MINNESOTA EMPLOYERS WORKERS COMPENSATION CASE LAW SUMMARY (SEPT - NOV 2018)

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CASE LAW UPDATE

1. Loupe, Jr. v. McNeilus Steel, Inc., No. WC18-6175 (WCCA September 11, 2018)

The Employee appealed the Compensation Judge's holding that payment for an x-ray administered four years after the employee underwent knee surgery due to a work related injury was precluded under the medical treatment parameters. The WCCA affirmed. After undergoing surgery on August 21, 2013, the Employer and Insurer approved follow-up x-rays on April 29, 2014, October 7, 2014, July 7, 2015 and July 7, 2016. Pursuant to Minn. R. 5221.6100, the Employer and Insurer denied authorization of an x-ray to be taken on May 23, 2017. The treatment parameter indicates a "routine" x-ray is "not indicated unless the information from the study is necessary to develop a treatment plan." However, the parameter provides an exception allowing for a repeat x-ray "to follow up a surgical procedure." The Employee argued the Judge erred in applying the treatment parameter governing "routine" imaging, rather than the treatment parameter governing "repeat" imaging. The WCCA disagreed with the Employee. The WCCA noted the employee was stable and all of his follow-up x-rays were normal. Therefore, the WCCA concluded it was reasonable for the Judge to conclude that further x-rays were routine and not indicated under the treatment parameters.

The employee also argued the only medical opinion submitted came from the treating physician in which he explained the reasonableness and necessity of the follow-up x-rays. Therefore, the Employee claimed the Judge was bound by the treating physician's opinion. Nonetheless, the WCCA concluded that substantial evidence in the record as a whole supported the Judge's finding.

2. Blomme v. ISD No. 413, No. WC18-6169 (WCCA September 14, 2018)

The WCCA affirmed the Compensation Judge's decision that the employee was PTD. The Self-Insured Employer unsuccessfully argued the Employee failed to perform a diligent job search and that he was managing rental properties, which showed that he was capable of gainful employment. The WCCA concluded reasonable evidence supported the Judge's finding that a job search was futile, as the Employee was not medically released to return to work for more than a few months over an 11 year period. The WCCA further concluded that the Employee's income from the rental properties was insubstantial in that he was earning less than $50.00 per week. The Self-Insured Employer noted the Employee received about $18,000.00 per year in gross rents. However, after accounting for costs and expenses, the Employee and his wife typically lost money and only made $4,911.00 in their best year. The WCCA attributed one-half of that to the Employee, which amounted to $47.22 per week. The WCCA concluded it was reasonable for the Judge to conclude this constituted insubstantial earnings.

3. Noga v. Minn. Vikings Football Club, No. WC18-6133 (WCCA September 19, 2018)

The Employee played professional football for the Minnesota Vikings from 1988 to 1992. His contract expired with the Vikings and then he played one season with the Washington Redskins and then a partial season for the Indianapolis Colts. He then played in the Arena Football League until he retired from professional football in 1999.

The Employee claimed a *Gillette* injury to his head due to repetitive trauma culminating on his last day with the Vikings, December 1, 1992. While playing for the Vikings, the Employee experienced headaches and dizziness. At times, he was given Advil or Tylenol, and occasionally was given a blanket and told to rest in the training room. After his contract ended with the Vikings, the Employee continued to experience headaches and nausea with his subsequent teams and continued to receive medication and at times rested in the training room.

The Employee filed a Claim Petition on January 15, 2015. The Vikings denied primary liability and notice and argued the statute of limitation had run. The Compensation Judge held the Employee sustained a *Gillette* injury culminating on his last day of employment with the Vikings. The Judge further concluded the Vikings had sufficient notice of the *Gillette* injury and that the statute of limitations was met through medical treatment provided in the teams' locker room. The Vikings appealed.

In a prior decision filed on April 20, 2017, the WCCA vacated the finding of a *Gillette* injury and remanded with instructions to provide further analysis of how the evidence supported the finding of a *Gillette* injury, while the Employee played for the Vikings. The WCCA also vacated and remanded the Judge's findings regarding notice and the statute of limitations. On remand, the Judge again found the Employee sustained a *Gillette* injury, while playing for the Vikings. The Judge concluded the injury culminated on the Employee's last day of employment, December 1, 1992.

The Vikings appealed, in part, on the grounds that as a matter of law liability should have fallen on the last employer, while the Employee played in the Arena Football League. Pursuant to *Michel's v. American Hoist & Derrick,* 269 N.W.2d 57 (Minn. 1978), liability for a *Gillette* injury generally is held to rest with the employer and insurer on the risk on the date of disablement, so long as the duties of that employment substantially contributed to the Employee's disability. The WCCA indicated that rule is not a defense to primary liability. Instead, it is a rule to apply in cases of apportionment. Therefore, the rule did not apply to the present case because the Vikings were the only named employer.

The WCCA also upheld the Compensation Judge's finding that the statute of limitations was met by the Vikings providing Tylenol and Advil and a place for the Employee to rest. The WCCA distinguished this situation from Livgard v. Cornelius Company, 243 N.W.2d 309 (Minn. 1976) in which it was determined that providing aspirin by a company nurse for the Employee's complaints of back, hip and leg pain did not satisfy the statute of limitations. The WCCA noted that in Livgard aspirin was dispensed as a general service provided to all Employees who suffer from minor ailments of whatever nature and origin. In Livgard, there was no evidence to suggest that the need for aspirin was attributed to the Employee's work activities.

The Vikings further argued the statute of limitations could not be met because the Employee's *Gillette* injury had not yet culminated at the time the treatment was provided. The WCCA disagreed. The WCCA reasoned, as a practical matter, the culmination date of a *Gillette* injury will inevitably be later than some or all of the contributing traumatic events.

The Vikings also appealed the finding that the Employee provided proper notice. The WCCA noted that the notice requirement does not begin to run until it is reasonably apparent to the Employee they suffered an injury. The WCCA agreed with the Compensation Judge that both the Employee and the Employer became aware of the compensable nature of the injury when they received a copy of a physician's report dated February 17, 2004 in which the physician referenced the Employee's blackout episodes from concussions. The report was attached to a Stipulation for Settlement that was filed on March 23, 2004 regarding numerous orthopedic injuries. The WCCA concluded the Employer had actual notice of the claim because the report was attached to the Stipulation.

4. Rosar v. Southview Acres Health Care Center, No. WC18-6143 (WCCA September 21, 2018)

The Employee injured herself when she fell at work, while walking. The floor was carpeted, non-slippery, flat, dry and debris free. The Compensation Judge concluded nothing about the floor contributed to the Employee's fall. However, the Employee testified, as a nursing assistant, she always walked fast while working. In applying *Dykoff*, the Compensation Judge concluded that walking fast was not the cause of the fall, and therefore, the injury did not arise out of the Employee's employment. The WCCA affirmed. As the Employee was unable to cite any hazard other than walking fast, the WCCA concluded substantial evidence supported the Compensation Judge's conclusions.

5. Krull v. Divine House, Inc., No. WC18-6166 (WCCA September 27, 2018)

While working in a group home, the Employee was carrying three gallons of milk, turned, took a step and felt her knee pop. Pursuant to Dykhoff, the WCCA affirmed the Employee's injury did not arise out of her employment. The main factual issue in the determination was that she had completed the turn and was walking normally when the injury occurred. Therefore, there was no increased risk. According to the WCCA, her testimony was "unequivocal that she was walking normally, and unaffected by the three gallons of milk that she was carrying."

6. Wright v. Viking Coca Cola Bottling Co., No. WC18-6168 (WCCA October 1, 2018)

On February 25, 2015, the Employee slipped and fell on ice. The Self-Insured Employer admitted a left upper extremity injury. The Employee did not report that he struck his head. However, sixteen months later he began treating for neurological symptoms and indicated he hit his head when he slipped and fell on the ice. The Self-Insured Employer obtained IME reports from an orthopedist and a neurologist. Based on the neurologist's report, the Judge denied the

Employee's claim for a spine/head/concussive injury. However, the Judge awarded TTD benefits on the grounds the Employee's left upper extremity injury was contributing to the Employee's inability to work.

The Employee appealed the Judge's denial of a head injury. The Employee argued the IME's opinion was unfounded. The WCCA disagreed and cited numerous facts that supported the IME's opinion.

The Self-Insured Employer appealed the award of TTD benefits arguing the Employee was working without a wage loss for sixteen months before he was taken off work due to his non-compensable head injury. The WCCA disagreed indicating the treating physician took the Employee off work, in part, due his left upper extremity injury.

7. Lein v. Eventide, WC17-6101 (WCCA December 29, 2017; Minn. S. Ct. October 2, 2018, *affirmed without opinion*)

The Supreme Court summarily affirmed the WCCA in this matter. The WCCA held that stairs themselves impose an increased risk, such that an injury falling on stairs at work inherently arises out of employment.

8. Kronberger v. 3M Cos., No. WC18-6165 (WCCA October 11, 2018)

The Employee claimed a *Gillette* injury to her right shoulder culminating on May 3, 2016, the date she began treatment, due to working on an assembly line from January 2015 to May 2016. She began noticing the symptoms in late 2015. At that time, she attributed her symptoms to work, but did not think much of it because they would go away on their own.

On May 3, 2016, the Employee saw her family doctor for her right shoulder because her symptoms persisted. Her family doctor placed her on light duty. He also completed forms provided by the Employer in which he indicated the condition was not work related.

After one week on light duty, the Employer notified the Employee they could no longer accommodate her restrictions. The Employee continued to treat through the summer of 2016 without improvement, so her doctor referred her to a specialist, Dr. Matthew Eich. The specialist recommended surgery.

After seeing Dr. Eich, the Employee reported a work injury to her Employer and completed a First Report on July 28, 2016. The Employer and Insurer denied primary liability based upon the family doctor's reports. The Employee underwent surgery on August 5, 2016. In his August 18, 2016 treatment notes, Dr. Eich indicated the Employee suffered a work injury due to repetitive trauma.

The Judge found the Employee sustained a *Gillette* injury culminating on May 3, 2016. The Employer and Insurer appealed on the grounds Dr. Eich's opinion was unfounded and that the Employee failed to provide timely notice.

The WCCA affirmed the Judge's causation finding holding that substantial evidence supported Dr. Eich's opinion. The WCCA also affirmed that the Employee provided adequate notice on the grounds the delay was excusable due to ignorance of fact and the delay did not

prejudice the Employer. The WCCA indicated notice must be given when it becomes reasonably apparent to the employee an injury has resulted in or is likely to cause a compensable claim. Anderson v. Frontier Commc'ns, 819 N.W.2d 143 (Minn. 2012). In the present case, the Employee gave notice within 180 days of May 3, 2016 and did not have a factual basis to report an injury until Dr. Eich expressed his opinion that the Employee sustained a work injury.

In the alternative, the Employer and Insurer also appealed the award of TTD benefits on the grounds the judge failed to make a finding as to when the employee reached MMI and when MMI was served. The WCCA agreed and remanded the award of TTD benefits with instructions to issue findings regarding MMI.

9. Zabel v. Gustavus Adolphus College, No. WC18-6185 (WCCA October 12, 2018)

On April 18, 2013, the Employee sustained an admitted injury when she slipped and fell on ice, striking the back of her head. The Employer and Insurer discontinued benefits arguing the injury was temporary and resolved. The Employee filed an objection to discontinuance. On April 25, 2017, the judge issued a Findings and Order holding the Employee recovered as of May 19, 2014. The Employee did not appeal.

In the Findings and Order, the Compensation Judge referenced treatment the Employee received on July 13, 2015. At that time, she reported nausea and vertigo since a concussion one year earlier. The judge also issued a finding that the employee received treatment on July 31, 2015 at which time she complained of a headache starting on July 13, 2015 when she "got sick, lost her balance and ran into a wall." However, the judge indicated the employee denied a new injury in July 2015.

In February 2018, the Employee field a claim petition alleging a traumatic brain injury sustained on July 13, 2015. According to an August 15, 2017 narrative report from the Employee's physician, she experienced a "zinger" and dizziness while sorting mail at work and then lost her balance and fell into a wall. The doctor concluded her symptoms intensified in July 2015 and that the incident at work was a substantial contributing factor.

The Employer and Insurer moved to dismiss the Employee's Claim Petition based on *res judicata*. The judge granted the motion and dismissed the Employee's Claim Petition with prejudice. The judge reasoned the Employee could have and should have claimed the July 13, 2015 injury at the time of the 2017 hearing.

The WCCA reversed the Judge's dismissal. The WCCA indicated, though the Employee could have, she was not required to allege the 2015 injury at the time of the hearing in 2017. The WCCA concluded *res judicata* did not bar the Employee from bringing the claim at a later date because the issue was not previously adjudicated. The WCCA cited prior holdings that an action should be precluded when the same evidence would sustain both actions and that *res judicata* is not to be applied rigidly in workers' compensation cases and the focus is whether its application would work an injustice on the party against whom estoppel is urged.

The Employee unsuccessfully relied on the WCCA's decision in Schuette v. City of Hutchinson. In Schuette, the Employee alleged a PTSD injury on June 23, 2015 and a consequential orthopedic injury on November 12, 2008. The judge denied the PTSD injury, and

therefore, did not address the Employee's alleged consequential injury. Subsequently, the Employee filed a new Claim Petition alleging the 2008 orthopedic injury was compensable as the physical manifestation of his PTSD. The judge granted the employer and insurer's motion to dismiss based on *res judicata* on the grounds the employee previously brought the claim, though based on a different theory of liability.

The WCCA distinguished Schuette on the grounds Zabel did not previously allege the July 13, 2015 injury.

10. Hudson v. Trillium Staffing, No. WC17-6076 (WCCA October 25, 2018)

On April 16, 2014, the Employee suffered an admitted injury as a result of a motor vehicle accident, while driving truck for the Employer. The Employee claimed a traumatic brain injury (TBI), which the Employer and Insurer denied. The parties settled the claim for $125, 000.00 with medical open for the Employee's neck and low back. At the time of the settlement, the Employee was not working and indicated an email that he believed he may never work again due to his injuries. He had also been assessed with 10% PPD for his neck, 12% for his low back, and 0% for TBI.

Subsequent to the Award on Stipulation, in November 2015, the Employee began treating with a psychiatrist. In June 2016, the psychiatrist assessed 75% PPD. The Employee was also later deemed unable to work by the Minnesota Department of Human Services and his psychotherapist.

In June 2016, the Employee filed a Petition to Vacate with the WCCA. The WCCA granted the petition. The Minnesota Supreme Court reversed on the grounds the 75% rating was not supported by the record, nor did the psychiatrist provide the basis for her opinion.

Following the Supreme Court's decision, the Employee filed a second Petition to Vacate. He included his medical records and an updated permanency rating, narrative report, and treatment records from the psychiatrist. The psychiatrist revised the PPD rating to 36% and cited the Employee's treatment history. During oral argument before the WCCA, the Employee offered additional exhibits, including a social security decision finding the Employee to be disabled as of November 3, 2015. Following oral argument, the WCCA referred the matter to OAH for an evidentiary hearing to determine: 1) whether the Employee's work injury was a substantial contributing factor to his inability to work; 2) to what extent the Employee's PPD was causally related to the Employee's work injury; and 3) whether the Employee's medical opinions were adequately supported.

Following an evidentiary hearing, the compensation judge found the Employee's medical opinions lacked adequate foundation. Based on the judge's finding, the WCCA denied the Employee's Petition to Vacate.

11. Sanchez-Rivera v. Swift Pork Co., No. WC18-6182 (WCCA October 31, 2018)

The Employee claimed a *Gillette* injury to his bilateral shoulders forearms, heels, and right shoulder culminating on July 27, 2016, while packaging meats into boxes. He began treating on

August 8, 2016 regarding right shoulder pain. His subsequent treatment was for bilateral elbow and shoulder pain. On behalf of the Employer and Insurer, Dr. Jeffrey Nipper issued an IME report indicating the Employee did not suffer a work injury and that his symptoms were idiopathic and that he did not require work restrictions. Though the Employee may have experienced muscle fatigue due to his work, Dr. Nipper did not believe he suffered a work injury. Subsequently, the Employee returned to his regular work.

Two months later, the Employee resumed treatment. He was taken off work from March 23, 2017 to April 4, 2017. He then returned to light duty. However, on April 10, 2017, he claimed a new injury to his wrists, hands, and thumbs. His treating doctor diagnosed bilateral thumb, forearm, and upper extremity injuries, which he attributed to a new *Gillette* injury culminating on April 10, 2017. Dr. Nipper re-examined the Employee. He did not find a new injury, and instead, found the Employee's complaints to be psychosomatic.

The Employee filed a Claim Petition alleging a *Gillette* injury to his bilateral upper extremities and shoulders culminating on July 26, 2016 and to his bilateral hands, wrists and thumbs culminating on April 10, 2017. Relying on Dr. Nipper's reports, the Judge denied the Employee's claim.

The Employee appealed arguing Dr. Nipper's opinions lacked foundation. The WCCA affirmed and held the record contained sufficient medical support for Dr. Nipper's opinions.

12. Dodgson v. City of Minneapolis Public Works, No. WC18-6186 (WCCA October 31, 2018)

On July 20, 2017, the Employee sustained an injury to his left index finger, which resulted in the amputation of the finger. The Employer offered light duty work within the Employee's restrictions. The Employee refused indicating he had no transportation to the job. Due to his work injury, he was precluded from driving and could only obtain infrequent rides to work from his wife and father-in-law. It was suggested the Employee take the public bus, the cost ranged from $2.20 to $5.00 per day. The Employee objected due to the cost and said it was too far for him to walk, two to three blocks each way, because he was told to avoid walking in temperatures below 65 degrees. He was prescribed charcoal-lined gloves.

The Self-Insured Employer discontinued wage loss benefits based on the Employee's job refusal. The Employee filed an Objection to Discontinuance. Under *Minn. Stat. § 176.101, subd. 1(i)*, temporary total disability benefits "shall cease if the employee refuses an offer of work that is consistent with a plan of rehabilitation..." The compensation judge upheld the discontinuance on the grounds the Employee unreasonably refused a job offer that was consistent with the rehabilitation plan, which was to return the Employee to work with the Employer. The judge concluded the Employee's refusal was unreasonable, in light of the low cost to take the bus, the potential for family members to assist, and the use of charcoal-lined gloves.

The Employee appealed arguing the compensation judge's finding that the job offer was consistent with the rehabilitation plan was clearly erroneous. The Employee cited the initial rehabilitation plan in which it was not anticipated that the Employer would be able to provide long

term employment. Furthermore, the QRC testified the offer was consistent with the rehabilitation plan, except for the transportation issue.

The WCCA affirmed the compensation judge, and in doing so, the WCCA noted the rehabilitation plan did not address transportation, or any issues with the Employer's ability to provide long term employment. The WCCA indicated both parties were bound by a strict adherence to the plain language of the statute and the terms of the rehabilitation plan. Gilbertson v. Williams Dingmann, LLC, 894 N.W.2d 148 (Minn. 2017).

The Employee also appealed on the grounds his refusal was reasonable. The WCCA noted a refusal of a job offer may be considered reasonable if it would "dramatically alter a reasonable and responsible pattern of living." Punt v. Bayliner Marine Corp., 44 W.C.D. 372, 374 (WCCA 1990). Furthermore, transportation to and from work is a relevant factor. Hodgin v. Xcel Energy, No. WC09-4993 (WCCA 2010). However, the WCCA concluded substantial evidence supported the compensation judge's finding that the Employee's refusal was not reasonable.

13. Petrie v. Todd County, No. WC18-6176 (WCCA November 9, 2018)

The Employee worked as a correctional officer. She was involved in two altercations with inmates in 2016. The first occurred on September 12, 2016. An inmate lunged at her as she entered a cell with a tray, requiring the Employee to restrain her. The next incident occurred two days later. An inmate was trying to grab medication from the Employee and pushed his way out of his cell. After the altercation, his cell was searched and a weapon made out of eyeglasses was found. The inmate was previously found with a weapon made out of a piece of a table. The Employee filed a first report of injury indicating she was hit across the back during the second incident.

On January 9, 2017, after receiving mental health treatment and being diagnosed with PTSD, the Employee filed a claim petition alleging PTSD and a back injury.

On April 21, 2017, Dr. Scott Yarosh performed an independent psychiatric evaluation. He diagnosed PTSD. However, after reviewing surveillance video, he concluded the work incidents did not cause or aggravate the Employee's condition.

The Compensation Judge found that Dr. Yarosh's opinion did not meet the statutory criteria for a diagnosis of PTSD and denied the Employee's claim. The judge did not consider whether the Employee's alleged PTSD was causally related to her work incidents or whether her injury could be considered a "physical-mental" injury stemming from the back injury.

The Employee appealed the judge's finding that Dr. Yarosh's opinion did not meet the statutory criteria for PTSD and requested a remand on the issue of causation. The WCCA concluded the compensation judge's finding in this regard was manifestly contrary to the evidence, as Dr. Yarosh's diagnosis was unequivocal, and remanded the issue of causation.

The Employee also argued the judge failed to determine whether she sustained a physical injury to her back and whether the injury was a substantial contributing factor to her development of a mental injury or PTSD. The WCCA agreed and remanded this issue as well.

14. Sather v. NewMech Cos. & Harris Cos., No. WC18-6188 (WCCA November 9, 2018)

On March 27, 1998, the Employee sustained a low back injury, while working for NewMech. A CT Scan revealed a small herniation at L5-S1 and the treating physician provided permanent restrictions of no lifting over 50 pounds. In March 1999, the judge placed the Employee at MMI and assessed 10% PPD. The Employee continued to treat periodically. The records reference subsequent exacerbations, diagnostic testing, and injections.

On October 24, 2013, the Employee presented at the emergency room with complaints of an acute exacerbation of chronic low back pain that existed for several years.

On October 30, 2013, the Employee sustained a second work injury to his low back. This time he was working for Harris Companies. On January 8, 2014, the treating physician performed a decompression at L2-3 and L3-4. The surgery did not help and the Employee underwent fusion surgery on February 10, 2016.

On January 8, 2016, at the request of Harris, the Employee saw Dr. Mark Larkins for an IME. He concluded the Employee's 2013 injury resulted in a permanent aggravation.

In May 2016, the Employee settled with Harris on a full, final and complete basis with future medical left open. Subsequently, Dr. Larkins reviewed additional records and issued a supplemental opinion attributing the Employee's disability to his 1998 injury at NewMech. He did not apportion anything to the Employee's 2013 injury at Harris. In November 2016, Harris filed a Petition for Contribution and Reimbursement against NewMech.

On April 20, 2017, at the request of NewMech, Dr. Terry Hood performed an IME. He concluded the Employee's 1998 injury resolved prior to his 2013 injury and apportioned 100% to the Employee's 2013 injury.

The Compensation Judge apportioned liability equally between the two injuries. NewMech appealed. The WCCA held that there was substantial evidence when considering the record as a whole for the Judge's determinations.