Minnesota Employers Workers' Compensation Alliance Meeting – December 3, 2020

CASE LAW UPDATE

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SUBJECT MATTER JURISDICTION

Musta v. Mendota Heights Dental Ctr. (W.C.C.A. Nov. 10, 2020)

Background: The employee suffered a work injury to her neck on February 11, 2003. Her doctor later certified her has having intractable pain, which quailed her to obtain medical cannabis from an authorized distributor. She paid for the prescription out of pocket and requested reimbursement from the employer and insurer. The employer and insurer denied reimbursement, citing preemption of federal law criminalizing marijuana. The only issue at hearing was whether an order requiring reimbursement of medical cannabis would be in violation of federal law, as the parties stipulated that the treatment was reasonable, necessary, and causally related to the work injury. The Office of Administrative Hearings certified the preemption question, but the Minnesota Supreme Court declined to address the issue. Thereafter, the compensation judge found that the employer and insurer must reimburse the employee's medical cannabis out-of-pocket expenses, as the United States Congress' decision to not appropriate funds to the Department of Justice for prosecution of marijuana related offenses nullified any federal preemption arguments.

Holding: The Minnesota Workers' Compensation Court of Appeals (WCCA) upheld the compensation judge's holding on separate jurisdiction grounds, noting that medical cannabis was compensable under the Minnesota Workers' Compensation Act and they did not have "jurisdiction to decide legal questions governed by laws, including criminal laws, outside of the Worker's Compensation Act." The compensation judge's analysis regarding the lack of appropriation of funds was rejected to the extent it applied federal law.

Bierbach v. Digger's Polaris (W.C.C.A. Nov. 10, 2020)

Background: The employee suffered a 2004 work injury to his ankle. Primary liability was accepted for the injury by the employer and insurer. In 2013 the employee alleged a consequential neck and back injury with ongoing chronic pain. In 2018 the employee's provider recommended that the employee was a candidate for medical cannabis to help with his intractable pain and to wean him off of narcotics. The compensation judge awarded the employee reimbursement for out of pocket medical cannabis expenses.

Holding: The WCCA upheld the compensation judge's decision, rejecting the employer and insurer's subject matter jurisdiction argument, finding that the compensation judge did not have to make any determination of federal criminal law in deciding to reimburse medical marijuana expenses, and therefore it did not exceed its subject matter jurisdiction. In other words, cannabis was compensable under the applicable Minnesota Worker's Compensation Act and no further inquiry by the compensation judge concerning federal law was appropriate. In this same vein, on the issue of federal preemption (consistent with *Musta v. Mendota Heights* decided on the same day) the WCCA declined to address whether the Federal Controlled Substances Act preempted state medical cannabis law, citing a lack of subject matter jurisdiction.

Strohman v. Grand Casino (W.C.C.A. October 23, 2020)

Background: The employee suffered a work injury on July 16, 2018 while working for Grand Casino, an entity owned by the employer, the Mille Lacs Band of Ojibwe Indians (the Band). Primary liability was accepted, and benefits were paid until October 24, 2019, at which time benefits were discontinued based on an independent medical evaluation. In response to the employee's amended claim petition, the Band filed a motion to dismiss, asserting a lack of jurisdiction. The compensation judge, thereafter, dismissed the employee's claim petition with prejudice, citing the employer's status as a federally recognized tribe and sovereign entity that had not waived its sovereign immunity.

Holding: The WCCA upheld the compensation judge and rejected the employee's various attacks on the previous holding in *Tibbetts v. Leech Lake Reservation*, wherein the Minnesota Supreme Court held that a workers' compensation claim brought against a sovereign tribal entity under the Minnesota Workers' Compensation Act must be dismissed for lack of jurisdiction when that entity's sovereign immunity had not been waived. First, the fact that the third-party administrator originally admitted the injury and paid benefits did not waive the sovereign immunity. Second, the public policy argument that providing benefits to injured workers outweighed the Band's sovereignty was also rejected. Third, the WCCA rejected the employee's argument that as an individual member of the Band, she was able to waive its sovereign immunity, noting the lack of persuasive authority to allow such an argument.

Merrill v. Mille Lacs Band Family Servs. (W.C.C.A. October 15, 2020)

Background: On February 19, 2019, the employee slipped and fell while working for the Mille Lacs Band of Ojibwe, of which he was also an enrolled member. Primary liability was initially accepted for the injury, but benefits were discontinued following an independent medical evaluation. The employee's attorney filed a claim petition with the Minnesota Office of Administrative Hearings. The compensation judge dismissed the claim petition on jurisdiction grounds.

Holding: The WCCA rejected the employee's argument that by failing to have a sufficient number of attorneys eligible to appear in tribal court, the employer had implicitly waived immunity. The WCCA cited *Santa Clara Pueblo v. Martinez*, in which the U.S. Supreme Court described the standard for waiving immunity, stating: "It is settled that a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed."

CAUSATION - SUBSTANTIAL EVIDENCE

Hakomaki v. Braun Intertec (W.C.C.A. October 30, 2020)

Background: The employee injured his low back at work on April 12, 2018. He had near complete recovery by July 24, 2018. On August 14, 2018, however, the employee reported a setback after he lifted a motorcycle off a rider at Sturgis, South Dakota, a week or two earlier. Thereafter, the employee's symptoms deteriorated, and he required significant back treatment. The compensation judge found that the April 12, 2018 work injury was no longer a substantial contributing cause of his conditions following the motorcycle incident at Sturgis.

Holding: The WCCA affirmed the compensation judge's finding, holding that the medical records, together with the independent medical evaluation opinion regarding the employee's low back condition, constituted substantial evidence supporting the judge's determination that the employee's April 12, 2018, work injury was not a substantial contributing cause of the employee's condition after July 24, 2018.

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION

Schumacker v. Crenlo, Inc. (W.C.C.A. October 22, 2020)

Background: On August 21, 2001, the employee suffered a low back injury which was admitted by the employer. He underwent fusion surgery on October 2, 2002, and subsequently reported a strong recovery with little to no pain. By late 2004 and early 2005, he had little back pain and was given lifelong 40-45 lb. lifting restrictions. The parties negotiated a settlement of the employee's indemnity benefits in the summer of 2005 with select medical benefits left open. Within a month of the settlement, the employee suffered an exacerbation of his symptoms. Thereafter, the employee ultimately required extensive treatment, including four surgeries between 2007 and 2017, culminating in a "heroic" eight level fusion from T10-L3 on September 10, 2017. He was on social security disability from 2007 until the September 10, 2017 surgery, as he was unable to work in any capacity. Hs sought to vacate the prior stipulation for settlement, arguing that he had a substantial change in his medical condition since the court issued its award on stipulation.

Holding: Pursuant to Minn. Stat. § 176.461, the WCCA may set aside an award on stipulation "for cause." The term "for cause" is limited to:

1. a mutual mistake of fact;
2. newly discovered evidence;
3. fraud; or
4. a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award.

The issue in this case was whether the employee sustained a substantial change in his medical condition. The WCCA conducted an in-depth application of the six factors outlined in *Fodness v. Standard Cafe*, finding that each supported vacating the initial settlement:

1. A change in diagnosis: The employee initially underwent a two-level fusion. His condition ultimately evolved to requiring an eight-level fusion over the course of many years and many surgeries.
2. A change in the employee's ability to work: At the time of the settlement, his restrictions were 45-pound lifting restrictions, and he was working as a taxi driver and operating his own handyman business. Following the 2017 surgery, he was working part time with ten pound lifting restrictions, alternating between sitting and standing, and not working consecutive days. There was also a ten-year period of being unable to work completely.
3. Additional permanent partial disability: At the time of the settlement, he was given a 20% permanent partial disability rating. At present, the employee has a 43.5% rating.
4. The necessity of more costly and extensive medical care than initially anticipated: The employee required extensive treatment and four separate surgeries following the 2007 settlement.

5. A causal relationship between the injury covered by the settlement and the employee's current worsened condition: The record supported causation, regardless of the co-morbidities caused by the employee's lifelong smoking, which also played a contributing factor.
6. The contemplation of the parties at the time of the settlement: There was little evidence of the parties' contemplation at the time of the settlement, but given his limited wage loss and relatively strong condition, there is nothing to suggest the parties contemplated the extensive future difficulties.

As a final note to its holding, the WCCA cautioned that whether to vacate an award could only be determined on a case to case basis, and specifically indicated that any such analysis should not be approached on a strict basis of how many additional levels of fusion occurred subsequent to an initial settlement.

Sayler v. Bethany Home (W.C.C.A., October 15, 2020)

Background: On January 19, 1997, the employee, a certified nursing assistant, injured her right great toe when a patient's wheelchair ran over her right foot. Her symptoms gradually worsened, and she was diagnosed with complex regional pain syndrome (CRPS). She settled her claim in December of 1998 with most medical left open. Thereafter, the insurer paid approximately $278,000.00 in medical expenses, which included installation of a spinal cord stimulator and eight related surgical procedures. The employee sought to vacate the stipulation based on a substantial change of medical condition.

Holding: The WCCA performed an in-depth application of four of the *Fodness* factors, finding that none of the factors met the requirement that they be unanticipated at the time of the settlement.

1. A change in diagnosis: The employee's CRPS spread from her right foot and ankle to her right hip, low back, left foot, and left leg following the settlement. Similarly, the employee took medication for anxiety and depression for many years prior to the work injury. However, both issues only demonstrated a worsening of her diagnosed conditions, not a change in her diagnosis, and therefore could not be said to be unanticipated.
2. A change in the employee's ability to work: The employee stopped working for the employer and applied for Social Security Disability (SSDI) around the time of the settlement. Within six months she was awarded SSDI benefits and has been receiving benefits ever since. Thus, the employee's ability to work did not substantially change.
3. Additional permanent partial disability: The employee claimed a 13% permanent partial disability rating at the time of the 1998 settlement. By 2007 she was assigned a 17% rating for CRPS of the right knee. In 2017 she received an additional 13% rating for her right leg CRPS and 6.5% on the left leg. However, these new ratings were all related to the same CRPS condition which had already spread at the time of the settlement. Therefore, the additional permanent partial disability could not be seen to be unanticipated.

4. The necessity of more costly and extensive medical care than initially anticipated: Because the spinal cord stimulator was referenced in the stipulation, the related medical treatment and surgeries were not unanticipated at the time of the settlement.

ARISING OUT OF & IN THE COURSE OF EMPLOYMENT - TRAVELING EMPLOYEE

Bank v. Minn. Dep't of Human Servs. (W.C.C.A., October 20, 2020)

Background: On June 26, 2018, the employee injured her back after tripping on a rug entering a hotel elevator while she was on a work trip out of state. The only issue at hearing was whether the injury arose out of employment. The compensation judge found that it did not, as the employee failed to show that the injury was a result of an increased risk hazard pursuant to *Dykhoff v. Xcel Energy.*

Holding: The WCCA reversed and remanded the case, holding that *Dykhoff* did not overrule traveling employee jurisprudence under *Voight v. Rettinger Transp.* Pursuant to the traditional rule under *Voight*, a causal connection is established so long as a traveling employee is engaged in a reasonable activity at the time of injury. Employees are extended "portal to portal" coverage while traveling, and the increased risk test under *Dykhoff* did not overrule this prior existing law under *Voight.*

CAUSATION - AGGRAVATION; JOB SEARCH - SUBSTANTIAL EVIDENCE

Hanson v. Schleis Floor Covering, Inc. (W.C.C.A., September 23, 2020)

Background: The employee had long standing pre-existing knee issues dating back to an injury playing college football in 1982, and a subsequent arthroscopic surgery in 1983. Following surgical recovery, the employee experienced complete resolution of his knee symptoms. He then started working as a union floor covering installer in 1990, a job that required significant time on his knees. He felt a pop with subsequent pain in his right knee while working for an employer, Omni, in July of 2008. This injury required surgery, but the employee was able to return to his previous position. In September of 2018 the employee stumbled over a sheet of plywood while working for another employer, Schleis, injuring his right leg and right knee. Total knee replacement surgery was recommended with causation disputed. At hearing, the compensation judge found that the July 2008 work injury was a substantial contributing cause of the employee's permanent knee condition and attributed 100 percent of liability to Omni. The 2018 injury was deemed to be a temporary condition that resolved without contributing to the need for surgery. The compensation judge also determined that the employee performed a reasonable job search.

Omni appealed the findings and order.

Holding: The WCCA affirmed the decision of the compensation judge. First, they rejected Omni's argument that the compensation judge's findings did not individually match any one of the various medical opinions over the years. The WCCA notes that the compensation judge was not required to adopt any one single opinion in full, but rather could rely on different portions of different opinions in coming to a final conclusion. Second, the WCCA upheld the compensation judge's application of *Wold v. Olinger Trucking, Inc*., despite his failure to identify all of the factors outlined in that case. In deciding whether an injury is a permanent or a temporary aggravation, the weight to be given to each factor was a question of fact for the compensation judge. Third, the employer's lack of job search argument was without merit, as the employee was only off work for three months between being laid off in November of 2018 and being taken off work completely in February of 2019.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY; EVIDENCE - EXPERT MEDICAL OPINION

Boucher v. St. Luke's Hosp. of Duluth (W.C.C.A., September 17, 2020)

Background: The employee injured his low back on June 30, 2018. He subsequently developed bilateral lower extremity paresthesia and was unable to lift his left leg by October of 2018. A neurologist performed an independent medical evaluation and opined that there was no objective evidence to support a connection between the back injury and the leg symptoms. The treating provider provided a report indicating that it was possible the physical and emotional stress from the work injury contributed to the functional neurologic disorder. At hearing, the compensation judge found that the June 30, 2018 injury was not a substantial contributing cause of the ongoing lower extremity symptoms. The employee appealed.

Holding: The WCCA affirmed the compensation judge's decision. First, the employee objected to the compensation judge's reliance upon what he described as unreliable or incorrect hearsay contained within the medical records. However, because said medical records were introduced by the employee at hearing, without objection, the WCCA found that he could not later object to their introduction on appeal. Thus, the evidence available could reasonably be interpreted to support the compensation judge's findings. Second, the employee argued that the compensation judge failed to make a specific credibility finding with regards to the employee and the medical records. The WCCA found that this was only required if the employee's testimony was at odds with the medical records, and while the employee vaguely testified that there were inaccuracies in the medical records, he never connected the alleged inaccuracies to the material facts necessary to prove his claim.

Brandia v. Keystone Auto. Indus. (W.C.C.A., September 10, 2020)

Background: On September 1, 2013, the employee injured her right elbow at work. After unsuccessful conservative treatment, a doctor at Minneapolis Pain Centers and Medical Advanced Pain Specialists (MAPS) recommended a trial spinal cord stimulator followed by implementation of the permanent implant. At hearing, the compensation judge denied the compensability of the trial.

On its first review, the WCCA variously upheld and vacated the compensation judge's findings and remanded for additional findings related to the issue as to whether the employee had a permanent complex regional pain syndrome (CRPS). While the compensation judge denied payment based on the finding that the employee did not have CRPS, she still needed to make findings regarding whether an spinal cord stimulator could be reasonable and necessary care regardless of diagnosis, and that she needed to make findings related to the medical treatment parameters.

On remand, the compensation judge concluded that regardless of the diagnosis, the spinal cord stimulator was not reasonable and necessary medical care. She also found that MAPS did not follow the treatment parameters in relation to the spinal court stimulator, and that a departure from the treatment parameters was not appropriate, and that the employee's situation did not rise to the level of a rare case defined by the *Asti* or *Jacka* cases.

Holding: The WCCA upheld the compensation judge's finding that the spinal cord stimulator was not reasonable and necessary. It also upheld the compensation judge's findings in relation to the treatment parameters for the spinal cord stimulator.

Under Minn. R 5221.6305, Subp. 3.B., a spinal cord stimulator is indicated only if: (1) the treating provider determines that a trial screening period of a spinal cord stimulator is indicated because the patient: has intractable pain, is not a candidate for surgery, and has no major psychological comorbidity as assessed by a psychologist or psychiatrist; (2) before the spinal cord stimulator trial, a second opinion outside the providers' practice must confirm the above; and (3), there must be a 50% improvement in pain of 3 days during the trial.

The WCCA found that the first and third requirements were met, but the second requirement was not as there was no referral for a second opinion after the recommendation for a spinal cord stimulator was made. The evaluation done by the employee's previous provider failed for several reasons. First, his evaluation was performed six months before the spinal cord stimulator procedure was proposed. Second, the doctor was not a psychiatrist or a psychologist. Third, the employee's testimony that she discussed pursuing a spinal cord stimulator with her doctor as a future last resort was not the type of evaluation that could serve as the second opinion contemplated by the rule.