might develop symptoms requiring surgery at an adjacent level. Because there was no evidence that the employee was told that adjacent level degeneration was possible, the standard for vacation of the stipulation was met.

TABLE OF AUTHORITIES