MINNESOTA CASE LAW UPDATE

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APPORTIONMENT - PERMANENT PARTIAL DISABILITY

Rabideaux v. Minnesota Power/ALLETE, Inc., 2010 MN Wrk. Comp. LEXIS 5 (W.C.C.A. January 6, 2010), Affirmed.

When the employee began working for the self-insured employer in October of 1990, she had a significant preexisting low back condition that included three surgical procedures. More specifically, the employee had low back surgery in September 1998, February 1999, and in 2001, the employee underwent a posterolateral bilateral fusion at L3-4 with segmental bilateral instrumentation and placement of a bone stimulator.

The employee sustained a work related low back injury with the employer on April 4, 2003. At hearing, the compensation judge found the April 4, 2003 injury to have substantially and permanently aggravated the employee's low back condition. Further, the judge found the April 2003 injury to have been the cause for the employee's fourth low back surgery. Unfortunately, the employee did not enjoy any significant improvement from the surgery and ultimately underwent the implantation of a morphine pain pump in February 2005. The Workers' Compensation Court of Appeals affirmed the findings of the compensation judge in a decision dated October 31, 2006.

At a subsequent hearing on the issue of permanent partial disability, the compensation judge found the employee was not entitled to additional permanency as a result of the fourth low back surgery in 2004. The compensation judge found the employee to have sustained a 19% PPD rating of the lumbar spine, but attributed the entire 19% to the employee's preexisting condition. In addition, the compensation judge found the April 4, 2003 personal injury was a substantial contributing factor in the employee's development of bowel, bladder, and sexual dysfunction, motor and sensory loss in the lower extremities and ataxia. Further, the judge found the employee to have developed thoracic spine problems from the morphine pump implantation that aggravated a preexisting thoracic spine condition. The judge rated employee with a 7% PPD rating of the thoracic spine, a 10% rating to the central nervous system and the spinal cord injury resulting in ataxia, a 12.5% rating for motor loss in the lower extremities, a 20% rating for the bladder disorder, a 12% rating for an anal disorder, and a 10% rating for sexual dysfunction. After application of the statutory formula, the judge awarded the employee a 62.41% total permanent partial disability. The judge found that except for the 19% PPD of the lumbar spine, apportionment of permanent partial disability was not appropriate under Minn.Stat. §176.101, subd. 4a. The self-insurer appealed the finding as to apportionment. The parties did not appeal the compensation judge's finding of the 62.41% permanent partial disability rating. As such, the only issue before the workers' compensation court of appeals was whether or not it was

appropriate to apportion a portion of the permanency to the employee's preexisting condition.

The self-insured employer alleged that the 62.41% PPD rating was substantially due to the employee's preexisting low back condition as evidenced in the medical records pre-dating the 2003 work injury. As such, it was the appellant's position that apportionment of the permanency to the preexisting disability was appropriate. The appellant argued that the words "preexisting disability" in the statute refers to any disability that preexists the work related injury and is a substantial contributing factor to the permanent disability which arises following the work injury. The employee had a 30% PPD rating prior to the April 2003 work injury which the appellant argued was a substantial contributing cause to the development of the conditions that gave rise to the 62.41% rating.

The Workers' Compensation Court of Appeals disagreed with the appellant and upheld the compensation judge's finding that apportionment under Minn.Stat. §176.101, subd. 4a was not available.

In 1984, Minn.Stat. §176.101, subd. 4a, changed the law with respect to apportionment when a work injury aggravates or accelerates a non-work related preexisting condition. More specifically, subd. 4a allowed apportionment of permanent partial disability "only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury." The primary goal of apportionment under Minn.Stat. §176.101, subd. 4a is to "alleviate the burden on employers for that part of the permanent partial disability which is not related to a work injury.

In addition to the statutory basis to deny apportionment, the court also addressed the principles of equitable apportionment wherein successive employers and insurers contribute their proportionate share of the total responsibility for wage loss and permanent partial disability benefits. The court confirmed that equitable apportionment is not available to apportion to a non-work, preexisting disability. Because the employee did not have bowel, bladder, motor loss, sexual dysfunction, spinal cord injuries, and/or thoracic spine problems prior to the April 4, 2003 work injury, all of the 62.41% permanent partial disability was related to the work injury and thus payable by the self-insured employer.

APPEALS

Parniani v. Cardinal Health 414, Inc., 2009 MN Wrk. Comp. LEXIS 96 (W.C.C.A. October 14, 2009), Appeal dismissed.

The employee filed a notice of appeal from a findings and order of the compensation judge. The WCCA, finding that the employee had failed to timely remit the filing fee, dismissed the appeal.

The pro se employee alleged a work related injury while in the employ of Cardinal Health 414, Inc., which was denied by the employer and insurer. The employee filed a Claim Petition seeking wage loss benefits, rehabilitation benefits, and payment of medical expenses. Following a hearing on the matter, the compensation judge found the employee to have sustained personal

injuries to her low back, upper back, right hand, and right arm which were temporary in nature having fully resolved by May 31, 2006. The judge awarded a limited period of temporary total benefits along with payment of limited medical expenses while denying the remainder of the employee's claims.

On September 10, 2009, the employee filed a Notice of Appeal to the Workers' Compensation Court of Appeals with an attached letter stating, " . . . A $25 filing fee is not included because I am indigent; ergo, my financial hardship affidavit (with attachments) petitioning for a waiver of any and all of my costs, fees, etc." In addition, the employee submitted a letter to the Office of Administrative Hearings requesting to have the fee waived.

The court in dismissing the Appeal cited to Minn.Stat. §176.241, subd. 4 which provides, in part, that "within the 30-day period for taking an appeal, the appellant shall: . . . (3) in order to defray the costs of the preparation of the record of the proceedings appealed from, pay to the commissioner of finance, Office of Administrative Hearings account the sum of $25.00." The statute further provides that upon "a showing of cause, the chief administrative law judge may direct that a transcript be prepared without expense to the party requesting its preparation in which case the cost of the transcript shall be paid by the Office of Administrative Hearings."

First, the court held that the statute does not grant the Chief Administrative Law Judge the authority to waive the payment of the $25.00 filing fee to the commissioner of finance. Next, citing to earlier cases, the court held that the $25.00 fee must be paid to the commissioner of finance within the 30-day appeal period in order to perfect an appeal. Ferguson v. Ford Motor Co., 61 W.C.D. 54 (W.C.C.A. 2001). The service and filing requirements for a notice of appeal are jurisdictional and where subject matter jurisdiction is lacking, the court cannot reach the merits of the case. Carpenter v. Woodvale, Inc., 40 N.W.2d 727, 39 W.C.D. 430 (Minn. 1997) and Hammesch v. Molitor, 328 N.W.2d 455, 35 W.C.D. 541 (Minn. 1983) respectively.

ARISING OUT OF AND IN THE COURSE AND SCOPE

Moe v University of Minnesota, 2009 MN Wrk. Comp. LEXIS 25 (W.C.C.A. April 27, 2009), Reversed and remanded, [Summarily aff'd. (Minn. October 5, 20090]..

The employee worked for the University of Minnesota. On January 30, 2006, she drove to work and parked her car on campus in a service lot operated by the University of Minnesota. After parking her car, she walked toward Hodson Hall where she worked. When she was walking on a public sidewalk from her parking spot to her work, she slipped and fell, injuring her right arm and wrist.

The compensation judge determined that the injury did not occur in the course and scope of employment. The compensation judge determined that the employee did not slip and fall on the employer's premises (since she was on a public sidewalk) and determined that she did not encounter a special hazard related to her employment when she fell. Therefore, the compensation judge determined that the injury did not occur in the course and scope of employment.

The Workers' Compensation Court of Appeals reversed this determination. The Minnesota Workers' Compensation Court of Appeals found it important that the employee was injured while walking between the employer parking lot and the building where she worked and the W.C.C.A. found it important that there was no indication that the employee' s route was unreasonable or that she deviated from her route for any personal reason. Based on a prior workers' compensation decision in Weiss v. State, Bemidji State Univ., (55 W.C.C.A. 663 (W.C.C.A. 1996), summarily aff.d (Minn. December 27, 1996), the W.C.C.A. in the present case concluded that since the employee sustained an injury in reaching her main work premises from the employer parking lot and since it was reasonable for the employee to walk on the public property in the fashion that she did, the injury was compensable and occurred in the course and scope of employment. The W.C.C.A. also found that it was important that the route the employee took was a customary route between the parking lot and the main employer premises as part of their decision concluding that the injury occurred in the course and scope of employment.

Denais v Minnesota Mining & Manufacturing Company, 2009 MN Wrk. Comp. LEXIS 48 (W.C.C.A. June 15, 2009), Affirmed in part and reversed in part.

The compensation judge and W.C.C.A. both denied the injury claim based on the idiopathic injury defense. The fall of the employee onto a flat floor was found to be an idiopathic injury and was found not compensable.

The W.C.C.A. discussed the Koening v North Shore Landing, 54 W.C.D. 86 (Minn. 1996). In Koening, the employee fell at work onto a flat floor covered with slate tiles and the employee had no recollection as to why he fell. The employee in Koening had a history of epileptic seizures and alcohol abuse and the compensation judge in that case stated that the likely cause of the fall was due to a seizure caused by alcohol abuse. The W.C.C.A. in Koening concluded that injuries resulting from idiopathic falls onto flat surfaces do not arise out of employment and in Koening, the W.C.C.A. stated that a flat floor, regardless of its softness or hardness, is standard in a work place and is not unique or an unusual hazard.

Based on the analysis in Koening, since the employee in the present case fell as a result of an idiopathic fall onto a flat floor, the injury was determined to not arise out of employment and compensation was denied.

ATTORNEY FEES

Fahey v R & L Shared Services, LLC 2009 MN Wrk. Comp. LEXIS 73 (W.C.C.A. August 28, 2009), Affirmed.

The employee's attorney in this case made a claim for Roraff attorney fees. The employee had filed a Claim Petition seeking approval for a fusion surgery based on an admitted injury.

The hearing, based on the surgical claim, was scheduled for December 7, 2007. However, in a November 27, 2007 IME report from Dr. Mark Larkins, Dr. Larkins opined that the fusion surgery was reasonable, necessary and causally related to the admitted work injury. Therefore,

prior to hearing, the employer and insurer agreed to pay for the disputed surgery and they also picked up the temporary total disability benefits based on the time off related to this surgery.

Thereafter, the attorney for the employee filed a claim for Roraff attorney fees based on the 25/20 percent formula applied to the $65,485.31 in surgical medical bills. The employee's attorney sought $13,000.00 in attorney fees. The employer and insurer argued that while attorney fees were payable, they were payable based on the 25/20 percent formula as applied to the temporary total disability paid.

The compensation judge awarded the $13,000.00 in claimed Roraff fees. The W.C.C.A. affirmed. The W.C.C.A. acknowledged the employee's claim for temporary total disability and the claim for the fusion surgery were both initially denied. However, the W.C.C.A. emphasized that this was an admitted injury and that the only real issue was whether the employee was entitled to the fusion surgery. Under these circumstances, the W.C.C.A. affirmed the award of Roraff attorney fees rather than requiring that the 25/20 percent contingency formula be applied to the temporary total disability claim.

Garding v Protomold Company, Inc., 2009 MN Wrk. Comp. LEXIS 18 (W.C.C.A. March 24, 2009), Affirmed.

The compensation judge awarded Roraff attorney fees and this award was affirmed by the Workers' Compensation Court of Appeals.

In this case, the employee sustained an admitted injury on November 10, 2006. The employer and insurer paid temporary partial disability benefits until the treating doctor released the employee to full-time work at which point the employer and insurer filed an NOID which the employee did not object to.

Then, subsequently in December of 2007, the employee filed a Medical Request in which she sought a change of treating doctors and this was ultimately granted in an April 30, 2008 Findings and Order.

In May of 2008, the employee's attorney filed a Statement of Attorney Fees seeking $4,262.50 in Roraff attorney fees based on his representation of the employee on the requested change of treating doctors. The employer and insurer objected to this Statement of Attorney Fees.

Then in July of 2008, the employee filed a Claim Petition seeking payment of temporary partial disability benefits from and after November 12, 2007. The employer and insurer filed an Answer which stated "as a direct result of the recent hearing to address the employee's requested change of treating doctors," the employer and insurer were admitting liability for the claimed temporary partial disability.

The claim for attorney fees proceeded to hearing and in a Findings and Order, served and filed September 26, 2008, the compensation judge awarded attorney fees requested of $4,262.50 and it was this Award that was appealed to the Workers' Compensation Court of Appeals. The W.C.C.A. affirmed this Award of attorney fees.

Essentially on appeal, the employer and insurer argued that as a direct result of the compensation judge's decision to allow the employee to change treating doctors, the employer and insurer admitted liability for the temporary partial disability benefits which they had previously discontinued based on the opinions of the earlier treating physician. The employer and insurer therefore argued that contingency attorney fees should be taken from the temporary partial disability that was paid from and after November 12, 2007. The Workers' Compensation Court of Appeals disagreed.

The W.C.C.A. concluded that based on the limited information available to them, the dispute over the temporary partial disability was centered around whether the employee was able to work on a full-time basis and the W.C.C.A. concluded that this dispute had nothing to do with the change of physicians issue which was litigated. Therefore, because the W.C.C.A. concluded that the employee's entitlement to temporary partial disability benefits was not at issue at the hearing involving the request to change treating doctors, there was no stream of benefits from which the employee's attorney was entitled to a contingency fee.

Vaughn v Allina Health System, MN (Wrk. Comp. LEXIS 31 (W.C.C.A. March 9, 2009), Affirmed as modified. [Summarily aff'd. (Minn. June 30, 2009)].

The compensation judge awarded an excess attorney fee to the attorney for the employee, concluding that a reasonable contingent attorney fee was $35,000.00. The employee appealed and this excess attorney fee was affirmed by the Minnesota Workers' Compensation Court of Appeals.

In this case, between 1996 and 2006, there were a number of medical and rehabilitation disputes, some of which led to administrative conferences before they were resolved but there were no formal hearings. In 1999, the employer and insurer paid $685.50 to the attorney for the employee based on a rehabilitation dispute.

In 2007, the employee and the employer and insurer entered into a partial Stipulation for Settlement resolving a temporary total disability issue and the employee was paid $31,090.60 from which $6,418.12 were withheld and paid to the employee's attorney as attorney fees.

The employee then filed a Claim Petition in August of 2006 seeking permanent total disability benefits and a hearing proceeded in front of a compensation judge in October of 2007. The compensation judge awarded the permanent total disability claim. The decision was appealed on some issues that were resolved and the appeal eventually was dismissed.

In March of 2008, the employee's attorney filed a Petition for Disputed or Excess Attorney Fees in which he requested a fee of $45,000.00 in addition to the fees already paid. The employee's attorney claimed time of 170.32 hours resulting in a fee of $29,384.90 and according to this Petition for Excess Fees, the total dollar amount of benefits obtained for the employee was more than 1.5 million dollars in permanent total disability benefits over the life expectancy of the employee of 31.1 years.

The employer and insurer filed an Objection to the Petition for Fees and took the position that a

fee of $32,000.00 was appropriate based on the time spent on the file.

The compensation judge concluded that a reasonable attorney fee was $20,307.22 which represented $13,000.00 in addition to the $7,307.22 already paid as of March 5, 2008. The compensation judge awarded therefore an initial $5,692.78 paid under the $13,000.00 attorney fee cap and then $7,307.22 in excess fees. The employee appealed.

On appeal, the employee's attorney argued that the attorney fees awarded were arbitrary because nowhere in the decision did the compensation judge provide a rational for the amount awarded and that no evidence identified the figure awarded as reasonable.

The Workers' Compensation Court of Appeals reviewed the decision and concluded that they have not required the compensation judge provide a formula that was used to calculate a fee. The question is just whether the fee is reasonable. The W.C.C.A. noted that at no time did the attorney for the employee supply any justification or formula for the amount of attorney fees he was requesting.

The Workers' Compensation Court of Appeals concluded, in analyzing this case under the Irwin factors, that this was a more complicated case than normal since this was a permanent total disability claim. The Workers' Compensation Court of Appeals also indicated that much of the work of the employee's attorney for more than ten years was preparing and planning this case for the permanent total disability claim and the W.C.C.A. concluded this was an unusual responsibility borne by the employee's attorney and the W.C.C.A. concluded that the Award of Attorney Fees was not adequate and the W.C.C.A. awarded an additional $35,000.00 in attorney fees, $5,692.78 to reach the $13,000.00 cap and then an excess attorney fee of $29,307.22.

CAUSATION - *GILLETTE* INJURY

Palmer v. IRI Instore Solutions Group, 2009 MN Wrk. Comp. LEXIS 95 (W.C.C.A. September 22, 2009), Affirmed.

The employee appealed from the compensation judge's findings that the recommended left shoulder surgery was not causally related to a compensable work injury.

The employee was a field service representative for employer from February 2004 through April 2007. In September of 2005, the employee noticed the onset of left wrist symptoms. In December of 2005, the employee began dropping objects due to numbness in her left hand. She noticed the onset of left shoulder symptoms approximately six months later. On or about September 1, 2006, the employee's supervisor completed a First Report of Injury describing left arm, shoulder, elbow and wrist pain.

In January of 2007, the employee began treating with Dr. Kent Brunell, reporting bilateral wrist pain, left greater than right, and pain in her left forearm, elbow and shoulder due to repetitive movement at work. She reported that lifting, twisting, and reaching increased her shoulder symptoms. Dr. Brunell diagnosed the employee with overuse syndrome of the left arm and

shoulder and recommended physical therapy.

In February of 2007, Dr. Brunell recommended work restrictions to include no lifting or carrying more than 10-pounds. The employee initially reduced her hours and then resigned in April 2007 since she could not work within the work restrictions.

The employee was referred to Dr. Mark Holm who diagnosed left shoulder biceps tendinitis and rotator cuff tendinitis, left wrist DeQuervain's tenosynovitis and flexor carpi radialis tendinitis. In September of 2007, Dr. Holm recommended an arthroscopic examination of the left wrist which was performed on October 25, 2007. The surgery resolved the employee's left wrist symptoms, however, she continued to complain of left shoulder and left forearm pain and tenderness.

After performing several injections into the employee's left shoulder, Dr. Holm recommended left shoulder arthroscopic subacromial decompression surgery and radial nerve decompression of the left proximal forearm.

An independent medical examination was performed by Dr. William Call at the request of the employer and Insurer. Dr. Call examined the employee's left wrist, however, he did not assess the employee's left shoulder condition. In essence, Dr. Call agreed with Dr. Holm's diagnosis and treatment with respect to the left wrist condition and opined that the employee's injury was temporary and has resolved as of the date of his evaluation.

The employee was then evaluated by independent medical examiner, Dr. Wayne Thompson with respect to her left shoulder condition. While Dr. Thompson could not make a specific diagnosis of the employee's left shoulder condition, he opined that it was idiopathic and that her work activities did not substantially aggravate, accelerate, or cause her left shoulder condition.

On October 28, 2008, the employee filed a medical request seeking approval for the proposed left shoulder surgery and left forearm decompression surgery. The employer and Insurer disputed the reasonableness, necessity, and causal relationship of the proposed surgeries.

The employee sought a causation report from Dr. Holm. The employee provided Dr. Holm with her job duties, but did not include the amount of overhead reaching or reaching over the shoulder level that the employee's work required. In his report dated December 16, 2008, Dr. Holm indicated that the repetitive twisting of merchandise that the employee performed at work was a significant contributing factor to her left wrist condition and subsequent surgery. With respect to the employee's left shoulder condition, Dr. Holm indicated that in order for the employee's condition to be considered work related, "her work activities would have to include repetitive overhead reaching and lifting, not just lifting a product and turning or twisting it at waist level." Further, Dr. Holm stated that because he did not have any information regarding the frequency of the employee's overhead reaching and lifting at work, he could not say that the condition was work-related. Lastly, Dr. Holm suggested that if the employee had to reach overhead dozens of times per hour, he would then opine that her work activities were a significant contributing factor to her left shoulder condition, however, he would not consider the condition to be work-related "if the frequency with which she had to reach overhead or lift overhead was only several times

per hour."

At the employee's request, the January 29, 2009 hearing was limited to the proposed left shoulder surgery. The compensation judge found the employee had not shown that she had sustained a *Gillette* injury to her left shoulder culminating on September 1, 2006 and denied the employee's request for surgery. The compensation judge concluded that Dr. Holm lacked foundation for a causation opinion, as he did not know the extent of the employee's work-related overhead activity.

In her appeal, the employee argued that the compensation judge erred by failing to consider Dr. Holm's opinion in conjunction with her testimony that 25% of her work was at shoulder height and above, which when taken together with the contemporaneous medical records, was sufficient to establish a *Gillette* injury.

The Workers' Compensation Court of Appeals upheld the compensation judge's decision that there was insufficient evidence to find a *Gillette* injury based upon the judge's ability to review the employee's testimony, along with Dr. Holm's opinion, and other medical records.

EXCLUSIONS FROM COVERAGE

Endres v Endson, Inc., 2009 MN Wrk. Comp. LEXIS 49 (W.C.C.A. June 22, 2009), Affirmed.

Both the Compensation Judge and the W.C.C.A. found the employee to be the "de facto" owner of the employer and that equitable estoppel barred the employee from claiming workers' compensation benefits as he had not elected coverage in his policy.

In the documents related to formation of the corporation at issue, Lisa Johnson was listed as the incorporator, sole share holder and only executive officer of the company. Ms. Johnson testified that she gave the employee at issue, Edward Endres, the authority to sign contracts on behalf of the company including insurance contracts but that Mr. Endres did not have authority to set salaries or grant raises.

Evidence showed that the remuneration of Mr. Endres from the employer operation varied substantially over the years and payment was often made on an irregular basis. For example, during the first several years, there were sometimes gaps of weeks or even months between paychecks.

When the business began, Ms. Johnson executed an insurance application through the Assigned Risk Plan for workers' compensation coverage. This application indicated that Ms. Johnson was the owner with 100% ownership and Ms. Johnson did not elect coverage for herself.

In April of 2004, another application for workers' compensation insurance was filed with the Assigned Risk Plan and Ed Endres was listed as the owner with 100% ownership and Mr. Endres signed the application in blank indicating that he was the sole proprietor, partner or officer and no elections of coverage were made. The insurance agent testified that he had prepared the

application and did not know why he had listed Mr. Endres as the owner of the business.

Two subsequent applications for insurance were completed, one in January of 2005 and the other in May of 2006. The January of 2005 application stated that the employer had 6 employees and paid remuneration of $47,000.00 and the May of 2006 application did not specify the number of employees and listed total remuneration of $53,000.00. Both of these applications indicated that Mr. Endres was the owner with 100% ownership and Mr. Endres signed both applications over the signature line specifying that he was the sole proprietor, partner or officer and again no elections of coverage were made in either form.

Mr. Endres testified at the hearing that all of the applications that he had signed were brought to him for signature by the insurance agent during busy periods at the restaurant and that he never read the applications before signing them and that he did not know that he was listed as the owner of the business.

The insurance agent testified that with respect to the total remuneration figures listed in the applications, he must have received that information from Mr. Endres or from Ms. Johnson. However, both Mr. Endres and Ms. Johnson denied supplying this payroll information for the insurance applications.

The compensation judge, after considering the documentary evidence and the testimony of Ms. Johnson and Mr. Endres and the insurance agent, concluded that Mr. Endres was the de facto owner of the employer and that because he had not elected workers' compensation coverage, the injury was not compensable. The W.C.C.A. affirmed this determination.

The W.C.C.A. indicated that it is undisputed that the articles of incorporation and related documents for the employer, a closely held corporation within the meaning of the workers' compensation statute, listed Lisa Johnson as the sole share holder and sole executive officer. However, other documents in evidence, such as the 3 applications for workers' compensation insurance coverage, indicated that Edward Endres owned 100% of the employer.

The W.C.C.A. also found it important that the insurance agent dealt almost exclusively with Mr. Endres on insurance matters and only met with Ms. Johnson once.

The W.C.C.A. also found it important that Mr. Endres' pay was much more indicative of ownership than employee status. For example, Mr. Endres apparently received no pay whatsoever for full-time work through the end of 2002 and then just under $2,500.00 in gross income for the entire 2003 calendar year and then only received 3 checks in 2004, paying him $800.00 gross or less per check and then thereafter his pay continued to be somewhat irregular sometime with long gaps between payments. In addition, at the end of 2006, he received 3 $7,000.00 checks within 2 days.

The W.C.C.A. also noted that while Mr. Endres, Ms. Johnson and the insurance agent all offered testimony to refute the allegation that Mr. Endres had any ownership interest in the employer, the compensation judge expressly indicated that he did not find any of the witnesses to be particularly credible.

The W.C.C.A. also found it relevant that the insurance applications did not include the remuneration paid to Mr. Endres for purposes of premium calculation. The W.C.C.A. concluded that if Mr. Endres was an employee, his remuneration would have to have been included and would resulted in a substantially higher premium and the best explanation for his remuneration not being included was that he was in fact the owner.

The W.C.C.A. therefore concluded that Mr. Endres was in fact the de facto owner of the employer. The question then became the effect of this determination.

The W.C.C.A. applied the equitable estoppel doctrine and found that Mr. Endres could not take advantage of his initial denial that he was an employee in order to receive workers' compensation insurance coverage only after he sustained an injury. The W.C.C.A. attempts to limit this case to the very specific circumstances found herein but again did conclude that Mr. Endres was the de facto owner of the employer and since coverage was not elected, he did not have workers' compensation coverage for his injury claimed.

Mercer v. Susan A. Berg, 2009 MN Wrk. Comp. LEXIS 93 (W.C.C.A. September 28, 2009), Reversed.

The employer, Susan A. Berg, appealed the compensation judge's finding that the employee was not a "household worker" as defined by Minn.Stat. §§ 176.011, subd 21 and 17.041, subd. 1(n).

On February 23, 2008, Dr. Sandra Berg hired Sandra Mercer, the employee, to care for her two children. The job included preparing meals and doing laundry for the children, getting the children ready for and transporting the children to and from school, bathing the children, putting them to bed and staying at the home overnight when as necessary due to Dr. Berg's job

On the first day of her employment, the employee fell on the stairs of Dr. Berg's home and broke her foot. Dr. Berg was not insured for purposes of workers' compensation liability. The employee filed a claim petition seeking workers' compensation benefits. The Special Compensation Fund denied liability alleging that coverage was not available for the employee under the "household worker" exclusion set forth in Minn.Stat. § 176.041, subd 1(n).

A hearing was held on February 3, 2009, pursuant to Minn.Rule 1420.2605, to determine the employment status of Ms. Mercer. In the Findings and Order served and filed February 26, 2009, the compensation judge found the employee was not a household worker within the meaning of the statute and was therefore not excluded from coverage. Dr. Berg appealed.

When an appeal involves a question of low in circumstances such as application of a statute or rule or in a case with undisputed facts, the Workers' Compensation Court of Appeals reviews the case *de novo.*

Minn.Stat. §176.041, subd. 1 excludes from coverage under Chapter 176 "a person employed as a household worker in, for, or about a private home or household who earns less than $1,000 in cash in a three month period from a single private home or household."

The issue before the court in the present case is whether Ms. Mercer was employed as a "household worker" as contemplated by the statute.

Minn.Stat. §176.011, subd 21 further defines "household worker" as "one who is a domestic, repairer, groundskeeper, or maintenance worker in, for, or about a private home or household, but the term shall not include independent contractors nor shall it include persons performing labor for which they may elect workers' compensation coverage under Section 176.041 subd. 1a."

The compensation judge based his finding that employee was not a household worker upon the fact that the childcare services and household chores performed by the employee related solely to the care of the children, facts the compensation judge found to be analogous to the court's reasoning in Duke v. Davies, 37 W.C.D. 323 (W.C.C.A. 1984). In Duke, the Workers' Compensation Court of Appeals held an employee who had been hired as a personal care attendant for Ms. Davies who had suffered a stroke, and whose job duties were entirely related to the care and assistance of the employer without any responsibility for housecleaning duties, was not a domestic or household worker under the Statute.

The Court in the present case agreed with the employer's position that Ms. Mercer was not working as a personal care attendant at the time of her injury. Further, that the limited facts of the Duke case require the performance of housecleaning duties for an employee to be considered a domestic worker. The employer relied on the holding in Anderson v. Ueland, where the Supreme Court stated that domestic workers are persons "who are employed exclusively in the care of the family home and in serving members of the family." Anderson v. Ueland, 197 Minn.518, 267 N.W. 517, 519 (1936).

The Workers' Compensation Court of Appeals found no legal basis for concluding that the employee was not a household worker simply because her only duties related to the care of the children. The Court reversed the compensation judge's finding that the employee was not a household worker and held that the employee was excluded from coverage by the earnings requirements of Minn.Stat. §176.141, subd 1(n).

JURISDICTION - SUBJECT MATTER

Gee v. Now Technologies, (W.C.C.A. July 30, 2009), Dismissed. [Affirmed without Opinion].

The employee sustained an admitted work related injury on May 16, 1996. In April of 2008, the employee underwent a replacement implantable pain pump/bone stimulator at St. Joseph's Hospital. The device, a Synchromed E.L. Programmable Pump, was manufactured by Medtronic. HealthEast billed the employer and insurer $30,576.00 for the pump and hardware and subsequently filed a Medical Request seeking payment of in the amount of $25,989.60.

The matter proceeded to Hearing before a compensation judge on the issues of whether HealthEast/St. Joseph's Hospital is the healthcare provider that provided the service, article or supply pursuant to Minn.Rule 5221.0700, subp. 2A, and whether HealthEast/St. Joseph's

Hospital is entitled payment of $25,989.60, which represented the remainder of its 85% usual and customary charges for medical supplies and treatment provided to the employee, or whether paying is denied (pending a full evidentiary hearing) because the compensation judge had independent statutory authority to determine and award a reasonable charge amount which was less than either 85% ususal and customary or 85% prevailing charge limitations set forth in Minn.Stat. §176.136 or Minn.Rule 5221.0500.

In the compensation judge's findings and order dated June 9, 2009, the judge found that HealthEast was the healthcare provider that had furnished the infusion pump and as such they were entitled to bill the insurer subject to the limitations set forth in Minn.Stat. §176.136, subd. 1b(b), and Minn.Rule 5221.0500, subp. 2D; that Medtronic did not furnish any medical and/or health services to the employee; that the employer and insurer's obligation to pay HealthEast for the April 21, 2008 surgery could not exceed 85% of the provider's usual and customary charges for similar treatment, and that a compensation judge had the authority to determine the reasonable value of HealthEast's charges in an amount less than the 85% limit set forth in Minn.Stat. §176.136, subd. 1(b)b. The compensation judge set the matter for a full evidentiary hearing to determine the reasonable value of HealthEast's charges.

The employer and insurer appeal the decision of the compensation judge finding that HealthEast Care Systems is a healthcare provider and that Medtronic is not a healthcare provider. HealthEast Care Systems cross appealed the compensation judge's finding that the employer and insurer's obligation for the employee's surgical procedure was the reasonable value of those services not to exceed 85% of the usual and customary charges for similar treatment.

Minn.Stat. §176.421, subd. 1 provides that a party may appeal to the Workers' Compensation Court of Appeals "within 30-days after a party in interest has been served with notice of an award or disallowance of compensation, or other order affecting the merits of the case." As a general rule, an order is appealable only if it "finally determines the rights of the parties and concludes the action." Hagen v. Hoffman Aseptic Packaging, slip op. (W.C.C.A. May 8, 1997). This policy prevents piecemeal appeals and protects the rights of the parties until all claims have been adjudicated to the trial court. Johnson v. Johnson, 363 N.W.2d 355, 357 (Minn.App. 1985). Orders that do not affect the merits of the case, or do not prevent a later determination of the case on the merits, are not appealable to the Workers' Compensation Court of Appeals. Mierau v. Alcon Indus., Inc., 386 N.W.2d 741, 38 W.C.D. 652 (Minn.1986).

In determining whether an issue presented on appeal constitutes a justifiable controversy, appellate courts have used a three-part test, as set forth in Graham v. Crow Wing County Bd. Of Comm'rs, 515 N.W.2d 81, 84 (Minn.App.1994)(citing St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585, 587 (Minn.1977). The test requires that the issue must (1) involve definite and concrete assertions of rights by parties with adverse interests, (2) involve a genuine conflict in tangible interests of opposing litigants, and (3) be capable of relief by decree or judgment.

In reaching their decision in the present case, the W.C.C.A. noted that there had been no award or disallowance of compensation or other order affecting the merits of the case and that no benefits were yet at stake. Further, that the compensation judge's decision did not determine the rights of

the parties or conclude the action, but instead, that the parties sought a legal interpretation of Minn.Stat. §176.136, subd. 1b(b) in the absence of a justifiable controversy.

The W.C.C.A. dismissed the employer and insurer's appeal, as well as the cross appeal of HealthEast Care Systems, and remanded the case to the Office of Administrative Hearings for an evidentiary hearing.

Swenson v. Michael Nickaboine, d/b/a Northland Quality Builders, 2010 MN Wrk. Comp. LEXIS 7 (W.C.C.A. January 26, 2010), Reversed and remanded.

The employee appealed the compensation judge's decision dismissing his case based upon a finding that Minnesota courts lacked jurisdiction over the employee's claim for workers' compensation benefits.

At a bifurcated hearing on the sole issue of whether Minnesota jurisdiction existed for the employee's claim, the compensation judge determined that the employee had entered into a consensual employment relationship with a "tribal employer" working on "tribal land" which represented a "contested case that is tribal in nature." Further, the workers' compensation judge concluded that neither Federal Statute 28 U.S.C. §1360 or 40 U.S.C. §3172 applied in the present case based upon her interpretation of the Minnesota Supreme Court's holding in Tibbetts v. Leech Lake Reservation Bus. Comm., 397 N.W.2d 883, 39 W.C.D. 238 (Minn. 1986).

In Tibbetts, the Minnesota Supreme Court held that Minnesota did not have jurisdiction to consider a workers' compensation claim against an Indian band itself where the band's inherent sovereign immunity had not been waived either by the band's act or by federal statute. The compensation judge further concluded that the case involved consensual employment with a tribal employer on tribal land to which a tribal court could exercise jurisdiction in a Minnesota workers' compensation tribunal.

The employee was not a member of the Mille Lacs Band of Ojibwe [MLBO] or of any other band or tribe. The MLBO, who operates Grand Casino Hinkley, amongst other businesses, had decided to expand Grand Casino Hinkley. Mr. Nickaboine, doing business as Northland Qaulity Builders, was hired as a subcontractor by M.A. Mortenson to work on the casino expansion, and in October 2006, he hired the Mr. Swenson, the employee. Mr. Nickaboine was an enrolled member of the MLBO.

All of the work performed by the employee was at the casino expansion project on the reservation. The employee alleged a work related injury on May 30, 2007. The alleged injury occurred on the reservation of the MLBO.

The insurer denied the claimed, alleging, in part that Minnesota had no jurisdiction over the claim pursuant to Minn.Stat. §176.041, subd. 5a, which provides that "[e]xcept as specifically provided by subdivisions 2 and 3, injuries occurring outside of this state are not subject to this chapter." It was the insurer's position that the MLBO reservation, being tribal land, was located "outside of" the state of Minnesota.

In Nevada v. Hicks, the Supreme Court noted that "[s]tate sovereignty does not end at a reservation's border. Though tribes are often referred to as 'sovereign' entities . . . It is now clear, 'an Indian reservation is considered part of the territory of the State." Nevada v. Hicks, 533, 361-362 (2001) (citations omitted). In reliance upon the holding in Nevada v. Hicks, the Workers' Compensation Court of Appeals concluded that the MLBO reservation lies within Minnesota for purposes of Minn.Stat. §176.041, subd. 5a, and that a work injury that occurs on the reservation is not an out-of-state injury under the workers' compensation statute.

Next, the court analyzed to what extent and under what circumstances state laws may be applied to tribal Indians on the reservations. In Public law 280, codified as 28 U.S.C. §1360, Congress granted some states, including Minnesota, state jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such state has jurisdiction over other civil causes of action, and those civil laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state." The MLBO land falls within the "areas of Indian country" listed for Minnesota.

The Workers' Compensation Court of Appeals determined that a workers' compensation claim brought by an injured worker is a civil cause of action contemplated by 28 U.S.C. §1360. As such, they determined that Minnesota jurisdiction may be asserted over a petitioner's claim arising out of a workers' compensation injury even when the injury occurs on tribal land.

As a separate basis for a finding Minnesota jurisdiction, the court referred to 40 U.S.C. §1372 wherein Congress provided that "the state authority charged with enforcing and requiring compliance with the state workers' compensation law and with the orders, decisions, and awards of the authority may apply the laws to all land and premises in the state which the Federal Government owns or holds by deed or act of cession." Based upon the plain language of 40 U.S.C. §1372, the court concluded that Minnesota workers' compensation law applied to the present case.

Based upon the foregoing, the court determined that the site where the injury occurred, although part of the MLBO reservation, was owned by the United States and as such, Minnesota jurisdiction over the case was granted by Congress.

The court distinguished the holding in Tibbetts v. Leech Lake, from the present case in that it did not involve the MLBO or any subordinate business entity of the MLBO, thus failing to give rise to the subject of the MLBO's sovereign immunity. Michael Nickaboine, doing business as Northland Quality Builders, was a private employer. His affiliation with the Band consisted solely of his personal membership in the Band and as a licensed business allowed to conduct business on the reservation.

While the court agreed with the judge's interpretation that a MLBO tribal court would be able to assert jurisdiction over a workers' compensation claim filed there by an injured worker during employment on tribal land, the court believed the compensation judge erred in concluding that the tribal court had exclusive, rather than concurrent jurisdiction.

After having determined that the Office of Administrative Hearings had concurrent jurisdiction with the tribal courts over the employee's claims, the court analyzed the principles of comity to determine whether the exercise of jurisdiction in that tribunal is appropriate. In Lemke v. Brooks, 614 N.W.2d 242 (Minn.App. 2000), the Minnesota Court of Appeals held that 28 U.S.C. §1360's grant of civil jurisdiction applied to a wrongful death action against an Indian defendant by a non-Indian arising from a death taking place on tribal land. The court then went on to consider whether the state court was required to defer to the jurisdiction of the tribe. The court stated that the guiding federal principle was deference, and "[a]bsention by a state court is appropriate when the exercise of state court jurisdiction 'would undermine the authority of the tribal courts' or 'infringe on the right of Indians to govern themselves.'" 614 N.W.2d at 246 (citations omitted). The court held that a Minnesota court could properly assert jurisdiction in light of the general applicability of the law and the absence of interference with tribal self government.

In the present case, the Workers' Compensation Court of Appeals found the civil remedies provided to injured workers pursuant to the Workers' Compensation Act are similarly laws of general application to private persons both on and off tribal lands. Based upon the MLBO having not created legislation in the area of workers' compensation other than with respect to the claims of employees against the band itself or its tribally owned enterprises, the court held that the exercise of Minnesota jurisdiction would not interfere with any workers' compensation scheme enacted by the MLBO.

In finding that the Office of Administrative Hearings had concurrent jurisdiction with the Mille Lacs tribal court over the employee's claims, and further, that the exercise of that jurisdiction was consistent with the principles of comity, the compensation judge's decision was reversed and the matter was remanded to the Office of Administrative Hearings for a hearing on the merits of the employee's claim.

MEDICAL TREATMENT AND EXPENSE

Hausladen v. Egan Mechanics, W.C.C.A. Slip Opinion, January 7, 2010. Affirmed in part and reversed in part.

The employee sustained a work related low back injury on June 6, 2006. The employee was diagnosed with a lumbar strain/sprain, with intermittent leg pain for which she was prescribed physical therapy and medications along with a recommendation for work restrictions.

In mid-December of 2006, the employee had completed 29 therapy sessions at Physicians Neck and Back Clinics (PNBC) and was released to return to her usual job duties without the need for restrictions. Additional recommendations included that she should quit smoking, increase her cardiovascular activities, and use a "Roman chair" for further strengthening.

In January 2007, the employee was laid off from her job and began collecting unemployment benefits. In April of 2007, the employee returned to her treating physician at which time the assessment included "chronic low back pain without radiculopathy." The employee was referred

to Dr. Miles Belgrade due to "significant pain impacting her life."

In June of 2007, the employee began working as a sheet metal worker for another employer. She was noted to be working without restrictions and little or no wage loss related to her low back condition.

In January 2008, a hearing was held before a compensation judge on the issue of the employee's request for approval for a referral to Dr. Belgrade and the applicability of the Treatment Parameters. The judge concluded that the treatment parameters were applicable because the employer and Insurer had admitted liability and paid benefits, and that, pursuant to the Treatment Parameters, the employee was not entitled to a pain clinic evaluation or treatment.

On appeal, a panel of the Workers' Compensation Court of Appeals affirmed the judge's finding that the Treatment Parameters was applicable, however, they remanded the case to the compensation judge for consideration of whether a departure from the parameters was warranted under Minn.Rule 5221.6050, subp. 8, and, if not, whether the requested pain clinic referral qualified for a "rare case" exception to the parameters pursuant to case law.

In May of 2008, while treating with Dr. Biewen (based upon referral by her treating physician), a recommendation was made for a follow-up MRI and a trial of lumbar epidural injections. Despite the employer and insurer's denial of the MRI and epidural injections, the employee proceeded with the treatment, some of which was paid by her private insurance carrier.

On April 10, 2009, the matter came before the compensation judge to resolve the issues on remand relative to the requested pain clinic evaluation, and consideration for the employee's claim for additional medical expenses, including the recommended MRI and well as the office visits with Dr. Biewen, physical therapy, and the epidural injections.

In the compensation judge's decision dated June 9, 2009, the compensation judge determined that the pain clinic evaluation did not qualify for a departure under the treatment parameters. However, he determined that the "proposed evaluation" with Dr. Belgrade was reasonable and necessary medical treatment that qualified as a 'rare case exception' pursuant to case law. While denying the employee's claim for physical therapy, the judge ordered the employer and insurer to pay for the reasonable fee service sums for the pain clinic treatment, and to pay expenses for Dr. Biewen's treatment, the epidural steroid injections, and the requested MRI scan. The Employer and Insurer appealed.

In their decision, the Workers' Compensation Court of Appeals described the "rare case" exception, which was first set forth in Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), wherein the court explained that "the treatment parameters cannot anticipate every exceptional circumstance," "a compensation judge may depart from the rules in those rare instances in which a departure is necessary to obtain proper treatment." Application of the "rare case" exception is generally a question of fact.

While acknowledging the judge's "careful and thoughtful" consideration of the record in the present case, the court found that there was absolutely nothing about the case that qualified it as

exceptional or rare, as contemplated by case law. The court found that the employee's condition was not medically complex, she continued to work in her ususal and customary occupation, and there was no medical evidence that explained in any detail what the employee hoped to gain from the requested treatment.

The court noted that as a rule they are extremely hesitant to overturn a judge's decision on an issue of fact. That being said, they cautioned that "fact issues are not immune from review." The court went on to state, "if we were to affirm the judge's decision here, virtually any employee with continuing symptoms could claim entitlement to chronic pain treatment. Such a result would be inconsistent both with the intent of treatment parameters and of case law governing 'rare case' exceptions." Finding that the judge's decision was not supported by substantial evidence, the court reversed the award of the referral to Dr. Belgrade.

Although the employer and insurer appealed the compensation judge's award of the office visits to Dr. Biewen, the epidural steroid injections and the recommendation for a follow-up MRI, the court affirmed the judge's decision on these three issues.

Johnson v Metz Baking Company, 2009 MN Wrk. Comp. LEXIS 22 (W.C.C.A. May 1, 2009), Affirmed.

The employer and insurer denied a request for payment for neck medical treatment in part based on causation and also based on reasonableness and necessity and the employer and insurer sought to apply the treatment parameters as well. The employer and insurer argued that when medical treatment is denied for multiple reasons which include reasonableness and necessity as well as causation, the treatment parameters should be applied.

The compensation judge determined and the W.C.C.A. agreed that since the employer and insurer denied primary liability for medical treatment, the employer and insurer could not use the treatment parameters as a defense to this medical treatment.

Pinc v Stepping Out, Inc., 2009 MN Wrk. Comp. LEXIS 13 (W.C.C.A. March 6, 2009), Affirmed in part and reversed in part.

In this case, the employee sustained an admitted injury on June 29, 2004.

On March 12, 2008, the employee filed a Claim Petition seeking approval for surgery and reimbursement for payment for a pre-operative physical examination. The employer and insurer, in their Answer, denied the claimed benefits were reasonable, necessary or causally related to the injury.

A hearing took place on July 31, 2008. At the hearing, the employer and insurer argued that the employee had not met the applicable treatment parameters for approval for surgery and specific treatment parameter rules were cited. The compensation judge determined that the treatment parameters were applicable and that the employee had not met the requirements of the parameters and the compensation judge concluded that a departure from the parameters was not appropriate. The compensation judge further concluded that even if the parameters were not applicable, the

surgery was not reasonable and necessary and the employee's claim was denied. The employee appealed.

The employee, on appeal, argued that the treatment parameters were not applicable since the employer and insurer denied that the recommended surgery was causally related to the work injury. The Workers' Compensation Court of Appeals agreed with this position.

Evidently, the compensation judge had concluded that while the employer and insurer denied reasonableness and necessity of the surgery, they did not dispute causation. The Workers' Compensation Court of Appeals did not agree with this assessment and concluded that based on their review of the record, causation was an issue. The Workers' Compensation Court of Appeals pointed to the answer of the employer and insurer where causation was listed as an issue and at the hearing, the employer and insurer did not indicate that they were no longer denying causation. Therefore, the W.C.C.A. reversed the determination from the compensation judge that the treatment parameters were applicable.

The case was remanded to the compensation judge to reconsider the need of surgery based simply on reasonableness and necessity. The W.C.C.A. would not accept the compensation judge's decision even on reasonableness and necessity since the W.C.C.A. pointed out that the compensation judge denied the reasonableness and necessity of the surgery in part because the compensation judge had incorrectly concluded that the employee had failed to undergo certain conservative treatment before seeking surgery.

Brown v REM Cent. Lakes, 2009 MN Wrk. Comp. LEXIS 71 (W.C.C.A. August 25, 2009), Affirmed.

Pursuant to Minnesota Rule 5221.6200, Subp. 6C (1), before an approval of a dorsal column stimulator is indicated, there must be a second opinion confirming that the treatment is indicated and within the treatment parameters and a personality or psychosocial evaluation is required indicating that the employee can likely benefit from the dorsal column stimulator.

In Brown, the compensation judge awarded the employee's request for a trial screening period for a dorsal column stimulator. The Workers' Compensation Court of Appeals affirmed this approval for the trial screening period and the W.C.C.A. indicated that the prerequisites required for a dorsal column stimulator pursuant to Minnesota Rule 5221.6200, Subp. 6C (1) do not apply for a trial screening period prior to the implementation of the actual spinal cord stimulator.

PENALTIES

Fahje v Dycast Specialties Corp., 2009 MN Wrk. Comp. LEXIS 74 (W.C.C.A. August 17, 2009), Affirmed.

The employer and insurer discontinued payment of temporary total disability benefits at the point that the employee returned to a light duty job on October 25, 2007. The employer and insurer, however, did not file a NOID until May of 2008. The employee argued that penalties were

appropriate based on the late filing of the NOID. The employee alleged harm suffered due to the late filing of the NOID. Basically, the employee alleged that had she received the NOID on time, she could have contacted her treating doctor to issue a report regarding causation and the need for ongoing restrictions related to her wage loss claim. The employee argued that because the employer and insurer did not timely file the NOID, she did not have the opportunity to ask the treating doctor to address causation and the need for restrictions because by the time the NOID was filed the employee's treating doctor had moved to Austria and was not available.

Both the compensation judge and the W.C.C.A. denied this penalty claim. The W.C.C.A. determined that there was no harm to the employee caused by the late filing of the NOID. The employee had retained her attorney by January of 2008 and the treating doctor continued to treat the employee into July of 2008 and therefore, the W.C.C.A. confirmed that there was a period of approximately 7 months where the employee had an attorney and the attorney could have followed up with the treating doctor to address causation and restrictions. The W.C.C.A. found it significant in addition that by January of 2008, when the employee retained her attorney, they had already received the IME report notifying the employee that they would not pay any additional benefits and under these circumstances, the W.C.C.A. determined that an NOID was not required to inform the employee that there was a dispute regarding causation and they determined that no penalties were appropriate.

The W.C.C.A. also found it important that the compensation judge denied the claim for benefits beginning on October 25, 2008 based on causation and this decision was affirmed by the W.C.C.A. and the W.C.C.A. further stated that it does not make sense to penalize an employer and insurer for stopping payment that it did not owe.

Ollikkala v RSI, Incorporated, 2009 MN Wrk. Comp. LEXIS 79 (W.C.C.A. August 11, 2009), Affirmed in part and reversed in part. [Summarily aff'd. (Minn. January 29, 2010)].

At hearing, Judge Arnold determined that the employer and insurer had failed to make payment in a timely manner under a previous order from the court and Judge Arnold awarded a penalty of $250.00. This penalty was affirmed by the Workers' Compensation Court of Appeals. The W.C.C.A. determined that it was apparent from the record that the employer and insurer neglected to pay interest on the benefits awarded under the compensation judge's prior Findings and Order. The W.C.C.A. confirmed that interest on benefits that are due is payable under the statute whether or not entitlement to interest has been pleaded or specifically awarded and therefore even though entitlement to interest had not been pleaded before the compensation judge, the W.C.C.A. affirmed this $250.00 penalty.

Myers v. Minnesota Vikings Football Club, Inc., 2009 MN Wrk. Comp. LEXIS 94 (W.C.C.A. September 18, 2009), Affirmed as modified, in part, reversed in part, and vacated in part.

The employee played as an offensive tackle with the Minnesota Vikings Football Club during the 1978, 1979 and 1980 seasons. In 1978, the employee reported pain in the palm of his right hand for which he received treatment from the team trainer and team doctor. On December 7, 1979, he fell and twisted his left hand and wrist and again received treatment from the team doctor. In August and September of 1980, the employee sustained injuries to his left knee. In October of

1980, the employee was placed on waivers by the Vikings.

Approximately three years later on July 27, 1983, the employee filed a claim petition seeking temporary total and/or temporary partial disability benefits from September 21, 1980 and continuing, and permanent partial disability benefits as a result of his August 7, August 24, and September 18, 1980 left knee injuries. Ultimately, the parties entered into a settlement agreement wherein all claims were closed with the exception of future medical treatment.

Approximately 18-years later, on March 6, 2003, the employee filed a claim petition against the self-insured employer, alleging entitlement to unspecified benefits based upon the 1978 right hand injury and the left hand/wrist injury on December 7, 1979. The employee amended the claim petition on May 25, 2004 with the same claims and injury dates against the employer and its then insurer, Employers Insurance of Wausau. The employer denied liability, asserting that the employee had failed to provide proper notice and that the claims were barred by the six-year statute of limitations. The employee clarified his claims to include temporary total and/or temporary partial disability benefits from and after January 1, 1982 along with 10% permanent partial disability to each hand and wrist.

In the compensation judge's Findings and Order served and filed November 13, 2006, the compensation judge awarded the employee wage loss benefits as well as 10% permanent partial disability to each hand and wrist. The employer and insurer appealed. The Workers' Compensation Court of Appeals issued their decision on July 20, 2007. On September 13, 2007, the insurer issued a check to the employee for accrued wage loss benefits, permanent partial disability benefits, and interest on the indemnity and permanency accruing from the date of the compensation judge's 2006 Findings and Order. On the same date, the insurer issued payment to the employee's attorney for fees ordered by the W.C.C.A. and for taxable costs arising from both the hearing and the subsequent appeal. The following day, the employee filed a claim petition for penalties pursuant to Minn.Stat. §176.225, subdivisions 1(b) and 5, alleging that the employer and insurer had failed to make payments as ordered. The employer and insurer denied the claim for penalties alleging that there had been an agreement with the employee's attorney extending the time for payment following the decision on appeal.

The employee's claim petition proceeded to hearing on December 30, 2008 on the issues of (1) "the extent to which the employee is entitled to an award of interest on benefits previously awarded by this court, " and (2) "the extent to which those benefits were paid late and what, if any, penalties are appropriate under Minn.Stat. §176.225, subd. 1(b) and subd. 5." In a decision issued January 21, 2009, the compensation judge denied the employee's claim for penalties, concluding that the employee had not shown "that the delay in payment for those checks issued by the insurer on September 13, 2007, was unreasonable, vexatious or inexcusable under the facts of this case." The judge found that there had been some sort of agreement extending the due date for payment until September 10 or 11, although it was unclear whether the delay related to interest payments only or other benefits as well. The judge found no basis for an award of penalties with respect to the alleged late payment of attorney fees and subdivision 7 fees. Lastly, the judge awarded a provisional 10% penalty pursuant to Minn.Stat. §176.225, subd. 1(b) and 25% penalty under Minn.Stat. §176.225, subd. 5, in the event that there was late payment of the net underpayment in temporary partial, permanent partial and interest payments.

The employee appealed from the compensation judges' denial of his claim for penalties and from the judge's determination of the "due date" for purposes of calculating interest pursuant to Minn.Stat. §176.221, subd. 7.

The W.C.C.A. affirmed the judge's determination that interest on indemnity benefits began to accrue from the filing of the Amended Claim Petition. The court cited to the decision in Hop v. Northern States Power Co., slip op. (W.C.C.A. Sep. 12, 1996), wherein the court held "there can be . . . no accrual of interest until the obligation to pay is both fixed and ascertainable by the obligor," citing to Lappinen v. Union Ore Co., 224 Minn. 395, 29 N.W.2d 8, 15 W.C.D. 19 (1947).

With respect to penalties, the court first set forth the requirements in Minn.Stat. §176.221, subd. 8 which provides that all payment of compensation must be made within 14 days of the filing of an appropriate order. Pursuant to Minn.Stat. §176.225, subd. 5 provides that "[w]here the employer is guilty of excusable delay in making payments, the payments which are found to be delayed shall be increased by 25 percent." The court made clear that the statute does not grant discretion to a compensation judge to award a greater or lesser penalty, nor does the statute allow the employer and insurer additional time to make payment in complicated cases.

Given the finding by the compensation judge that the payments were delayed, and the absence of an excuse or reason for the delay by the employer and insurer, the court found the employer and insurer guilty of "inexcusable delay" within the meaning of the statute. The court reversed the judge's denial of the employee's claim for penalties and ordered the employer/insurer to pay a penalty equal to 25% of the wage loss and permanent partial disability benefits ordered, after subtraction of attorney fees, as well as a 25% penalty on the interest paid by the insurer on September 13, 2007.

In addition to the penalty awarded under subd. 5, the court awarded the employee a penalty of $250.00 pursuant to Minn.Stat. §176.225, subd. 1(b) which provides that a compensation judge, or the Workers' Compensation Court of Appeals, upon appeal, "shall," "as a penalty" "award additional compensation" of "up to 30 percent" of the total amount of compensation ordered. Like, subdivision 5, the award of penalties pursuant to subd. 1(b) is mandatory, affording no discretion as to the imposition of when the statutory threshold has been met, noting however, that the court does have discretion at to the amount of the penalty.

PRACTICE AND PROCEDURE

Hurd v Northern Industrial Installation, 2009 MN Wrk. Comp. LEXIS 33 (W.C.C.A. April 10, 2009), Affirmed. [Summarily aff'd. (Minn. August 28, 2009)].

In this case, there were two employers and insurers. One of the employers and insurers entered into a Pierringer settlement shortly before hearing.

At the hearing that proceeded with the other employer and insurer, this other employer and insurer argued that the compensation judge erred by not making a finding regarding

apportionment. Although the Workers' Compensation Court of Appeals confirmed that the compensation judge was informed about the Pierringer settlement prior to the hearing, the W.C.C.A. determined this was not enough to put apportionment in issue at hearing.

The impact of this decision was to allow the employee to receive the full amount of the benefits awarded to him without any reduction based on the Pierringer settlement that he had previously entered into.

Yuan v. Si Ming Cai, 2009 MN Wrk. Comp. LEXIS 70 (W.C.C.A. August 3, 2009), Vacated in part and remanded.

Pursuant to M.S. §176.285, service of papers and notices can be performed by mail and if so, service is effective at the time mailed if properly addressed and stamped. If the document is properly addressed and stamped, it is presumed that the paper notice reached the party to be served, however, a party may show by competent evidence that the party did not receive the paper or notice or that it had been delayed in transit for an unusual or unreasonable period of time and in the case of non-receipt or delay, an allowance shall be made for the parties' failure to assert a right within the prescribed time.

In this case, the employer alleged that it did not receive notice of the hearing and the W.C.C.A. concluded that the evidence at hearing with regard to notice was inconclusive and therefore the case was remanded to the compensation judge to obtain evidence on whether the employer was provided notice for the hearing.

PRACTICE AND PROCEDURE - INDEPENDENT MEDICAL EXAMINATION

Ollikkala v RSI, Incorporated, 2009 MN Wrk. Comp. LEXIS 79 (W.C.C.A. August 11, 2009), Affirmed in part and reversed in part. [Summarily aff'd. (Minn. January 29, 2010)].

The employer and insurer appealed an order from Compensation Judge Paul Rieke, denying its request to compel the employee to submit to an independent medical examination by Dr. Hood. This denial of the Motion to Compel was reversed by the Workers' Compensation Court of Appeals and therefore the W.C.C.A. required the employee to submit to this IME with Dr. Hood.

In this case, the employee was first seen for purposes of an IME by Dr. Tilok Ghose, who opined that the employee had sustained a sprain/strain to her low back as a result of the September 19, 2006 injury from which the employee had fully recovered by February 15, 2007.

The employer and insurer filed an NOID based on the opinions of Dr. Ghose and the employee filed a Claim Petition seeking ongoing temporary total disability. This matter was heard in front of Compensation Judge Jerome Arnold on August 10, 2007 and in the September 27, 2007 Findings and Order of Judge Arnold, he determined that the opinions of Dr. Ghose were not persuasive and he found that the employee had not yet recovered from the work injury.

On February 15, 2008, the employee was again examined by Dr. Ghose, who reiterated his opinions that the employee had reached MMI with a full recovery as of February 15, 2007.

This matter again went to hearing in front of Judge Arnold on July 1, 2008 and Judge Arnold again adopted the opinions of the treating doctor and found that the employee had ongoing disability from his work injury and rejected the opinions of Dr. Ghose. This Findings and Order was issued July 11, 2008.

After the July 11, 2008 Findings and Order of Judge Arnold, the employer and insurer scheduled the employee for an IME with Dr. Hood on the specific issue of a proposed spinal fusion surgery raised by a new Claim Petition. The employee objected to this examination and the employer and insurer filed a Motion to Compel which was denied by Judge Rieke. Judge Rieke, in his Order denying the Motion to Compel, determined that Dr. Ghose appeared to be qualified to offer an opinion on the recommended low back fusion surgery even if he does not regularly perform the exact surgery recommended.

The Workers' Compensation Court of Appeals determined that there is nothing in M.S. §176.155 limiting the employer to a single examination or granting a compensation judge the authority to direct whom the employer must retain for an opinion. The W.C.C.A. indicated that in the Order from Judge Rieke denying the Motion to Compel the employee for an IME with Dr. Hood, Judge Rieke did not deny the request of the employer and insurer for an independent medical examination, he just denied the request to have the independent medical examination with Dr. Hood. The W.C.C.A. determined that in this case where the necessity of the exam was not disputed, only who may conduct the exam, the judge erred in denying the Motion to Compel.

The W.C.C.A. went onto explain that the employer and insurer are entitled to fully explore their defense to the claim for surgery with a medical expert of their choice. The W.C.C.A. went onto indicate that whether Dr. Ghose is qualified to analyze the surgical request is irrelevant since surgery had not been recommended or claimed until after the Dr. Ghose examinations. The W.C.C.A. further stated that the sole issue for the compensation judge was whether the requested exam was reasonable under the statute and the W.C.C.A. determined that the employee's argument that the employer had engaged in "doctor shopping" may be of some relevance to the compensation judge at trial but is not relevant regarding whether the exam is reasonable in the first place.

REHABILITATION - CHANGE OF QRC

Stutelberg v. Kelleher Construction, 2009 MN Wrk. Comp. LEXIS 30 (W.C.C.A. April 17, 2009), Affirmed.

In this case, the employee sustained an admitted injury. On August 20, 2007, the employee met with a QRC who was an employee of the insurer. The QRC disclosed her relationship with the insurer to the employee and the employee signed the rehabilitation rights and responsibilities of the injured worker form, which indicated that the employee had the right to choose his own QRC up to 60 days after the filing of a written rehabilitation plan. A rehabilitation plan was then filed on August 20, 2007.

The QRC went with the employee to medical appointments. The QRC worked with the treating

doctors to obtain restrictions and worked with the employee to return to work with the employer, where the employee returned to work for about one month. The QRC then sent the employee to a placement vendor for placement services.

The employee filed a Rehabilitation Request on or about March 26, 2008 seeking a change of QRC. The employer and insurer responded to this Rehabilitation Request arguing that the request was untimely and that the QRC who was already on the case was in the best position to provide rehabilitation services.

At the administrative conference, the request for a QRC's was denied and the employee filed a Request for Formal Hearing. At the hearing, the employee argued that it would be in the best interest of the parties to allow the employee to choose QRC's and the employee also argued that there was an inherent conflict of interest for the QRC because the QRC was an in-house QRC working for the insurer.

The compensation judge determined that the QRC had provided appropriate rehabilitation services to the employee and the compensation judge determined that the QRC had complied with the professional standards of conduct for QRC's and the compensation judge determined that the preponderance of the evidence failed to establish a change of QRC was in the best interest of the parties.

The Workers' Compensation Court of Appeals affirmed. The W.C.C.A. found it important that the QRC had disclosed her affiliation with the employee and that the employee did not exercise his right to choose a different QRC within the initial 60 day period. The W.C.C.A. stated that the fact the QRC is an employee of an insurer is a factor that a compensation judge may consider but the W.C.C.A. stressed "best interest of the parties" is still the controlling consideration to be analyzed.

RES JUDICATA

Hatfield v Lenort, 2009 MN Wrk. Comp. LEXIS 76 (W.C.C.A. August 12, 2009), Affirmed as modified.

The Workers' Compensation Court of Appeals confirmed that the doctrine of res judicata applies in workers' compensation cases only with respect to issues specifically litigated and decided in prior proceedings. The doctrine of res judicata is that a final judgment on the merits, in a prior proceeding, bars a second suit for the same claim.

In Hatfield, the compensation judge and the Workers' Compensation Court of Appeals refused to apply the doctrine res judicata to deny the requested surgery.

In this case, an earlier hearing in front of a compensation judge determined that the proposed surgery was causally related to the work injury at issue but the surgery was denied based on reasonableness and necessity. After the first hearing the employee filed another request for approval for the same surgery. The compensation judge and the W.C.C.A. refused to apply the res judicata doctrine in the second hearing where the employee again sought the same surgical

approval because there was additional evidence that was generated after the first hearing but before the second hearing. The new evidence that was developed included the fact that the employee had now complied with preconditions set out in the initial Findings and Order in that he had ceased smoking and had undergone an EMG which indicated a chronic left C7 radiculopathy and the treating doctor had reviewed the results of the EMG and diagnosed a C7 radiculopathy and continued to recommend surgery. As a result of this new evidence, the doctrine of res judicata did not prevent the employee from requesting and prevailing on his surgical request even though this same surgery was previously denied in a hearing based on reasonableness and necessity.

VACATION OF AWARD

Brownell v Jolanopp Excavating, Inc., 2009 MN Wrk. Comp. LEXIS 6 (W.C.C.A. June 23, 2009).

In this case, the Workers' Compensation Court of Appeals determined that the employee had established good cause to vacate an Award on Stipulation on the grounds of a substantial change in medical condition pursuant to M.S. §176.461 (4).

The employee and the employer and insurer, in August of 1997, entered into a Stipulation for Settlement on a full, final and complete basis. The employee was paid $100,000.00 for this settlement. In the Stipulation, the employee claimed entitlement to payment of temporary total disability and temporary partial disability benefits, permanent partial disability benefits, retraining and rehabilitation services. The employee did not allege entitlement to permanent total disability in the Stipulation. The employer and insurer alleged in this Stipulation that the employee had reached maximum medical improvement with no more than an 8% permanent partial disability and they denied the employee was permanently and totally disabled and alleged the employee had the capacity to return to work.

The Court analyzed the Fodness factors to determine whether the Award should be vacated based on a substantial change in medical conditions (Fodness v. Standard Café, 41 WCD 1054 (WCCA 1989)).

The first Fodness factor is whether there has been a change of diagnosis. The W.C.C.A. determined that there had been a change in the diagnosis of the employee. At the time of the Stipulation, the employee was diagnosed with a severe right forefoot degloving injury and since the Stipulation had undergone two further amputations. The W.C.C.A. also stated that the employer and insurer conceded a change in diagnosis.

The next Fodness factor is whether there has been a change in the employee's ability to work. The Workers' Compensation Court of Appeals determined that the employee's ability to work had not improved since the time of the Stipulation, rather, the restrictions assigned by his treating doctor since the Stipulation for Settlement were significantly more limiting than the FCE in place at the time of the Stipulation for Settlement. The W.C.C.A. also put weight on the testimony of the employee that he could no longer work at the time of the Petition to Vacate as compared to

his testimony prior to the settlement in which he testified that he could return to work he believed operating heavy equipment.

The W.C.C.A. acknowledged the argument of the employer and insurer that even the 1997 FCE in place at the time of the Stipulation for Settlement did provide significant restrictions for the employee but the W.C.C.A. still concluded that there had been a significant change in the employee's ability to work since the time of the Stipulation.

The next Fodness factor is whether there has been any change in permanent partial disability and there was no dispute that at the time of the Stipulation the employee had either an 8% or 15% permanency and then at the time of the Petition to Vacate, the employee had either a 28% or 34% permanency and therefore the W.C.C.A. did find an additional permanent partial disability incurred.

The next Fodness factor is whether there has been a necessity for more costly and extensive medical care than anticipated at the time of the Stipulation. In this case, the employee was in need of two additional surgeries that the W.C.C.A. determined resulted in much more extensive and costly medical care than initially anticipated at the time of the Stipulation.

The next Fodness factor is causal relationship and the W.C.C.A. determined that there was a causal relationship between the employee's initial injury and his need for further amputations after the Stipulation for Settlement was entered into.

The last Fodness factor is whether the substantial change in the medical condition of the employee since the time of the Stipulation was clearly not anticipated and could not reasonably have been anticipated at the time of the Award. The W.C.C.A. concluded that there was no evidence in the medical records in existence at the time of the Stipulation for Settlement that additional amputation surgery would be necessary and they concluded there was no evidence in the medical records at the time of the Stipulation that the employee would be unable to work following the Award. Therefore, the W.C.C.A. concluded that the substantial change in the employee's medical condition was one that was not clearly anticipated and could not reasonably have been anticipated at the time of the Award.

As a result the W.C.C.A. approved the Petition to Vacate based on a determination that the employee had sustained a substantial change in the employee's medical condition.

Budke v. St. Francis Medical Center, 2009 MN Wrk. Comp. LEXIS 86 (W.C.C.A. October 14, 2009), Petition to vacate findings and order denied. [Affirmed without opinion (Minn. January 27, 2010)]

The employee sustained work related injuries on November 14, 1996 and December 2, 1996 in the course of her employment with St. Francis Medical Center. At hearing, it was determined that the employee had reflex sympathetic dystrophy (RSD) in her left shoulder as a result of her work injuries.

In 2002, the employee filed a Claim Petition seeking permanent partial disability benefits as a

result of the RSD. In the Findings and Order dated September 4, 2003, the compensation judge denied the employee's claim, finding that the employee had failed to establish she met the requirements of Minn.Rule 5223.0400, subp. 6, and Minn.Rule 5223.0410, subp. 7. The judge, cited to Lohman v. Pillsbury Co., 40 W.C.D. 45 (W.C.C.A. 1987) which stood for the proposition that each element in a relevant schedule must be met in order for a finding of permanent partial disability to be made. The compensation judge did not make a determination as to whether or not the employee had sustained an impairment of function demonstrated by objective findings as the result of her 1996 work injuries. The compensation judge's decision was not appealed.

On April 20, 2009, the employee filed a petition to vacate the 2003 findings alleging that the Workers' Compensation Court of Appeals had changed the law upon which the 2003 decision relied. More specifically, the employee claimed that the court's decision in Stone v. Harold Chevrolet, 65 W.C.D. 102 (W.C.C.A. 2004) held that it was not necessary to satisfy all of the requirements of the rules in order to receive permanent partial disability benefits for RSD. As such, the employee argued that the decision in Stone created a change in controlling law relative to her claim for permanent partial disability benefits and constituted good cause for vacating the 2003 findings.

The court disagreed with the employee's position. First, the court did not consider Stone to represent a change in law. Second, the court held even if the employee's interpretation of Stone were found to be correct, a change of law is not cause for vacating an award under Minn.Stat. §176.461.

The W.C.C.A. restating their decision in Stone stressed that an injured employee who has significant functional impairment which is demonstrated through objective findings is entitled to receive permanent partial disability for that functional loss, regardless of what medical diagnosis is used. As such, the Court did not consider Stone to be in a change in law, but instead was consistent with the law as set forth in Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

Next, the Court addressed the employee's argument that a change in law constitutes cause to vacate an award. Citing to Minn.Stat. §176.461 as amended in 1992, "for cause" is limited to one of four definitions: (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. Given the statutory limitations pursuant to which the court is granted authority to vacate an award, and the fact that the "cause" upon which the employee based the petition is not included in the statute, the court denied the employee's petition.

Deines v Custom Log Buildings, 2009 MN Wrk. Comp. LEXIS 307 (W.C.C.A. August 17, 2009)

In this case, the Petition to Vacate the Award on Stipulation based on a mutual mistake of fact was granted.

In early 2007, the employer and insurer entered into a Stipulation for Settlement with the employee based on a July 26, 2002 work injury. The employee was approved for purposes of social security disability beginning in January of 2003.

This payment of social security disability coincided with some payments of temporary total disability.

The attorney for the employee filed a Petition to Vacate, arguing that it was his understanding that the Social Security Administration had been informed of the employee's receipt of temporary total disability and had made the appropriate reductions in social security for the periods that the employee received both social security and temporary total disability. It was later determined that the Social Security Administration had not reduced social security benefits to the employee for the period he received temporary total disability. Based on the misunderstanding of the parties regarding the prior coordination of social security benefits and temporary total disability, the employee filed the Petition to Vacate at issue. The employer and insurer did not object to this Petition to Vacate.

Based on the affidavit submitted by the employee's attorney outlining his misunderstanding regarding the coordination of social security disability benefits and temporary total disability benefits in this case and based on the failure of the employer and insurer to object to this Petition to Vacate (implying their agreement with this misunderstanding), the W.C.C.A. found that a mutual mistake of fact existed establishing good cause to vacate the Stipulation for Settlement.

Hergott v. Rahr Malting Co., 2010 MN Wrk. Comp. LEXIS 14, (W.C.C.A. February 12, 2010), Petition to vacate findings and order granted.

The employee sustained a work related injury on December 16, 2005 when a 30-pound metal grate fell on his right big toe, stretching and rupturing his extensor tendon. The employee underwent surgery in March 2006 with postoperative casting of his right foot. When the cast was removed approximately 10-days later, the employee was unable to dorsiflex his right big toe and he subsequently developed foot drop. A subsequent EMG revealed diffuse polyradiculopathy involving the L2-S1. Over time, the treating physicians diagnosed an immune-mediated lumbosacral plexopathy, with foot drop, either as a result of the original work injury or the surgery to treat the injury.

Following a hearing on the matter, the compensation judge issued a decision dated January 23, 2008 wherein it was determined that the employee had sustained a consequential injury "in the nature of post-surgical immune-mediated lumbosacral plexopathy and resultant foot drop." The employer and insurer were ordered to pay various workers' compensation benefits, including 10% permanent partial disability of the body as a whole.

On October 28, 2008, the employer and insurer filed a petition to vacate the compensation judge's findings and order on the ground of newly discovered evidence. Within the petition, the employer and insurer explained that the employee had filed a new claim petition seeking permanent total disability benefits and 80% permanent partial disability. In response to the Claim Petition, the employer and insurer obtained an independent medical examination with a

neurologist, Dr. Khalafalla Bushara. In his report, Dr. Bushara concluded that the employee was suffering from motor neuron disease, amyotrophic lateral sclerosis [ALS], or Lou Gehrig's disease. As such, the employer and insurer maintained that the employee's disability was related solely to the diagnosis of ALS and was unrelated to the work injury.

The employee was referred to and evaluated by Dr. Kelkar at the ALS Clinic at the University of Minnesota Medical Center, Fairview. Dr. Kelkar agreed that the employee was likely suffering from a motor neuron disease unrelated to the work injury.

Pursuant to Minn.Stat. §176.461, the Workers' Compensation Court of Appeals may vacate an award for cause, which the statute defines as a mutual mistake of fact, newly discovered evidence, fraud, or substantial change in medical condition "that was clearly not anticipated and could not reasonably have been anticipated at the time of the award."

The employee maintained that the diagnosis of ALS had been considered a diagnosis prior to the hearing and as such "there is no newly discovered evidence" sufficient to justify vacating the order.

The court in reviewing the medical records noted that at the time of the hearing, the employee's symptoms were almost entirely limited to his right lower leg and foot. However, according to the November 12, 2009 report of Dr. Kelkar, the employee was at that time exhibiting atrophy in the right hand as well as both legs and was experiencing muscle twitching in both upper extremities, chest, and trunk, and was noted to have abnormal reflexes in both arms and legs. Dr. Kelkar's report described the employee as "unable to stand or walk even with support."

In their decision to vacate the Findings and Order, the court relied not only on the change in diagnosis, but the extent to which the employee's condition had deteriorated "beyond anything contemplated in the medical records as of the hearing date." The court stressed that fairness is the overriding principle in the decision as to whether or not to vacate an award. Kresbsbach v. Lake Lillian Coop, 350 N.W.2d 349, 36 W.C.D. 796 (Minn. 1984). Lastly, the court cautioned that their decision approving the petition to vacate should not be read as involving any determination as to the employee's diagnosis or the question of causation - issues which remain to be resolved, if necessary, through litigation.

Hillesheim v Wooddale Nursing Home, Inc., 2009 MN Wrk. Comp. LEXIS 30 (W.C.C.A. April 14, 2009)

The Workers' Compensation Court of Appeals granted the Petition to Vacate, concluding that the employee had presented evidence sufficient to conclude that she did not understand or appreciate the nature and effect of her settlement and therefore, the Workers' Compensation Court of Appeals determined that the Award on Stipulation was voidable.

The employee in this case sustained a low back injury on January 23, 1997. This was an admitted injury. Eventually the employee entered into a Stipulation for Settlement with the employer and insurer. The Stipulation was drafted by the attorney for the employer and insurer and sent to the attorney for the employee in October of 1997. Nothing further happened at that

point. Then in January of 1998, the attorney for the employer and insurer sent another Stipulation for Settlement to the employee's attorney and thereafter a signed Stipulation for Settlement was sent back to the attorney for the employer and insurer. Then on March 17, 1998, the attorney for the employer and insurer returned the original Stipulation for Settlement to the employee's attorney indicating that the employee answered "no" to the question asking "has the Stipulation for Settlement been explained to you by your attorney, and do you understand it." Therefore, the attorney for the employer and insurer again asked that the Stipulation for Settlement be reviewed with the employee and that she answer "yes" to the above question and that she initial the changes in the original and all copies of the stipulation for settlement.

Then on April 28, 1998, the attorney for the employee sent the attorney for the employer and insurer a "fully executed and properly completed Stipulation for Settlement" and the Stipulation was signed by the employee and the answer to question #2 was listed as "yes." The parties agreed that this change was not initialed by the employee. The Stipulation for Settlement was then served and filed and an Award on Stipulation was issued.

In March of 2008, the employee filed a Petition to set aside the Award. She argued that she did not make the change in answer to question #2 in the Stipulation and she argued that any change in answer to question #2 from "no" to "yes" was done without her knowledge or consent.

In support of the Petition to Vacate, the employee argued that the compensation judge would not have approved the settlement had the unaltered document been presented with the answer "no" to question #2.

The Workers' Compensation Court of Appeals concluded that the employee's answer "no" to question #2 in the Stipulation for Settlement questions her understanding and appreciation of the nature and effect of the settlement. The Workers' Compensation Court of Appeals stated that a settlement agreement is a contract and as such, must reflect the intention of the parties. In the present case, the Workers' Compensation Court of Appeals concluded that there was persuasive evidence that one party, the employee, did not understand the terms of the settlement and the W.C.C.A. concluded it would be prejudicial to the employee and inequitable not to vacate the settlement. Therefore, the Petition to Vacate was granted with the conclusion that the Award was a voidable Award.

WAGES

Runge v Pointe Pesk Control, 2009 MN Wrk. Comp. LEXIS 28 (W.C.C.A. May 7, 2009), Affirmed.

The employee claimed that his average weekly wage calculation should include the value of an employer provided vehicle. The compensation judge denied this claim and this denial was affirmed by the W.C.C.A.

The main factor leading to the conclusion that the employer provided vehicle should not be included in the average weekly wage calculation of the employee was that the employee was prohibited from using the company provided vehicle for anything other than work. The value for

the use of a company provided vehicle is to be included in an average weekly wage calculation only to the extent that the employee has received value beyond the employee's right to use the vehicle for business purposes.