

HEACOX, HARTMAN, KOSHMRL,
COSGRIFF & JOHNSON, P.A.

Case Law Update

MINNESOTA SUPREME COURT

ATTORNEY'S FEES – EXCESS FEES

***Braatz v. Parsons Electric Company*, 850 N.W.2d 706 (Minn. 2014)**; Decided July 23, 2014.

Days prior to hearing, the employee dropped his claim for indemnity benefits and sought a determination of only primary liability and \$11,893.69 in medical expenses. The employee prevailed at the hearing and the decision was not appealed. The employee's attorney subsequently filed a statement of attorney fees seeking \$33,740.00 for his efforts pursuant to Minn.Stat. § 176.081, subd. 1(a)(1) and the *Irwin* factors. Counsel for the employer and insurer objected, arguing that both the employee's hourly fee of \$350.00 per hour and the number of hours spent, 96.40, were unreasonable. The compensation judge awarded the employee's attorney \$10,000.00 in addition to the \$2,578.72 contingency fee. The employer appealed and the WCCA affirmed. On appeal to the Minnesota Supreme Court, the employer argued that since the employee did not bring all of his viable claims at the time of hearing, any excess attorney's fees could not be awarded under the plain language of Minn.Stat. § 176.081, subd. 1(a)(3), which states that a claimant must file all disputed claims concurrently, and that attorneys fees may not be awarded for representation on an issue that could have been addressed at hearing, but was not pursued. The employer also argued that no reasonable person would pay an attorney \$12,578.74 to recover \$11,893.69, and that a compensation judge should consider private sector "billing judgment." The Minnesota Supreme Court upheld the compensation judge's findings awarding excess attorneys fees, holding that the employee's attorney did not forfeit the right to seek attorney fees for the medical benefits claim because he did not bring the indemnity claim. The Minnesota Supreme Court also held that the compensation judge did not abuse his discretion in awarding \$12,578.74 in attorney fees.

PERMANENT TOTAL DISABILITY - DISCONTINUING BENEFITS

***Stevens v. S.T. Services*, 851 N.W.2d 52 (Minn. 2014)**; Decided July 30, 2014.

Pursuant to Minn.Stat. § 176.238, subd. 11 (2012), an employer may not Petition to Discontinue an employee's workers' compensation benefits if the employee has been adjudicated permanently and totally disabled. Due to a shoulder injury, which required multiple surgeries, the employee was declared permanently and totally disabled by a compensation judge in 1994. A Stipulation for Settlement was entered into, stipulating that the employee was permanently and totally disabled. The employee was subsequently hired as a plumbing specialist by Home Depot in Alaska and worked from February 2008 through December 2010. He earned between \$33,000.00 and \$42,000.00 per year during his employment with Home Depot. Upon learning of this employment, the employer and insurer filed a Petition to Discontinue permanent total disability benefits with the W.C.C.A. in 2011, and the matter was referred for an evidentiary hearing. After the evidentiary hearing, the Petition to Discontinue was granted. On appeal, the W.C.C.A.

affirmed. The employee appealed to the Minnesota Supreme Court, which held that under the Stipulation for Settlement, the parties had agreed that the employee was permanently totally disabled and would receive ongoing benefits. As such, S.T. Services was not authorized to Petition to Discontinue benefits.

RIGHT TO JURY TRIAL

Schmitz v. United States Steel Corp., 852 N.W.2d 669 (Minn. 2014); Decided August 27, 2014.

The employee brought an action alleging retaliatory discharge and refusal to offer continued employment in violation of the Workers' Compensation Act in district court. He also brought a disability discrimination claim against the employer. The employer moved for summary judgment, which was granted by the district court. The employee appealed, and the Minnesota Court of Appeals affirmed the district court's summary judgment with regard to the discrimination claim, but reversed and remanded on the issue of refusal to offer continued employment. On remand, the employee amended his complaint to include a claim for threatening to discharge him for seeking workers' compensation benefits. The employee also sought a jury trial, which was quashed by the district court. Following a bench trial, the district court awarded judgment to the employee for emotion distress and rejected the employee's claims regarding retaliatory discharge and refusal to offer continued employment. After a partial affirmance and partial reversal at the Court of Appeals level, the employer appealed to the Minnesota Supreme Court. The Minnesota Supreme Court reversed the denial of the employee's right to a jury trial, holding that Minn.Stat. § 176.82, subd. 1 provides a civil remedy for retaliatory discharge claims. Additionally, the Minnesota Supreme Court refused to extend the *Faragher/Ellerth* affirmative defense of supervisory misconduct beyond hostile environment sexual harassment scenarios.

WORKERS COMPENSATION COURT OF APPEALS

SCOPE OF HEARING

Gordenier v. Original Mattress Factory, 2014 WL 2871790 (Minn.W.C.Ct.App. June 4, 2014).

The employee sustained two low back work-related injuries while working for the employer in 2007. Benefits were voluntarily paid, and a stipulation was entered into in 2009 leaving medicals open. The employer and insurer asserted that her injuries were temporary and had resolved. In 2013, the employee filed a Medical Request seeking payment for treatment of a piriformis condition (hip condition) alleging her issues were related to her low back injuries. As part of the Medical Request the employee sought removal and relocation of a bladder stimulator related to a non-work related urological condition. The case was set before a compensation judge on an expedited basis. At the hearing, the judge framed the issues as, "the nature and extent" of the injuries, and whether the injuries were "temporary or ongoing." There was no objection. Based on the

IME report and other medical evidence, the judge determined that her work injuries were temporary and denied the request for payment of treatment for her piriformis and urological condition. The employee appealed to the W.C.C.A. contending that the judge had expanded the scope of the hearing beyond the Medical Request. The W.C.C.A. determined that since the judge framed the issue and received no objection from the employee, the issues were not improperly expanded.

SUPERSEDING INTERVENING INJURY

***Reding v. Kraft Foods, Inc.*, 2014 WL 3016640 (Minn.W.C.Ct.App. June 16, 2014).**

The employee sustained an admitted neck and low back injury at work in 1999. In 2004 the employee sustained a severe non-work related injury, which resulted in an amputation of his left index finger and regional complex pain syndrome in his lower extremities. The employee sought permanent total disability benefits. The employer denied responsibility for the employee's ongoing disability and need for medical care, and asserted that his 2004 injury was a superseding intervening injury. The compensation judge denied the employee's claim for permanent total disability benefits on the basis that the 2004 injury was a superseding intervening injury. The employee did not appeal. The employee subsequently filed a Medical Request in May 2013 seeking payment of outstanding medical bills and out-of-pocket medical expenses. The compensation judge weighed the credibility of the employee's treating doctor and the IME doctor of the employer and insurer and concluded that the medical treatment in dispute was reasonably necessary and causally related to the 1999 work injury. On appeal, the W.C.C.A. agreed with the compensation judge's discretion and further concluded that the 2004 injury did not break the causal connection between the work injury and the employee's need for medical treatment.

VACATING A STIPULATION FOR SETTLEMENT

***Dehn v. Star Tribune/Cowles Media Co.*, 2014 WL 3016642 (Minn.W.C.Ct.App. June 17, 2014).**

The employee sustained an admitted injury to his left wrist in 1995 and subsequently developed symptoms in her right upper extremity. Both upper extremities required surgery. The parties entered into a settlement, and an Award on Stipulation was served and filed in May 1998. The terms of the settlement provided that in exchange for a full, final, and complete settlement leaving medical expenses open, the employee would be paid \$15,000.00. As part of the stipulated agreement the employee acknowledged that she may have future entitlement to wage loss benefits. She also claimed that she was in need of future treatment, including surgery. The employer and insurer asserted that she would not have any entitlement to future wage loss benefits, as she was fully capable of working without significant restrictions. Following the stipulated agreement the employee sustained multiple slip and fall injuries requiring multiple surgeries. In July 2013 the employee filed a petition to vacate the Stipulation for Settlement alleging a substantial change in medical condition.

The W.C.C.A. held that pursuant to Minn.Stat. §176.461, the W.C.C.A. has the authority to vacate an award on stipulation “for cause,” including a substantial change in medical condition. The W.C.C.A. vacated the 1998 Award on Stipulation asserting that the employee’s condition could not reasonably have been anticipated and that the employee’s condition had undergone a substantial change. In coming to that conclusion, the W.C.C.A. considered the employee’s change in work restrictions, assignment of permanent partial disability, her additional medical treatment, and lack of medical support for the employers position that the employee’s numerous falls contributed to her condition, all occurring since the time of the settlement.

JUSTICIABILITY

***Meyer v. Wal-Mart Stores, Inc.*, 2014 WL 3700641 (Minn.W.C.Ct.App. July 2, 2014).**

The compensation judge found that the employee failed to meet the disability threshold to establish a permanent partial disability, and, as a result, also failed to demonstrate that she was permanently and totally disabled as a result of her work injuries. The employee appealed contending that the judge’s decision finding that she was not permanently and totally disabled may bar future claims by reason of *res judicata*. Finding no justiciable controversy, the W.C.C.A. dismissed the appeal, holding the court would not submit an advisory opinion without a live controversy.

PERMANENT PARTIAL DISABILITY – PRESENT VALUE

***Roskos v. Bauer Electric, Inc.*, 2014 WL 5149050 (Minn.W.C.Ct.App. Sept. 23, 2014).**

The employee appealed from the compensation judge’s determination as to the discount rate for a lump sum payment of his permanent partial disability benefits pursuant to Minn.Stat. § 176.101, Subd. 2a(b). The employer and insurer applied a 5% discount rate to arrive at the present value of the employee’s permanent partial disability. The employee asserted the appropriate rate of the present value was to be calculated using a 1.59% discount rate. Minn.Stat. § 176.101, Subd. 2a(b) was amended in 2000 to provide that the present value of lump sum payments may be discounted up to a maximum of 5%. The compensation judge, relying on the report and testimony of a financial expert who indicated 5% was an appropriate discount rate, found for the employer and insurer. The W.C.C.A. concluded that the judge’s decision was, therefore, not clearly erroneous or unsupported by substantial evidence and affirmed the compensation judge’s determination.

CHANGE OF QUALIFIED REHABILITATION CONSULTANT

***Breeze v. FedEx Freight*, 2014 WL 4491002 (Minn.W.C.Ct.App. Aug. 26, 2014).**

The employee appealed from the compensation judge’s denial of payment for services provided by the employee’s first Qualified Rehabilitation Consultant (QRC) following

the employer's successful request for a change of QRC. The W.C.C.A. affirmed, holding that the QRC runs the risk of nonpayment when he or she continues to provide services to an employee pending the resolution of a dispute over rehabilitation services. The employee argued that since the judge denied the request to terminate rehabilitation services, and instead granted a change of QRC, the services are compensable. The W.C.C.A. disagreed and upheld the compensation judge's findings.

APPEALABLE ORDERS

***Brown v. North Memorial Medical Center and Parker Services, LLC*, 2014 WL 4491104 (Minn.W.C.Ct.App. Aug. 29, 2014).**

The employee filed a Claim Petition seeking entitlement to workers' compensation benefits for a work-related injury and consequential anxiety, major depression, and chronic pain syndrome. The employer filed a Motion to Dismiss, contending that psychological and pain management treatment had been foreclosed in a prior Stipulation for Settlement. The Motion was denied by the compensation judge and the employer and insurer appealed. The W.C.C.A. held that an order denying a Motion to Dismiss a claim is not an appealable order, as it does not finally determine the rights of the parties or conclude the action, and the appeal was dismissed.

REHABILITATION CONSULTATIONS

***Dahlheimer v. Qwest Corporation N/K/A Century Link*, 2014 WL 4808847 (Minn.W.C.Ct.App. Sept. 2, 2014).**

The employee sustained two admitted work-related injuries in 2005 and 2007. He returned to work on light duty and continued to have ongoing symptoms. In 2008 he developed a non-work related condition, for which he was taken off work. Ultimately, the employee's treating doctors determined his functional capabilities were very low. The employee requested a rehabilitation consultation, which was denied by the employer and insurer on the basis that the employee's disability stemmed from a superseding, intervening condition. The compensation judge granted the rehabilitation consultation, and determined that the condition was not a superseding, intervening condition. The W.C.C.A. affirmed, holding that unless the employer or insurer has filed and been granted a rehabilitation waiver, an employee is entitled to a rehabilitation consultation as a matter of right pursuant to Minn.Rule 5220.0110, subp. 7A. The W.C.C.A. also affirmed the compensation judge's findings that the employee's non-work related condition was not a superseding, intervening condition, as the record demonstrated evidence of continued symptoms and disability from the employee's work-related conditions.

“RULE OUT” PROVISION

***Phipps v. Bamboo Betty’s/Lex Corp, Inc.*, 2014 WL 4808846 (Minn.W.C.Ct.App. Sept. 10, 2014).**

The employee sustained a work-related injury to his left leg, and underwent an independent medical examination, performed by Dr. Paul Wicklund, who reported that the employee’s injury was temporary and had resolved. The employee continued to complain of symptoms and was recommended for surgery. The compensation judge adopted the determinations of Dr. Wicklund and denied the reasonableness and necessity of the employee’s requested surgery. The employee appealed, referring to the “rule out” provision as cited in *Ploog v. Premier 94 Truck Servs., Inc.*, 72 W.C.D. 45 (W.C.C.A. 2012). The W.C.C.A. determined that the “rule out” provision applies to diagnostic testing, and did not apply. The judge’s findings were affirmed.

VACATION AND SICK LEAVE

***Weigand v. Independent School District No. 2342*, 2014 WL 5149047 (Minn.W.C.Ct.App. Sept. 23, 2014).**

The employer and insurer appealed from the compensation judge’s findings that the employee’s work injury aggravated her pre-existing condition, that her RSD was related to her work injury, that her medical expenses were reasonable and necessary, and that the employee was entitled to temporary total and temporary partial disability benefits to compensate for her use of vacation and sick leave. The W.C.C.A. deferred to the compensation judge and affirmed the finding that her work injury aggravated her pre-existing condition, that her RSD was related to her work injury, and that her medical expenses were reasonable and necessary. The employer and insurer argued that the employee was not entitled to recovery of wage loss benefits because she had received her full wage using her vacation time and sick leave while she was attending medical appointments and she would be receiving double recovery. The W.C.C.A. affirmed the compensation judge’s decision, holding that workers’ compensation benefits were primary, and denying her these benefits would be, in essence, the employee paying workers’ compensation benefits to herself.

REHABILITATION REQUESTS – JOB SEARCH

***Petermeier v. Centimark Corp.*, 2014 WL 5529505 (Minn.W.C.Ct.App. Oct. 14, 2014).**

The employee sustained an admitted work injury when he fell from a ladder in 2011. Shortly after his injury, he began working with a QRC who provided rehabilitation services to the employee focusing on medical management and the employee’s return to work. The employee was the father to a minor child, from whose mother he was separated. In 2013, the employee filed a Rehabilitation Request seeking to change his rehabilitation plan to include a job search, as his current job with the employer separated him from his son for long periods of time, and therefore the job was not suitable. The

compensation judge denied this request, holding that the employer provided suitable gainful employment. The W.C.C.A. found that the judge's findings were clearly erroneous, reasoning that the employee's post-injury restrictions did not allow him to return to his former job, and, further, the job offered by the employer required him to alter his pattern of living. Additionally, the W.C.C.A. held that even though the employee accepted the job offered by the employer, it did not preclude him from later claiming it was unsuitable.

PERMANENT PARTIAL DISABILITY

***Hagos v. LSG Sky Chefs, Inc.*, slip op., (W.C.C.A. Oct. 7, 2014).**

The employee sustained a temporary work-injury, admitted by the employer and insurer. The parties agreed she had also sustained a 5% permanent partial disability. The compensation judge concluded that the employee's injury was temporary, and had resolved without disability, thereby denying her certain claimed medical expenses. The employee appealed. The W.C.C.A. affirmed the judge's finding insofar as the claimed medical expenses were concerned. However, the W.C.C.A. held that the employee's injury, while temporary, had not resolved without residual disability as she had been assessed with a permanent partial disability rating.

***Oullette v. Wal-Mart Stores, Inc.*, slip op. (W.C.C.A. Oct. 21, 2014).**

The employee sustained an injury to his spinal cord, and the employer and insurer initiated payments for temporary total disability benefits while the employee was unable to work. At the request of the employer and insurer, the employee underwent an independent medical examination with Dr. Exconde, who found the employee had sustained a 75% permanent partial disability rating. The employer and insurer then filed a notice of intention to discontinue temporary total disability benefits based on maximum medical improvement, and initiated payment of permanent partial disability pursuant to Dr. Exconde's report. The employer and insurer obtained surveillance, which showed the employee driving a vehicle, and filed a Petition to Discontinue benefits. The compensation judge determined that the employee had not sustained a 75% permanent partial disability as rated by Dr. Exconde and the employee appealed. The employee argued that the judge should have estopped the employer and insurer from disputing his permanent partial disability rating, because he was prejudiced by a change in their position. The W.C.C.A. upheld the judge's findings, holding that the employer and insurer made no misrepresentations to the employee, and further, the judge's decision is supported by substantial evidence on the record.

MEDICAL REQUESTS – RES JUDICATA

***Mach v. Wells Concrete Prods. Co.*, slip op., (W.C.C.A. Nov. 4, 2014).**

The employee sustained an admitted work injury in 2008 while working for the employer. The employee filed a claim petition in 2010, alleging he had developed RSD

and was seeking, in part, payment for implantation of a neurostimulator. The compensation judge denied the employee's request and the denial was affirmed by the W.C.C.A. Later, in 2013, the employee filed a Medical Request seeking payment for removal and replacement of the spinal cord stimulator. The compensation judge, who held that the employee's claims were barred by the doctrines of collateral estoppel and res judicata, denied the request. The request was denied with prejudice. The employee appealed, and the W.C.C.A. reversed, holding that since there had not been a finding that the 2008 work injury was temporary, had resolved, or was healed, the employee's claim was not barred. The Court remanded and instructed that the request be determined on its merits.

TRAUMATIC BRAIN INJURY

***Greer v. Minnesota Vikings Football Club*, 2014 WL 5314569 (Minn.W.C.Ct.App. Sept. 30, 2014).**

The employee appealed from the compensation judge's findings that he had failed to prove his chronic pain disorder and psychological condition was the result of his admitted 1989 work-related left-knee injury, that the employee failed to prove his 1989 left-knee injury was a substantial contributing factor to his permanent total disability, and that the employee failed to prove his work activities caused, aggravated, or accelerated his traumatic brain injury/cognitive impairment, chronic traumatic encephalopathy and/or dementia. Since the compensation judge's findings were based upon substantial evidence on the record, the W.C.C.A. affirmed.

SUBSTANTIAL EVIDENCE

***Casper v. City of Fergus Falls*, 2014 WL 4808848 (Minn.W.C.Ct.App. Sept 9, 2014).**

The W.C.C.A. affirmed the compensation judge's determination that the employee did not meet the permanent partial disability threshold for permanent total disability benefits under Minn.Stat. § 176.101, subd. 5(2)(a). The employee appealed, arguing he did meet the threshold and he was also entitled to a *Weber* rating. The W.C.C.A. agreed with the compensation judge that the employee's 10 percent permanent partial disability rating for his low back condition did not meet the threshold, and that the employee was not entitled to a *Weber* rating because his condition was sufficient described within the disability schedules.

***Lehnen v. Process Displays Co.*, 2014 WL 4808849 (Minn.W.C.Ct.App. Sept. 10, 2014).**

The employee appealed from the compensation judge's determination that his injury was a temporary aggravation. The W.C.C.A. reversed the judge's decision, holding that the judge's award of permanency was inconsistent with the finding that the employee's injury was temporary, and therefore the determination was clearly erroneous.

***Commodore v. Western Precipitation*, 2014 WL 5149052 (Minn. W.C.Ct.App. Sept. 23, 2014).**

The employee appealed the compensation judge's determination that benefits payments had been made, despite the employee's claims that he had not received those payments. The W.C.C.A. affirmed the compensation judge's findings, and found the judge's reliance upon the documentation of those payments to be sufficient for the employer to meet the burden of proof demonstrating the employer was owed a small credit.

***Brunkhorst v. Andrews Knitting Mills*, 2014 WL 5149049 (Minn.W.C.Ct.App. Sept. 25, 214).**

The employee appealed the compensation judge's determination that her medications, including her narcotic medications and ibuprofen, were not reasonable, necessary, or casually related to her work injury. The judge found that expert medical opinion of Dr. Zeller-Hack, the independent medical examiner, to be more persuasive. The W.C.C.A. affirmed, holding that the record supports the compensation judge's conclusions, and therefore the findings were affirmed.

***Shaw v. Supervalu, Inc.*, 2014 WL 5314568 (Minn. W.C. Ct. App. Sept. 30, 2014).**

The employer and insurer appealed from the compensation judge's determination that the employee had sustained a work-related injury to his neck, upper back, and right shoulder, contending that these findings were not supported by substantial evidence. The W.C.C.A. affirmed the judge's determinations, holding that the Court should defer to the compensation judge with regard to determinations of credibility of the evidence.

***Anwiler v. Luoma Egg Ranch, Inc.*, slip op., (W.C.C.A. Oct. 21, 2014).**

The employer and insurer appealed from the compensation judge's determinations that the employee had sustained a specific injury, *Gillette* injuries, and that she had sustained permanent partial disabilities. Additionally, the employer and insurer argued that the compensation judge committed an error by refusing to address an issue raised in the employer and insurer's closing argument for the stated reason that opposing counsel was not given notice of the issue with a reasonable opportunity to be heard. The W.C.C.A. affirmed the judge's findings with respect to the employees specific and *Gillette* injuries, as well as the permanent partial disability ratings, holding that it is the function of the compensation judge to give appropriate weight to medical evidence. The W.C.C.A. also found that the employer and insurer raised an issue not addressed at the hearing in closing argument, which was inappropriate as closing arguments are meant as an opportunity for the parties to reiterate their positions, not being new issues for consideration.

***Carroll v. Allina Mercy Hospital and Hennepin County Med. Ctr.*, slip op., (W.C.C.A. Oct. 31, 2014).**

The employee appealed from the compensation judge's denial of her claim for penalties against the self-insured employer Hennepin County Medical Center (HCMC). While working for HCMC, the employee sustained a low back injury in October of 2012, she advised her supervisor and sought treatment a few days later. The employee filed a Claim Petition in February of 2013. At hearing, in addition to other defenses HCMC raised a notice defense, which the employee claimed was frivolous and sought penalties. The W.C.C.A. upheld the compensation judge's denial of penalties, holding that an award of penalties is within the discretion of the compensation judge. The W.C.C.A. further held that an award of penalties is not appropriate where an employer and insurer have interposed a good faith defense. Noting that the judge's memorandum pointed out several good faith reasons for the employer and insurer's notice defense, including that the employee failed to report her ongoing injury when she was hired and that she continued to work full time after the alleged injury at HCMC, the W.C.C.A. found there was substantial evidence to support the judge's determinations.