

**WORKERS' COMPENSATION
CASE LAW UPDATE**

**The Minnesota Employers Workers'
Compensation Alliance**

Thursday, September 17, 2020

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PRACTICE & PROCEDURE - INTERVENORS

Koehnen v. Flagship Marine Co. & Auto Owners Ins. Co.

MN Sup. Ct. August 12, 2020

Compensation Judge: Kirsten Tate

Opinion Author: Justice McKeig

The Employee incurred \$9,476.01 in medical expenses at Johnson Chiropractic Clinic in connection with an alleged and disputed workers' compensation claim. The Employee filed a Claim Petition, and his attorney served Johnson Chiropractic Clinic with a valid notice of its right to intervene. Johnson Chiropractic Clinic did not intervene. More than 60 days later, the Employee, the Employer and Insurer, and an Intervenor agreed to settle the respective claims. They were aware of the unpaid balance at Johnson Chiropractic Clinic. No settlement offer was extended to Johnson Chiropractic Clinic. The parties served and filed a Stipulation for Settlement that contained language requesting that the Court extinguish Johnson Chiropractic Clinic's potential intervention interest due to failure to timely intervene. The Court served and filed the Award on Stipulation as requested.

Johnson Chiropractic Clinic later filed a "Petition for Payment of Medical Expenses." The Employer and Insurer moved to dismiss the petition. The Compensation Judge granted this motion, holding that Johnson Chiropractic Clinic lacked standing to make a claim for medical expenses independent from a claim made by the Employee. Johnson Chiropractic Clinic appealed.

The Minnesota Supreme Court held that a potential intervenor does not have an independent right to file a petition. It held further that while an intervenor has an independent right to file a petition where the intervenor was excluded from settlement negotiations, this right does not extend to potential intervenors.

This case does not change the common understanding of the law in this area. However, had the potential intervenor's argument been accepted, it would have. The common practice of extinguishing the rights of potential intervenors that did not timely intervene continues to shield Employers and Insurers from the risk of defending against newly asserted claims for medical expenses after a workers' compensation claim is settled.

VACATION OF AWARD – REFERRAL FOR HEARING

Cates v. SPX Service Solutions & Broadspire Ins. Co.

W.C.C.A. August 5, 2020

Compensation Judge: N/A

Opinion Author: Judge Sean Quinn

The Employee sustained admitted injuries to his neck, left shoulder, head, chin, and teeth in 1992. Nature and extent of the injuries was disputed, and the Employee, Employer, and Insurer entered into a Stipulation for Settlement in 1999. The stipulation contemplated a PPD rating of 15.5%, including a 7% rating relative to the neck. The Employee continued to work full-time with restrictions at the time of the settlement. He received only chiropractic treatment relative to the neck prior to the settlement. Following the 1999 settlement, the Employee reported an increase in neck symptoms, resulting in various injections, radiofrequency neurotomies, imaging, and a four-level fusion. He was granted SSDI benefits in 2014. The Employee obtained a narrative report assigning a 27% PPD rating relative to the neck, and 11% PPD rating relative to the left shoulder, and opining that he was permanently and totally disabled. The Employer and Insurer obtained an independent medical examination report indicating that the Employee's cervical spine condition was the result of the natural aging process and nicotine use unrelated to the 1992 injury, and that the left shoulder condition was likewise unrelated.

The Employee filed a motion vacate the 1999 Stipulation for Settlement based on substantial change in condition. The WCCA did not grant or deny this motion. It instead referred the case to a Compensation Judge for findings of fact.

The WCCA evaluated the motion based on the *Fodness* factors, which are: a change in diagnosis; a change in the employee's ability to work; additional permanent partial disability; necessity of more costly and extensive medical care than initially anticipated; causal relationship between the injury covered by the settlement and the employee's current worsened condition; and contemplation of the parties at the time of the settlement. It reasoned that the Employee's diagnosis, ability to work, permanent partial disability, and the extent of medical care had clearly changed in a manner that was not anticipated by the parties at the time of settlement. The WCCA indicated that there were disputes regarding the extent of PPD, medical causation, the extent of work restrictions, and whether the Employee is permanently and totally disabled, all of which were factual and not legal. The WCCA therefore requested findings of fact on those issues prior to making the legal determination as to whether the 1999 Stipulation for Settlement should be vacated.

SUBSTANTIAL EVIDENCE

Williams v. Farmers Union Industries, LLC & SFM Risk Solutions

MN Sup. Ct. June 2020

Compensation Judge: Sandra Grove

Opinion Author: Justice Barry Anderson

The Employee sustained two admitted work-related injuries. The first was a laceration resulting from an auger blade that snapped off of a machine and struck the Employee in the mouth. The second involved burns resulting from hot grease being inadvertently spilled onto the Employee. An independent medical examiner opined that the Employee recovered from the physical effects of both injuries.

The Employee became fearful of returning to work between the two injuries, and did not return to work after the second. He was diagnosed with PTSD, severe depression, and anxiety. An independent medical examiner opined that the employee did not meet the criteria for PTSD, and that his symptoms of depression and anxiety were related to pre-existing psychological conditions.

At a hearing on the Employer and Insurer's Petition to Discontinue TTD benefits, the Compensation Judge adopted the independent medical examination reports. She found that the physical injuries had resolved, and that the Employee had not sustained a consequential psychological injury. The Employee was represented by an attorney at the hearing, but appealed to both the WCCA and the Minnesota Supreme Court *pro se*. The Employee argued on appeal that the Compensation Judge's decision was incorrect.

The WCCA affirmed, explaining that the issue on appeal is not whether the Compensation Judge was correct, but whether her decision was supported by substantial evidence. Because the Compensation Judge reviewed the Employee's medical records, and medical opinions on the issue, her decision was supported by substantial evidence. The Minnesota Supreme Court affirmed without opinion.

ATTORNEY FEES – EXCESS FEES

Ansello v. Wisconsin Central, Ltd. & Discover Re Risk Management

W.C.C.A. June 19, 2020

Compensation Judge: John Baumgarth

Opinion Author: Patricia Milun

A different issue in this case was previously litigated to the Supreme Court in 2017. The Employee was injured in the course of his employment as a longshore worker, and therefore his claim was covered by the Longshore and Harbor Worker's Compensation Act (LHWCA). Certain medical benefits were denied under the LHWCA, and the Employee brought a claim for those benefits under the Minnesota Worker's Compensation Act (MWCA). The issue of whether there was concurrent jurisdiction under the MWCA was litigated to the Minnesota Supreme Court, and the Minnesota Supreme Court held that there was concurrent jurisdiction. The Employee was subsequently awarded various benefits under the MWCA.

The Employee's attorney was previously awarded attorney fees relating to claims that were brought under the LHWCA, as well for the WCCA and Minnesota Supreme Court appeals. He subsequently brought a claim for excess attorney fees under MWCA in the amount of \$59,025. The Compensation Judge awarded \$12,000. The Employee appealed.

The Compensation Judge excluded time that was spent on the LHWCA claim, and made the fee determination based on time that was spent solely on the jurisdictional challenge under the MWCA claim. Significantly, the Compensation Judge attributed time spent proving entitlement to the medical benefits to be related to both the LHWCA and MWCA claims, and excluded that time. The Employee argued that this exclusion of time was not proper, and that the Compensation Judge should not have considered attorney fees awarded under the LHWCA. The WCCA affirmed, noting that double recovery would occur if the Employee was allowed to claim fees for the same time under both the LHWCA and the MWCA.

TREATMENT PARAMETERS; RARE CASE EXCEPTION

Johnson v. Darchuks Fabrication, Inc. & Harleysville Insurance

W.C.C.A. June 18, 2020

Compensation Judge: Grant Hartman

Opinion Author: Patricia Milun

This case was previously litigated to the Minnesota Supreme Court on a distinct, but related issue. The Employee was diagnosed with CRPS and was being prescribed long-term narcotic pain medications. The Employer and Insurer argued that while the Employee had sustained an admitted injury, he had not sustained CRPS as a consequence of that admitted injury. The Employer and Insurer argued, in the alternative, that the long-term narcotic pain medications were not prescribed in compliance with the applicable treatment parameters. The Compensation Judge found that the treatment parameters do not apply where the Employer and Insurer are also contending that the admitted injury has resolved. The Minnesota Supreme Court reversed, and remanded the case to the Compensation Judge for a finding as to whether the narcotic pain medications were prescribed in compliance with the treatment parameters.

On remand, the Compensation Judge concluded that the narcotic pain medications were not prescribed in compliance with the applicable treatment parameters (due to inadequate record keeping), and that the standard for departure from the treatment parameters was not met. He concluded that the medications were nonetheless compensable under the “rare case exception.” The Employer and Insurer again appealed.

The WCCA explained that the “rare case exception” is a judicially created exception that offers the Compensation Judge latitude to award medical benefits that do not comply with the treatment parameters. The WCCA agreed that this exception applied in this case, noting that the Employee suffers from intractable pain, that no alternative other than amputation of the affected limb has been proposed, that the narcotic pain medications reduce the Employee’s pain, and that they allow him to participate in activities of daily living.

MEDICAL TREATMENT & EXPENSE - SURGERY

Heling v. Black Horse Carriers, Inc. & Great West Casualty Co.

W.C.C.A. June 12, 2020

Compensation Judge: Kathleen Behounek

Opinion Author: David Stofferan

The Employee sustained an admitted left shoulder injury. A subsequent MRI showed a full thickness rotator cuff tear and degenerative changes. The treating physician recommended a total shoulder arthroplasty and rotator cuff repair. An independent medical examiner found the rotator cuff tear to be related to the admitted injury, but the degenerative changes, and therefore the arthroplasty, to be age related and unrelated to the work injury. The Employer and Insurer therefore denied the recommended surgery. The Employee moved forward with only a rotator cuff surgery, but continued to have left shoulder symptoms thereafter. The treating physician again recommended an arthroplasty, which the Employer and Insurer again denied. The compensation judge found that the work-related injury aggravated the previously asymptomatic degenerative condition, and therefore was a substantial contributing factor to the need for the arthroplasty. The Employer and Insurer appealed.

The Employer and Insurer argued that because the treating physician testified that he was not aware of shoulder treatment that the Employee had received two years prior to the admitted injury, his opinions lacked foundation. The WCCA rejected this argument, noting that the treating physician was given additional information regarding this treatment during redirect examination, and testified that this information did not change his opinion. Because the treating physician's opinion did not lack foundation, the compensation judge was free to choose between the opinion of the treating physician or the independent medical examiner.

ATTORNEY FEES – EDQUIST FEES

Borucki Vukelich v. Rise, Inc. & Sentry Ins. Group

W.C.C.A. June 12, 2020

Compensation Judge: William Marshall

Opinion Author: David Stofferan

The Employee was injured in a motor vehicle accident. After collecting \$20,000 in no-fault benefits, the Employee filed a Claim Petition alleging that the motor vehicle accident was work-related. The no-fault carrier intervened. The Employee, and the Employer and Insurer settled their respective claims on a full, final, and complete basis, inclusive of attorney fees, but exclusive of the no-fault carrier's intervention claim. The Employer and Insurer and the no-fault carrier proceeded to a Parker Lindberg hearing relative to that intervention claim.

The no-fault carrier was represented by an attorney at the Parker Lindberg hearing. The Employee appeared at the hearing pursuant to a subpoena. Her attorney came with her, but did not ask any questions or make any arguments. The intervention claim was awarded. The Employee's attorney subsequently filed a statement of attorney's fees for his appearance at the Parker Lindberg hearing. A Compensation Judge awarded the attorney fee claim against the no-fault carrier. The no-fault carrier appealed.

The WCCA reversed the award of attorney fees. The WCCA reasoned that the award was obtained as a result of the efforts of the no-fault carrier's attorney, not as a result of the efforts of the Employee's attorney.

CAUSATION – SUBSTANTIAL EVIDENCE

Shallock v. Battle Lake Good Samaritan Center & Sentry Insurance Group

W.C.C.A. June 8, 2020

Compensation Judge: Grant Hartman

Opinion Author: Gary Hall

The Employee sustained an admitted low back injury. Following the low back injury, she began reporting left lower extremity symptoms including pain, weakness, and foot drop. A wide variety of testing and evaluation by physicians in multiple practice areas failed to identify a clear explanation for the left lower extremity symptoms. MRI scans of the low back, mid back, and neck all failed to show any impingement or other abnormality that would correlate with the Employee's left leg symptoms. Multiple EMGs were taken of the left lower extremity, and several physicians were in disagreement as to whether the EMG findings were consistent with radiculopathy. Potential diagnoses were offered by various physicians, including low back sprain/strain, lumbar facet arthropathy, L5 radiculopathy, chronic regional pain syndrome, multiple sclerosis, and FSH dystrophy. One physician provided an opinion that the Employee's left leg symptoms were causally related to the admitted low back injury, while several others opined either that the left leg symptoms were not causally related, or that the cause of the left leg symptoms was unknown.

The Employer and Insurer filed a Notice of Intention to Discontinue temporary total disability benefits based on its position that the admitted injury was a low back sprain/strain, which had resolved. This discontinuance was previously the subject of appellate litigation. This discontinuance was denied at the administrative and hearing level, with the Compensation Judge finding that the Employer and Insurer failed to meet their burden to prove that the admitted injury had resolved. The WCCA vacated and remanded, holding that the Compensation Judge had impermissibly shifted the burden of proof to the Employer and Insurer. On remand, the Compensation Judge found that the admitted low back injury was a substantial contributing factor to the Employee's ongoing left leg symptoms. The Compensation Judge accepted the opinion of the one physician that opined that the Employee's left leg symptoms were causally related to the low back injury.

The Employer and Insurer appealed from the decision on remand. The Employer and Insurer argued that the Compensation Judge's acceptance of the treating physician's opinion was erroneous in light of the multiple other medical opinions to the contrary, and in light of the fact that testing was not conclusive. The Employer and Insurer further argued that the treating physician's opinion lacked foundation, pointing to mischaracterization and omission of various test results.

The WCCA affirmed the Compensation Judge. The WCCA explained that the deficiencies in the treating physician's report go to its weight rather than its admissibility. Because the report did not lack foundation, the Compensation Judge's acceptance of that report formed a sufficient basis for his opinion. The absence of a detailed explanation for his rejection of competing evidence did not warrant reversal.