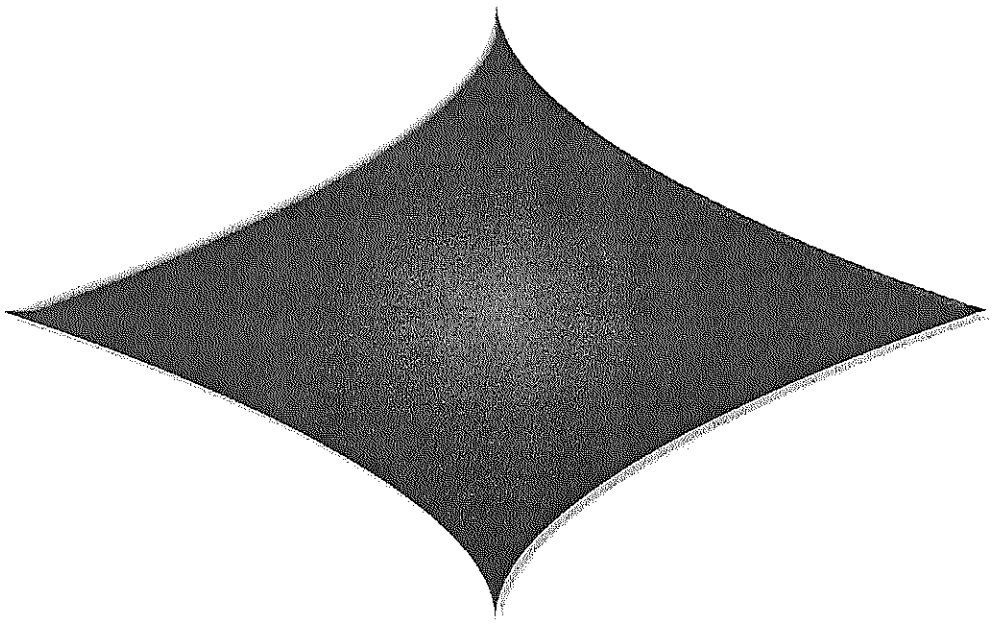

Case Law Update

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The Work Comp Experts

ATTORNEY FEES – RORAFF FEES

Ziegler v. Award Staffing Services, Inc., No. WC09-186 (W.C.C.A. Nov. 18, 2009)

Employee's attorney appealed from the award of Roraff attorney fees. The parties disputed the scope and extent of injury, with employer and insurer admitting a low back and shoulder injury, but denying an alleged neck injury. Employee filed a Claim Petition, seeking approval of a cervical fusion surgery.

The parties proceeded to hearing on the Claim Petition. Employer and insurer admitted liability for the cervical condition at the hearing but continued to deny the proposed fusion surgery. The Compensation Judge found that the surgery was not reasonable or necessary, as there were additional conservative measures to pursue first. Also, the employee's condition presented significant risks for the fusion, due to the history of smoking and cystic fibrosis. While the surgery request was denied, the employer and insurer were ordered to pay the intervenors seeking payment of medical expenses in the amount of $1,847.14.

Employee's attorney filed a claim for Roraff fees in the amount of $13,600.00, representing 45.90 hours of attorney time at $275.00 per hour, plus paralegal time billed at $100.00 per hour. The Compensation Judge awarded $3,300.00 in Roraff fees. The employee appealed.

On appeal, the W.C.C.A. found the hourly rates reasonable but agreed with the Compensation Judge that the matter was not that complex, and the employee had lost her primary claim for the fusion procedure. However, the appellate court indicated that the Compensation Judge did not place enough weight on the fact that the efforts of employee's attorney resulted in establishing primary liability for the cervical condition. Therefore, the W.C.C.A. revised the award of fees and increased the fees to $5,500.00, plus subd. 7 fees.

JURISDICTION – TEMPORARY EMPLOYMENT OUT OF STATE

Sterling, by Spain v. Fagen, Inc., No. WC09-172 (W.C.C.A. Nov. 25, 2009)

The employee died in a work-related incident while employed at a job site in Iowa. The employer was a Minnesota company that constructed ethanol and power plants throughout the United States. Except for office employees, all other employees temporarily work at job sites around the country on various construction projects.

The employee started the employment hiring process at the Minnesota headquarters and received a conditional job offer for a job site in Iowa. The employee went to the Iowa job site and completed an application for employment, payroll documents and took a drug screen test, and then underwent safety training, beginning work the same day. A little over four months after working at the Iowa job site, the employee died as a result of a work-related injury.

The employer and insurer filed a First Report of Injury in Iowa and paid $45,000.00 to Iowa's Second Injury Fund, pursuant to a request from the Iowa Division of Labor.

Shortly following the payment to Iowa's Fund, the employee's sister filed a claim for dependency benefits in Minnesota, which was denied. The insurer requested that Iowa refund the monies paid to the Iowa Second Injury Fund pending a determination of liability. The request for refund was denied.

Following a hearing, a Compensation Judge awarded the claim for dependency benefits, finding the employee was hired by a Minnesota employer and injured while temporarily employed outside of the state. Application of Minnesota Statutes sec. 176.041, subd. 3 therefore required application of the Minnesota Workers' Compensation Act. The W.C.C.A. agreed with this decision.

The W.C.C.A. also addressed the employer's request that the amount paid to the Iowa Second Injury Fund act as a credit against amounts owing under Minnesota's Workers' Compensation Act. The Court declined the request to credit the $45,000.00 paid in Iowa against the $60,000.00 the insurer was ordered to pay the employee's estate. While public policy and case law recognizes an insurer should not pay the same claim twice, and the employee should not obtain a double recovery, in this case, the employer was not paying the employee's estate twice.

The W.C.C.A. further declined to address the issues of whether the employer and insurer owed the payment to the Iowa Second Injury Fund under Iowa law.

MEDICAL TREATMENT – "RARE CASE" EXCEPTION

Hausladen v. Egan Mechanical, No. WC09-194 (W.C.C.A. Jan 7, 2010)

The Compensation Judge awarded a variety of medical expenses, including a pain clinic evaluation. On appeal, the W.C.C.A. reversed the award on the pain clinic evaluation, which had been awarded under the "rare case" exception to the treatment parameters.

Employee sustained an injury to her low back on June 6, 2006. After employee returned to her regular work activities without restrictions, the employee continued to complain of symptoms that continued to interfere with her recreational activities and required her to have assistance at work. Her treating doctor referred her the University Fairview Pain Center.

The employer and insurer denied the pain clinic referral, but after a hearing the Compensation Judge awarded the evaluation based on the "rare case" exception to the treatment parameters. The parties did not dispute that under treatment parameters Minn. R. 5221.6600 and Minn. R. 5221.6050, subp. 8, the employee did not qualify for a pain clinic evaluation. The Judge felt the "rare case" exception applied, because the employee's formal restrictions and ongoing employment did not reflect the actual limitation that employee's condition imposed on her activities.

While the W.C.C.A. was sympathetic to the employee's ongoing problems, it did not find the facts sufficient to support a "rare case" departure from the treatment parameters. The employee was able to continue her usual occupation. She continued to suffer from recurrent flare-ups which were to be expected under the circumstances. The physical medicine doctor managing employee's care did not offer any opinion on the chronic pain program referral, and the treating doctor who made the referral did not shed any light on what employee could expect to gain from the pain clinic. The W.C.C.A.

noted that the "rare case" exception should not be used to avoid limitations imposed by the treatment parameters.

MISCONDUCT AS BAR TO WAGE LOSS BENEFITS

Sampson v. Forest Lake District Memorial Hospital, No. WC09-184 (W.C.C.A. Nov. 10, 2009)

The employee sustained multiple low back injuries while working for different employers. Her first injury was on October 29, 1991, while working as a paramedic for the Forest Lake District Memorial Hospital. A January 1992 CT scan showed central disc bulges at L4-5 and L5-S1, and a 10.5% PPD rating was assigned in July 1992, along with permanent lifting restrictions of 50 pounds. The employee settled her claims related to the 1991 work injury on a full, final and complete basis in October 1994, leaving open only non-chiropractic medical care. She did not treat for her back between 1996 and 2003.

On June 26, 2003, she sustained a low back injury while working for Nationwide Housing Corporation. She only treated until November 2003, and then did not treat again for her low back until December 2005, when she had a flare-up of low back pain. She treated again in January 2007 for an increase in back pain following sit-up exercises.

Then on March 23, 2007, while working for Ebeneezer Social Ministries as housing director, she experienced an increase in low back pain while helping one of the residents move her belongings in the apartment building. The next day, the employee was unable to straighten up. Two days later, she presented to the emergency room complaining of significant back pain but indicated she could not think of what caused the pain. An MRI showed a small protrusion at L5-S1 that compressed the nerve root. She reported the March 23 injury to her employer and liability was accepted initially.

In December 2007, liability was denied for the March 23, 2007 injury, based on the statements in the initial emergency room notes. She was terminated from employment with Ebeneezer in February 2008, allegedly for misconduct.

The employee filed a Claim Petition, and an IME was performed by Dr. Mark Engasser at the request of the employer and insurer. He found no injury on March 23, 2007 and the complaints instead a natural progression of her pre-existing condition. He apportioned 2/3 of the liability to the 1991 injury and 1/3 to the 2003 injury.

Forest Lake District Memorial Hospital had an IME performed by Dr. Mark Thomas, who concluded the 1991 injury was permanent, the June 2003 injury was a temporary injury, and the March 2007 injury was a permanent injury.

Nationwide obtained an IME of the employee by Dr. Jeffrey Dick, who found that there was no work injury in 2007, and the 1991 and 2003 injuries were temporary, with all of the employee's problems instead due to her sit-up exercises in December 2006.

Treating doctor, Dr. Roushdy, apportioned liability for employee's back condition as 40% to the 1991 injury, 30% to the 2003 injury, and 30% to the 2007 injury.

The Compensation Judge concluded that the March 2007 injury was permanent, the June 2003 injury was temporary, and liability for medical expenses was apportioned between the 1991 injury (2/3) and the 2007 injury (1/3).

Ebeneezer appealed the liability findings regarding the 2007 permanent injury and 2003 temporary injury, and appealed the apportionment determination. It also appealed the award of wage loss benefits due to employee's termination for misconduct, and failure to conduct a diligent job search.

Ebeneezer argued that Minn. Stat. 176.101, subd. 1(e)(1) precluded an award of TTD benefits because she was terminated for misconduct, and therefore TTD benefits should not be recommenced. The employee argued that the defense is not available in the case where employer denied primary liability and would not have recommenced TTD regardless.

The Court declined to reach the issue, as they agreed with the Compensation Judge that the employee's conduct did not rise to the level of misconduct as required by the statute. The misconduct required to bar recommencement of TTD benefits must be "willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect." The Court cited numerous decisions to support its conclusion.

The employee had failed to provide accurate rent statements, received a written warning related to tenant complaints and related to making negative comments about her employer. She also was disciplined for letting a "new" employee terminate another employee when the injured employee was home with a sick child, and then another warning for failing to complete customer satisfaction surveys. She was finally terminated in part for referring to her supervisors in disparaging terms and also in part for failing to complete the satisfaction surveys. The Court agreed with the Judge that this did not rise to the level of the egregious statutory misconduct required to bar recommencement of benefits. The Court also cited another relevant factor – the fact that the employee's performance reviews were always very favorable, with the disputed conduct not occurring allegedly until after the insurer denied the March 2007 injury and then after another work injury occurred in January 2008. The Court suggested the inference was not favorable to the employer.

PERMANENT TOTAL DISABILITY – DISCONTINUANCE FOLLOWING SETTLEMENT

Ruby v. Mueller Pipelines, No. WC09-182, WC09-187 (W.C.C.A., Nov. 25, 2009)

The parties stipulated as part of a settlement that the employee was permanently totally disabled as a result of his injury of September 9, 2004. The settlement language provided that the employee "shall be paid permanent total disability benefits pursuant to Minn. Stat. sec. 176.101, subd. 4." When the employee reached age 67 over two years following the Award on Stipulation, the employer and insurer filed a Notice of Intention to Discontinue Benefits, based on the retirement presumption set forth in Minn. Stat. sec. 176.101, subd. 4.

An administrative conference was held pursuant to Minn. Stat. sec. 176.239, and the commissioner granted the request to discontinue PTD benefits. The employee filed and objection and the case proceeded to a hearing. The Compensation Judge concluded that he did not have jurisdiction to discontinue PTD benefits when the employee has been adjudicated permanently totally disabled. The employer and insurer appealed from the order to recommence PTD benefits.

Also consolidated with the employer and insurer's appeal on the discontinuance decision was the Petition to Discontinue Permanent Total Disability benefits filed by the employer and insurer with the W.C.C.A. directly.

The W.C.C.A. agreed that the discontinuance procedures outlined in Minnesota Statutes sections 176.138 and 176.139 were not applicable to situations where the employee had been adjudicated permanently totally disabled. Consistent with prior case law, the Court noted that an Award on Stipulation is an "adjudication." Accordingly, the employer and insurer could not use these statutory discontinuance procedures for the PTD benefits.

Addressing the employer and insurer's Petition to Discontinue, that was filed directly with the W.C.C.A., the Court found that the employer and insurer had a remedy. As outlined in the case of Ramsey v. Frigidaire Co. Freezer Prods., 58 W.C.D. 411 (W.C.C.A. 1998), rather than vacating a stipulation, the employer and insurer were allowed to pursue discontinuance of PTD benefits through a Petition to Discontinue filed with the W.C.C.A. The language of the Stipulation for Settlement would determine whether or not discontinuance was appropriate. The stipulation must contain language that indicates the parties intended PTD benefits to continue only as long as the employee remained permanently and totally disabled.

The employer and insurer argued that the presumption of retirement contained in Minn. Stat. sec. 176.101, subd. 4 resulted in the employee no longer being permanently totally disabled and therefore discontinuance was appropriate. By stating specifically in the Stipulation that the employee would be paid benefits pursuant to Minn. Stat. sec. 176.104, the W.C.C.A agreed that the retirement presumption was incorporated into the agreement. By function of the statutory language, discontinuance was mandatory, although the employee could attempt to rebut the presumption. The employee would need to file a Claim Petition to seek ongoing entitlement to PTD benefits beyond his 67th birthday.

PERMANENT TOTAL DISABILITY – RETIREMENT PRESUMPTION

Vandervoort v. Olinger Transportation, Inc., No. WC09-4983 (W.C.C.A. Jan. 4, 2010)

The W.C.C.A. reversed the Compensation Judge's finding that the employee failed to rebut the retirement presumption. The employee worked for employer from 1998 until his injury on May 27, 2004. Prior to his employment with employer, he worked in farming and at a variety of temporary positions. A month after the injury, the employee filed for Social Security Disability benefits, ultimately receiving the requested benefits.

The parties negotiated a settlement that included a stipulation of PTD. The Stipulation provided that the PTD benefits would end on the date of the employee's 67th birthday. The Stipulation also reserved to the employee the right to rebut the statutory retirement presumption. The employee objected to the discontinuance of PTD benefits, and the matter proceeded to hearing. The Compensation Judge found that the employee had failed to rebut the retirement presumption.

The Judge examined the six recognized factors relevant to the retirement presumption and whether the employee had rebutted the same:

1. Employee's expressed intent to retire or continue working;
2. The employee's application for Social Security retirement benefits;
3. Evidence of a financial need for employment income, including adequacy of pension or other retirement income;
4. Whether the employee had initiated discussion of retirement;
5. Whether employee had sought rehabilitation assistance; and
6. Whether the employee had actively sought alternative employment or was working.

The employee argued on appeal that because of the stipulation to PTD, should not have been expected to seek rehabilitation assistance or alternative employment. The W.C.C.A. agreed with the employee. Because the alleged retirement occurred following the employee's settlement, the W.C.C.A. did not believe that failure to seek rehabilitation assistance was evidence of voluntary retirement. In examining the other factors, the Court noted that three factors were neutral on the issue of rebutting the presumption while one factor weighed in employee's favor (evidence of financial need). In a footnote, the W.C.C.A. also observed that the FCE in early 2006 stated that the employee's goals included a return to trucking. The Court pointed to this as additional evidence of an intent to continue working.

Other deficiencies in the retirement presumption noted by the Court include a lack of medical evidence demonstrating a change or improvement in employee's medical condition, or evidence that employee was medically capable of sustained employment. Ongoing PTD benefits were ordered.

REHABILITATION – PRIVATE SERVICES WITH PRIMARY LIABILTY DENIAL

Najarro v. Minnesota Minerals & Aggregates, No. WC09-193 (W.C.C.A. Dec. 21, 2009)

The employer and insurer initially admitted primary liability for an alleged injury to the employee's left shoulder, but disputed the nature and extent of the injury. The employee filed a Claim Petition for various wage loss benefits, PPD benefits, medical expenses, and vocational rehabilitation services. The employer and insurer denied the claimed benefits and alleged that the employee's work injury was a temporary injury and had resolved, with no further benefits owing.

The same month the employee filed his Claim Petition, a private rehabilitation firm began providing services, including medical management and job placement assistance. The employer and insurer objected to the provision of services, but the QRC continued to provide services and work with the employee.

After a hearing, the Compensation Judge found that employee had sustained a permanent injury, and awarded portions of the vocational rehabilitation services that had been provided by the private firm. The employer and insurer appealed the decision, claiming that while liability was denied, the employee was only eligible for vocational rehabilitation services from Department of Labor and Industry's Vocational Rehabilitation Unit. The employer and insurer pointed to the language in Minn. Stat. sec. 176.104, subd. 1, which states the employee "shall" bed referred to VRU in cases where there is a dispute over medical causation or primary liability.

The W.C.C.A. affirmed the Compensation Judge's award of vocational rehabilitation services provided by the private rehabilitation firm. The Court stated that the QRC assumes the risk of an adverse liability decision resulting in non-payment, but the private QRC is not prohibited from providing services under circumstances of a denied claim.

TEMPORARY PARTIAL DISABILITY – INSUBSTANTIAL INCOME

Shepard v. Loram Maintenance of Way, No. WC09-4974 (W.C.C.A. Jan. 5, 2010)
The W.C.C.A. reversed the Compensation Judge's decision that very nominal wages earned post-injury were sufficient to establish entitlement to temporary partial disability benefits. The employee's pre-injury wage was $789.57, for his date of injury of November 11, 2006. In January 2009, the employee began working for a friend who owned a trucking business. He had no set hours, reported hours "on the honor system" and was paid an inconsistent hourly wage or by the job. He worked for a few weeks in January and February, earning $20.00 to $25.00 per week.

The employer and insurer filed a Notice of Intention to Discontinue Benefits in early February 2009, based on sporadic and insubstantial income. The Compensation Judge issued a decision denying the discontinuance.

Employee must demonstrate that post-injury wages are a result of gainful employment, involving more than "sporadic employment resulting in an insubstantial income." The W.C.C.A. found the employee's two to three hours per week of work under the circumstances insufficient to support a finding of gainful employment. The W.C.C.A. held that under the specific facts of the case, the earnings were too insubstantial to support a TPD benefit.

VACATION OF AWARD ON STIPULATION

Davis v. Trevilla of Golden Valley/United Healthcare, No. WC09-165 (W.C.C.A. Jan. 21, 2010)

While the Court reviews the various aspects of the employee's claim that she experienced a substantial change in condition, that supported vacating the Award on Stipulation, the discussion relating to the reasonable foreseeability of the change is worth mention. The Petition to Vacate related to an Award on Stipulation filed in 1993.

The W.C.C.A. concluded that employee demonstrated a substantial change in condition. The employer and insurer attempted to argue that such change was contemplated by the parties at the time

of the settlement, as reflected by the series of questions the employee had initialed as part of the Stipulation. Specifically, one of the questions asked employee to acknowledge that she understood the "settlements to be final even if her condition should substantially change in the future."

The Court referred to the questions initialed by the employee in the Stipulation as "boilerplate language" and suggested they *may* but do not necessarily reflect the parties' true expectations. The Court also observed that the questions do not necessarily represent *reasonably* foreseeable consequences of the work injury. In the case in question, the employee had been recommended for multiple surgeries after the Award, including a 3-level fusion.