MINNESOTA CASE LAW UPDATE
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by
Teresa R. Flack
and
Melissa S. Hareid

ARISING OUT OF AND IN THE COURSE AND SCOPE OF

Van Buren v. City of Willmar, 2010 MN Wrk. Comp. LEXIS 44 (April 30, 2010). Reversed. The employee worked in the Public Works Department of the City of Willmar. His duties included snow removal, tree trimming, grass mowing, and maintenance of city parks. The employee began his work day at the Public Works garage where he received his work assignments. Each day at lunch, he returned to the Public Works garage where he had lunch with other Public Works employees. The employees were not paid for their half-hour lunch break.

Approximately thirty years ago, a Public Works supervisor installed a basketball hoop in the garage. Thereafter, employees have shot baskets or played informal basketball games during the lunch break. There was no schedule, no organized teams, and basketball was not played every day or by all employees. The city did not sponsor or organize the activity. Playing basketball was not a part of any city wellness program.

On January 27, 2003, the employee sustained a personal injury while playing basketball in the garage with his coworkers during their lunch break. The employee claimed workers' compensation benefits for the injury. The city denied liability for the injury asserting that the injury did not occur during the course of his employment.

The employer and insurer appealed the Findings and Order of the compensation judge dated October 6, 2009, wherein the judge found the employee had sustained a work-related injury on January 27, 2003.

In their analysis of the facts, the Workers' Compensation Court of Appeals determined the employee's duties for the City of Willmar did not include playing basketball, and as such, he was clearly not in the course of his ordinary work duties when he was injured. The court next looked to the issue of whether the employee's personal injury possessed sufficient work-connection to justify imposing workers' compensation liability on the City of Willmar.

It was the employee's position that the work-connection was provided by the personal comfort doctrine which provides that an employee who is not engaged in his or her usual work duties is nevertheless determined to be in the course of employment when the injury occurs during "acts of an employee necessary to life, comfort, or convenience while at work, although personal to him and not technically acts of service, are incidental to the services, an injury arising while in

the performance of such acts is compensable." Hill v. Terrazo Machine and Supply Co., 279 Minn. 428, 433, 157 N.W.2d 374, 377, 24 W.C.D. 511, 517 (1968).

The court rejected the employee's argument finding that playing basketball during lunch is not a slight or brief deviation from work duties and is not an act which is "necessary to life, comfort, or convenience while at work." The court declined to expand the personal comfort doctrine to cover this or similar cases as it would have the practical effect of eliminating the "course of" requirement found in the statute.

In the alternative, the employee argued that there have been many cases where injuries sustained by an employee while engaged in horseplay were found compensable.

The court distinguished the current case, noting that horseplay is a deviation from employment which would exclude from coverage injuries incurred during such activity. However, cases considering horseplay have allowed recovery only where the employer was aware of the horseplay and acquiesced in it. See Olson v. Short Stop Electric, 59 W.C.D. 638 (W.C.C.A. 1969). Further, the court clarified that activity fitting within the label of horseplay is activity which usually carries such obvious risk of injury that a prudent employer would be expected to prohibit the activity. The court cautioned that an employer who knows of horseplay and allows it to continue is voluntarily expanding the course of employment to include non-work injuries which would otherwise be excluded.

Papesh v. Kandersteg, Inc., 2010 MN Wrk. Comp. LEXIS 113 (W.C.C.A. November 1, 2010). Affirmed.

The employee worked as a package delivery person. On September 27, 2006, she pulled into a paved, slightly-inclined residential driveway, to make a delivery. She stood at the back of her van and reached inside for a box. She grabbed the box that weighed about ten pounds, and then straightened up. As she was standing with both feet on the ground, she turned to her left and as she did so, she twisted her right knee. She was later assessed with lateral compartment tearing and underwent arthroscopic surgery. The employee filed a Claim Petition in 2008. The employer and insurer denied primary liability, asserting that the injury was not causally related to her work activities. The compensation judge determined that the employee sustained a work-related injury to her right knee on September 27, 2006. The employer and insurer appealed the determination that the right knee injury arose out of her employment.

The court stated that "arising out of" connotes a causal connection between the employee's injury and the employment. Under the "increased risk" test, applicable in Minnesota, the employee must show that the injury was caused by an increased risk to which the employee was subjected by her employment, beyond that experienced by the general public. The court felt that substantial evidence existed to support the compensation judge's finding that the injury arose out of employment, and that the injury was caused by an increased risk to which the employee, distinct from the general public.

Beukes v. Divine Healthcare, 2010 MN Wrk. Comp. LEXIS 78, (W.C.C.A. August 5, 2010). Reversed.

The employee worked as a visiting nurse, providing services at patients' homes. She testified that she typically would not use the patients' bathrooms when she was out making calls, but would use a restroom at a gas station when necessary, in order to avoid cost and inconvenience for her patients.

On February 19, 2008, the employee had two patients to visit. After completing her first visit and before proceeding to her next appointment, she went to a SuperAmerica gas station to use the restroom. The gas station was not on the direct route between the two patients' homes, but she used it because she had been there before and knew the restroom was clean. When she arrived, the restroom was in use. As she was waiting, she saw an ATM on the other side of the store. As she walked over to the ATM, she tripped over some cases of pop and fell, landing on her knees. She filed a workers' compensation claim. The employer and insurer denied liability, alleging that the employee's departure from the direct route between clients took her out of the course of employment. The compensation judge denied the employee's claim and found that her trip to the gas station was not a deviation from her employment, but that her walk to the ATM constituted a "personal errand" that took her out of the course of employment.

The Court of Appeals reversed. They characterized the employee as a traveling employee. The court stated that, when a substantial part of the employee's services is away from the employer's premises, the employee is characterized as a traveling employee and is considered to carry the employer's premises with her while engage in the employer's business, thus a traveling employee is under continuous workers' compensation coverage from the time she leaves home until the time she returns.

The court stated that, as a traveling employee, as long as the employee is engaged in "reasonable activity for his personal enjoyment or recreation when he is not otherwise engaged in his regular employment activities, he is protected." The court concluded that walking across a room to use an ATM while waiting to use the restroom could not be characterized as anything other than reasonable activity.

The court also pointed out that the reason the employee went to get cash from the ATM was because her car was broken down and she was using a rental car that day and needed cash to fill the car up with gas at the end of the day. The court stated that, where the employee was getting cash to buy gas for the car she needed to use for work, the injury was compensable under the "Gilbert doctrine" which holds that when an employee, as part of her job, is required to bring her own vehicle for use during the working day, an injury which occurs during the use of the vehicle is compensable. Gilbert v. Star Tribune, 480 N.W.2d 114 (Minn. 1992).

ATTORNEY'S FEES – RORAFF FEES

Ceja-Cisneros v. Cold Spring Granite, 2010 MN Wrk. Comp. LEXIS 120 (W.C.C.A. November 29, 2010). Affirmed in part and reversed in part.

The employee sustained an admitted injury on September 5, 2001 and alleged another injury, with the same employer, on March 2, 2007, for which primary liability was denied. The employee filed a Claim Petition in June 2009, seeking certain indemnity benefits, as well as payment of an unpaid bill at Injured Workers' Pharmacy in the amount of $334.52. The employer and insurer denied liability for the claimed benefits.

The hearing took place on January 6, 2010. At the hearing, the employee's attorney put into evidence a claim summary (Exhibit A), which included the bill at Injured Workers' Pharmacy, and out of pocket expenses and medical mileage. The exhibit noted that the employer and insurer had agreed to pay for those expenses.

Following the hearing, the compensation judge issued her Findings and Order, denying the employee's claim for temporary total, temporary partial and permanent partial disability benefits, but ordered payment of the medical expenses identified in Exhibit A.

The employee's attorney then filed a Statement of Attorney's Fees, seeking payment of Roraff fees in the amount of $12,773.50. The employer and insurer filed an objection. At the attorney fee hearing, both attorneys testified that they verbally agreed on January 5, 2010 (the day before the hearing) that the employer and insurer would pay for the medical expenses outlined in Exhibit A. In the Findings and Order regarding the attorney's fees, the compensation judge found that, in the time documented in the Statement of Attorney's Fees, only .4 hours were related to the contested medical issues. The judge also found that the medical expenses were not an issue of primary importance at the January 2010 hearing. The judge also found that the employee failed to establish that there was any genuine dispute regarding entitlement to medical benefits, and denied the employee's claim for attorney's fees. The employee appealed.

On appeal, the court did find that there was a genuine dispute in regards to the medical bills. The employee's attorney had claimed these expenses on his original Claim Petition and they were denied and therefore they remained in dispute until the day before the hearing. The court ruled that the employee's attorney was entitled to fees based on these benefits.

As far as calculation of the Roraff fees, the employee's attorney argued that all, or substantially all of his time spent on the case should be used to calculate the Roraff fees due. The court disagreed. They found that the hearing on the Claim Petition was primarily for temporary total, temporary partial and permanent partial benefits, and to establish primary liability for the alleged 2007 injury. At the hearing the employee failed to establish liability for the 2007 injury and was denied the claimed indemnity benefits. The compensation judge had previously accepted the employee's attorney's claim that he had spent 14 hours solely on the medical issues. The court was not persuaded and found that the employee's attorney did not provide any estimate of the time he spent to present and prepare the disputed medical bill and that the medical issues presented were neither novel nor complex. The court found that the employee's attorney was

only entitled to a contingent fee on the medical expenses obtained, pursuant to Minn. Stat. §176.081, Subd. 1.

Alden v. Mills Fleet Farm, 2010 MN Wrk. Comp. LEXIS 77 (W.C.C.A. July 29, 2010). Reversed.

The employee sustained an admitted low back injury on January 22, 2009. On April 8, 2009, the employee's treating doctor, Dr. Grenier, faxed the insurer a request for authorization of a laminectomy. Seven days later, the insurer responded, indicating that surgery was denied pending a second opinion pursuant to Minn. Stat. §176.135(1)(a). The insurer then contacted the employee and informed her that they would be scheduling an independent medical examination to address the surgical request. The IME was scheduled for May 2, 2009, with Dr. Hood. On April 24, 2009, the employee retained an attorney. Two days prior to the IME, the employee filed a Claim Petition, requesting approval for the surgery, and reserving Roraff fees.

The IME took place on May 2, 2009. On May 19, 2009, the insurer contacted Dr. Hood's office to check on the status of his report. The insurer was informed that Dr. Hood agreed with the requested surgery. The same day, the insurer contacted Dr. Grenier's office and indicated that the surgery was approved. They also wrote to the employee's attorney and told him that the surgery as approved and asked that the Claim Petition be withdrawn.

The employee underwent surgery on June 3, 2009. The employee's attorney then served and filed a claim for Roraff fees, which went to a hearing in February 2010. The employer and insurer objected to the fees, arguing that there was no genuine dispute over the surgery, that the employee's attorney had not requested a certification of dispute, and that the attorney had not been instrumental in obtaining approval for the surgery. The compensation judge found that the attorney's failure to request certification did not preclude his claim for fees, and that there had been a genuine dispute. The compensation judge awarded fees of approximately $6,000.00.

On appeal, the court found that the certification requirement did not apply here, where the costs of the surgery exceeded $7,500.00, bringing the claim outside the Department's jurisdiction. However, the court found that there was no "genuine dispute" under Minn. Stat. §176.081. The court clarified that, although the insurer framed its request as a second surgical opinion pursuant to Minn. Stat. §176.135, subd. 1(a), what it was really seeking was an independent medical examination pursuant to Minn. Stat. §176.155. The employer and insurer have a right to an independent medical examination prior to approving surgery, and the exercise of this right, standing alone, is not enough to establish the existence of a genuine dispute. Furthermore, the insurer handled the request in a timely manner under the rules. Here the insurer simply evaluated the surgery request and no genuine dispute existed. The court reversed the compensation judge's ruling.

GILLETTE INJURY – UNOPPOSED MEDICAL OPINION

Satrum v. City of Minneapolis, 2010 MN Wrk. Comp. LEXIS 25 (W.C.C.A. March 9, 2010), Reversed.

The employee appealed the compensation judge's determination that she failed to establish her right hip condition and need for surgery was related to her work activities/employment.
The employee worked in the public works department as a construction maintenance laborer. Her job duties required extensive shoveling and occasionally using a jackhammer. A pre-employment physical which was performed in June of 1999 did not note any restrictions or concerns.

On November 9, 2005, the employee jumped down from the wheel of a dump truck after retrieving some tools. When she landed, she reported that she "felt something pull in my back and it really hurt." The employee reported the incident to her supervisor and left work to seek medical attention.

The employee was seen by Dr. Jetzer who diagnosed a strained right groin and left lumbar strain. Dr. Jetzer provided the employee with work restrictions and conservative treatment measures. On November 18, Dr. Jetzer found the employee's "left lumbar strain" was resolved, and he released employee to return to work without restrictions.

The employee returned to see Dr. Jetzer in January 2006 and March 2006 with complaints of ongoing pain, primarily in her left hip. Dr. Jetzer's medical record stated, "It is my opinion that she suffered an injury in November but is (sic) appears that she has very extensive preexisting disease in both of her hips and in her back. She appears to be older than her age and therefore I consider that her injury should be a temporary aggravation of a pre-existing condition."

The employee was seen by Dr. Hanson at Sports and Orthopedic Specialists and later referred to Dr. Christopher Larson, who on April 10, 2006 recommended employee undergo a total hip arthroplasty. Employee was then referred to Dr. Thomas Nelson at Twin City Orthopedics to evaluate if alternative treatment options existed. Dr. Nelson agreed with the Dr. Larson's recommendations and on January 31, 2007 he performed left hip replacement arthroplasty.

The employer accepted liability for the employee's left hip condition and paid various wage loss benefits, permanent partial disability and medical expenses.

Employee returned to the date of injury employer who assigned her janitorial duties at the city's water treatment plant. The employee testified that her right hip began to bother her when performing her new job duties which primarily involved cleaning and mopping floors. The employee was terminated by the city in March of 2008. She was advised that there was no work for her within her restrictions. The employee testified that she was having right hip pain when she was terminated.

The employee was seen by Dr. Nelson on March 12, 2009 with complaints of right hip pain. Dr. Nelson recommended a right total hip arthroplasty. In the medical record, Dr. Nelson stated, "it

is again my opinion based on the records that I have reviewed and also my history and examination of the patient that the right hip is also a permanent aggravation of preexisting degenerative arthritis. Clearly, the work-related accident accelerated her arthritis and the need for eventual surgical treatment."

The employer/insurer denied the employee's right hip condition and a Claim Petition was filed. Dr. Nelson's deposition testimony attributed the employee's right hip condition to her activity level as a laborer finding that her work for the water department accelerated the pace of her hip degeneration and need for surgery.

At the hearing on the matter, the employee was the only witness who testified. The employee relied upon Dr. Nelson's opinions. The employer did not obtain an independent medical examination and instead relied upon the comments contained in Dr. Jetzer's March 2006 medical record.

The compensation judge denied the employee's claim finding that she had failed to establish her claim by a preponderance of the evidence.

The Workers' Compensation Court of Appeals reversed the compensation judge and ordered payment of benefits which the parties had stipulated at hearing were reasonable and necessary. The Court citing to Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994) held that in order to establish a *Gillette* injury, the employee must demonstrate a causal relationship between the employee's ordinary work activity and the disability. Further, to prevail on a claim, the employee must prove the claim by a preponderance of the evidence, "Preponderance of the evidence means evidence produced in substantiation of a fact which, when weighed against the evidence opposing the fact, has more convincing force and greater probability of truth." Minn.Stat §176.021, subd. 1a.

The Workers' Compensation Court of Appeals looked to the opinions offered by Dr. Nelson in his deposition testimony where he explained the mechanical process by which the employee's work led to an aggravation of her degenerative condition . . . there was no medical opinion offered in opposition to Dr. Nelson.

The Court found the compensation judge had essentially inserted his own medical opinion as to causation when he denied the employee's claim. More specifically, the judge referred to the employee's age, her smoking history, arthritic changes in her spine, and the lack of reported right hip symptoms. The judge rejected Dr. Nelson's opinions and failed to even mention Dr. Jetzer's opinions in his decision.

The Court held that in the absence of any contrary medical opinion, there was no basis for the compensation judge to reject Dr. Nelson's well-founded opinion.

"The finder of fact in a workers' compensation proceeding is not free to disregard unopposed medical testimony because such testimony concerns issues not within the realm of knowledge of the fact finder." Ruether v. State, Mankato State University, 455 N.W.2d 475, 478, 42 W.C.D. 1118, 1122 (Minn.1990).

JURISDICTION

Swenson v. Nickaboine, 793 N.W.2d 738, 2011 Minn. Lexis 38 (February 2, 2011). Affirmed.

In 2005, the Mille Lacs Band of Ojibwe (MLBO) entered into a construction contract with M.A. Mortenson Company to expand the Grand Casino Hinkley. The contract provided that Mortenson would submit itself to MLBO jurisdiction and that the contract would be governed by MLBO law. Mortensen then hired Northland Quality Builders as a subcontractor. The subcontract required Northland to obtain workers' compensation insurance, which they did. Nickaboine, a member of the MLBO, ran Northland Quality Builders as a sole proprietorship. In 2006, Nickaboine hired Swenson to help him out on the casino project. Swenson alleged that he injured his back at work in May 2007, when he missed a step while carrying a heavy tool box down a flight of stairs.

Swenson filed a workers' compensation claim. SFM, the workers' compensation insurer, moved to dismiss, arguing that the Office of Administrative Hearings had no jurisdiction under Minn. Stat. 176.041, subd. 5a. A hearing was held on the issue of jurisdiction, and the compensation judge then dismissed the case on the principles of federal constitutional Indian law, concluding that Minnesota did not have jurisdiction over a workers' compensation claim that arose from an injury on Indian land. Swenson appealed to the Workers' Compensation Court of Appeals, which reversed the compensation judge.

On appeal to the Supreme Court, the issues included whether the Minnesota Workers' Compensation Act applied to employees injured on tribal land, whether an agreement between the MLBO and its primary contractor to subject all disputes to tribal jurisdiction eliminates Minnesota jurisdiction over the workers' compensation claim, and whether Minnesota has jurisdiction to hear a workers' compensation dispute between a nontribal employee and an employer who is a tribal member, where the injury occurred on tribal land.

Under Minn. Stat. §176.041, subd. 5a, injuries occurring outside of the state are not subject to the Workers' Compensation Act, except where the employee regularly performs the primary duties of employment within the state or when an employee hired in Minnesota by an a Minnesota employer is injured while temporarily employed outside the state. The employer and insurer argued that the injury occurred outside the state, and that MLBO was not a Minnesota employer, because MLBO is legally outside of the state. The Court ruled that §176.041 does not exclude tribal land from its coverage, and that the MLBO reservation lies within Minnesota, subjecting it to Minnesota jurisdiction.

Regarding the contract entered into between MLBO and its general contractor, by which they subjected themselves to MLBO law, the Court ruled that employers and employees may not contract out of the applicability of Minnesota workers' compensation laws. Any agreement to contract out of the Workers' Compensation Act, where it otherwise applies, is void. Furthermore, they found that Swenson himself was not a party to that contract, so it did not apply to him.

Lastly, the insurer argued that OAH did not have authority to adjudicate a non-tribal employee's claim for an injury that occurred on tribal land, where the employee was working for a member of that tribe. The Court relied on a section of the United States Code, 40 U.S.C. §3172, which authorizes states to exercise their workers' compensation laws over federal lands located in the state. The Court stated that section 3172 allows Minnesota to apply its workers' compensation laws to federal land, including the MLBO reservation.

Summers v. Northern Indus. Erectors, Inc., 2010 MN Wrk. Comp. LEXIS 91 (W.C.C.A. September 15, 2010). Reversed and remanded.

The employee sustained an admitted injury on November 13, 2009. The injury occurred in North Dakota, at a construction site. At the time the employee was hired, he was a resident of Minnesota and a member of Ironworkers Local 512 in Minnesota. The employer was a Minnesota employer.

In early December 2008, the employee spoke to a friend who worked for the employer, who told him the company had work available for welders in North Dakota. The employee then called the project superintendent in North Dakota and inquired about employment. On December 22, the project supervisor made two phone calls to the employee while he was at home in Minnesota. The project supervisor testified that he tentatively offered the employee work, but that he would have to go through the union hall for hiring. The project supervisor then phoned the regional union office in North Dakota the same day and specifically requested the employee for the project in North Dakota. That information was then relayed to the union office in Minnesota. The following day, the employee went to the St. Paul Union office and received paperwork dispatching him to the job site in North Dakota. On January 5, 2009, the employee went to North Dakota, took a drug test and then went to the job site and filled out a W-4, and started work that day.

After the injury of November 13, 2009, the employee filed a claim for benefits in Minnesota and the matter went to arbitration. The only issue at arbitration was whether the employee was hired in Minnesota pursuant to Minn. Stat. §176.041, subd. 3. The arbitrator determined that the offer of employment occurred when the project supervisor had called the Union office in North Dakota, requesting the employee, and that the employee was hired on January 5, 2009 when he passed his drug test and filled out his employment paperwork in North Dakota, and therefore the employee was not hired in Minnesota and there was no Minnesota jurisdiction.

The court reversed, finding that the employee was hired in Minnesota. The court found that the project supervisor had the authority to hire the employee, and did so over the telephone while the employee was in Minnesota. While in Minnesota the employee received a Report to Contractor Slip from the union hall, dispatching him to the job site in North Dakota. The only two things left to do in North Dakota were to complete a drug test and fill out various employment documents. The court felt that these were administrative tasks that are generally completed after the employee first reports to work, and are consistent with the performance of a contract for hire that already is in existence. The court felt that passing the drug test was a condition subsequent to employment, rather than a condition precedent to employment.

The court concluded that the "final assent" by the employee to the employer's offer of employment occurred in Minnesota, and therefore Minnesota had jurisdiction over the claim.

PERMANENT PARTIAL DISABILITY – APPORTIONMENT

Matykiewicz v. Denny Hecker's Rosedale Dodge, 2010 MN Wrk. Comp. LEXIS 107 (W.C.C.A. October 18, 2010). Reversed.

The employee sustained work-related low back injuries in 1977 and 1978, leading to two L4-5 laminectomies. All of the employee's claims relating to these injuries were eventually settled, and he was paid for 20% permanent partial disability of the back. On September 17, 2003, he sustained a work-related low back injury with Denny Hecker's. This eventually went to hearing. The compensation judge took the 20% of the back previously rated and converted it to a whole body rating under Minn. R. 5223.0315, and arrived at a 14.2% rating. The compensation judge determined that the employee had a 22% whole body impairment relating to his low back condition, and that the employer and insurer were liable for the difference between that rating, and the 14.2% rating from the prior injuries.

The court reversed the award of additional permanent partial disability benefits. The court stated that the issue boiled down to causation, not the actual amount of permanency. The court stated that if all of the elements now warranting a 22% rating were also present prior to the 2003 injury, the 2003 work injury cannot be said to have contributed to the claimed permanent partial disability. The court stated that this was true even if the 2003 injury triggered additional subjective symptoms and increased work restrictions, because those factors do not by themselves provide grounds for permanent partial disability benefits. The court stated that not all permanent aggravations result in additional ratable permanency. The court found that the entire 22% rating was attributable to only to the impairment which preexisted the 2003 injury. In other words, the employee's condition met all of the requirements for the 22% rating prior to the 2003 injury, so there was no causal connection between the 22% rating and the 2003 injury. Because the employee's pre-existing condition would warrant a 22% rating, no additional permanent partial disability benefits were due.

PERMANENT TOTAL DISABILITY – DISCONTINUANCE

Tambornino v. Health Risk Management, 2010 MN Wrk. Comp. LEXIS 28 (W.C.C.A. March 18, 2010), Petition to discontinue permanent total disability denied. [Affirmed without opinion (August 25, 2010)].

The employer and insurer petitioned the Workers' Compensation Court of Appeals to discontinue payment of permanent total disability benefits on the basis that the employee had reached the age of 67-years and was presumed retired pursuant to Minn.Stat §176.101, subd. 4. The employer and insurer having accepted liability for the work related injury, entered into a settlement agreement with the employee. The parties agreed the employee was permanently and

totally disabled effective June 25, 2002, as a consequence of her work injury. The employer/insurer agreed to pay employee a lump sum to settle her claim for permanent partial disability benefits and further agreed to "continue to pay to the employee permanent total disability benefits from and after September 30, 2005, as her condition may warrant, and shall continue to reduce said ongoing benefits on a dollar-for-dollar basis, by reason of her receipt of Social Security Disability Insurance benefits."

Minn.Stat §176.238 provides the necessary procedures for the discontinuance of compensation benefits and the procedures for resolving requests by an employer and insurer to discontinue benefits. Minn.Stat §176.239 provides the procedures for parties to obtain an expedited interim administrative decision in disputes over discontinuance of benefits. Both statutes contain a subdivision that states, "This section shall not apply to those employees who have been adjudicated permanently totally disabled, or to those employees who have been administratively determined pursuant to division rules to be permanently totally disabled.

In Cook v. J. Mark, Inc., 51 W.C.D. 432 (W.C.C.A. 1994), the Workers' Compensation Court of Appeals held that an Award on Stipulation constitutes an "adjudication" within the meaning of Minn.Stat §176.238, subd. 11. Based on the holding in Cook, neither Minn.Stat §§176.238 nor 176.239 are applicable for the purpose of discontinuing permanent total disability benefits to an employee who is receiving those benefits pursuant to an Award on Stipulation.

In Ramsey v. Frigidair Company Freezer Products, 58 W.C.D. 411 (W.C.C.A. 1998), the Workers' Compensation Court of Appeals established the procedure to discontinue permanent total disability benefits separate from the statutes permitting a vacation of an Award on Stipulation. *See* Minn.Stat §§ 176.461 and 176.521. Pursuant to Ramsey, the employer and insurer may file with the Workers' Compensation Court of Appeals a petition to discontinue permanent total disability benefits. In reviewing the petition, the court reviews the language of the settlement agreement to determine whether the stipulation for settlement contains language demonstrating the parties intended benefits would continue only so long as the employee remained permanently and totally disabled. In Ruby v. Mueller Pipelines, Nos. WC09-182, WC09-187 (W.C.C.A. November 25, 2009), the Workers' Compensation Court of Appeals held that inclusion of the language in the stipulation which stated the employee "shall be paid permanent total disability benefits pursuant to Minn.Stat §176.101, subd. 4" the parties incorporated the presumptive retirement provision of the statute.

In the present case, the parties did not specifically incorporate the provisions of Minn.Stat §176.101, subd. 4 into the settlement agreement. The settlement provides for the payment of permanent total disability benefits "as the employee's condition may warrant," not pursuant to statute. The court interpreted the word "condition" to mean the employee's physical ability to work, not her age. As such, by their agreement, the parties limited the cessation of permanent total disability benefits to a change in the employee's physical condition. The court concluded that the employer and insurer's intention to waive their right to discontinue permanent total disability benefits at age 67 was reasonably inferred from their conduct in assenting to the terms of the stipulation and by failing to make an express reservation of that right in the stipulation. The petition to discontinue was denied.

Laudenbach v. Blandin Paper Co., 2010 MN Wrk. Comp. LEXIS 126 (W.C.C.A. December 13, 2010). Order for referral vacated and remanded.

The employee sustained an admitted work injury on May 15, 1997. The employer and insurer paid permanent total disability benefits. They filed an NOID in 2010, to discontinue permanent total disability benefits because the employee reached age 67. The employee requested a conference under Minn. Stat. §176.239. The compensation judge issued an Order that the Office of Administrative Hearings did not have jurisdiction, and referred the matter to the Court of Appeals. The issue was whether the compensation judge had the authority to refer the matter to the Workers' Compensation Court of Appeals.

The court held that, where no party had filed an appeal, and where no party had filed a petition to discontinue permanent total disability benefits, the compensation judge had no authority to refer the case to the W.C.C.A. The compensation judge's Order was vacated and it was remanded to the Office of Administrative Hearings.

Frandsen v. Ford Motor Co., 2010 MN Wrk. Comp. LEXIS 123 (W.C.C.A. December 22, 2010). Petition to discontinue permanent total disability benefits denied.

The employee sustained an admitted injury on November 3, 2004. The parties entered into a Stipulation for Settlement in 2005, by which they stipulated that the employee was permanently and totally disabled as a result of the work injury. In 2010, the employer and insurer filed a petition to discontinue permanent total disability benefit with the W.C.C.A., on the basis that the employee had reached age 67 and was presumed retired under Minn. Stat. §176.101, subd. 4. The employee filed an objection and alleged he was entitled to ongoing benefits.

The court stated that, in reviewing a petition to discontinue permanent total disability benefits, it will review the language of the settlement agreement to determine whether it contained a presumptive retirement provision.

The court determined that, in this case, the settlement agreement contained no language by which it could conclude that the parties intended for permanent total disability benefits to cease at age 67. The employer and insurer did not include a presumptive retirement provision in the Stipulation, nor did they include any language reserving the right to discontinue payment of benefits at age 67.

The employer and insurer also argued that there was evidence that the employee intended to retire prior to age 67, so the retirement presumption applied. However, the court found that the retirement presumption did not apply here, because the employer and insurer failed to reserve that right to discontinue, based on that presumption, in the Stipulation for Settlement. The failure to reserve the right to discontinue based on the retirement presumption, constituted a waiver of that right.

Skari v. Aero Sys. Eng'g, Inc., 2010 MN Wrk. Comp. LEXIS 93 (W.C.C.A. September 21, 2010). Reversed and remanded. Petition to discontinue permanent total disability benefits dismissed.

The employee sustained several admitted work-related injuries with the employer, with different insurers. In 2000, insurer Chubb filed a Petition for a Temporary Order for payment of temporary total disability benefits. Later, an Order Amending the Temporary Order was served and filed, amending the Order for payment of permanent total disability benefits. In 2005, the various insurers entered into a settlement which stated that the parties had stipulated that "by virtue of a Temporary Order" the Employee is permanently and totally disabled. The settlement dealt with apportionment and reimbursement to Chubb.

In 2009, Chubb filed an NOID, seeking to discontinue payment of permanent total disability benefits on the basis that the employee had turned 67. A .239 conference was held, and the compensation judge issued an Order stating she did not have jurisdiction to discontinue permanent total disability benefits, and ordered that Chubb recommence payment. Chubb appealed that decision and also filed a Petition to Discontinue permanent total disability benefits with the Court of Appeals.

Chubb argued on appeal that they were paying permanent total disability benefits not pursuant to the terms of a Stipulation, but pursuant to a Temporary Order, and that because there was no adjudication that the employee was permanently and totally disabled, they were able to discontinue pursuant to Minn. Stat. §176.238.

The court found that the Stipulation for Settlement contained no language obligating the insurer to pay permanent total disability benefits and that at the time the Stipulation was entered into, Chubb was already paying permanent total disability benefits. The court found that permanent total disability benefits were being paid pursuant to the terms of the Temporary Order and not the Stipulation, so there had been no adjudication that the employee is permanently and totally disabled and therefore the compensation judge did have jurisdiction to hear the case. The case was remanded to the compensation judge for a hearing on the issues raised in the NOID.

PERMANENT TOTAL DISABILITY – THRESHOLD

Bissonette v. Koochiching County, 2010 MN Wrk. Comp. LEXIS 36 (W.C.C.A. May 11, 2010). Reversed and remanded.

The employee sustained work related injuries to her shoulder and upper back on February 7, 2010. The employer and insurer paid employee 2% permanent partial disability relative to the shoulder injury.

In July 2007, Dr. Jeffrey Klassen diagnosed a high-grade partial thickness rotator cuff tear and AC arthrosis for which he recommended acromioplasty, distal clavicle excision and rotator cuff repair. Dr. Klassen was advised not to proceed with the surgery until the employee had her depression under control.

The employee was subsequently prescribed Celexa and Ambien and surgery was performed in January 2008.

The employee filed a Claim Petition seeking payment for the anti-depressant and insomnia medications. Following a hearing on the matter, the compensation judge found the employee's work injury did not cause or substantially aggravate any preexisting depression or insomnia, however, the judge ordered the employer to pay for medication to treat the depression and sleep disorder so that the employee could proceed with and recuperate from the shoulder surgery. Neither the employee, nor the employer/insurer appealed the Findings and Order.
The employee was evaluated by a licensed psychologist in May 2009 as part of an application for Social Security Disability benefits. In a report with his findings, Mr. Graham indicated, "She may indeed have some problems with pace and this may be indeed due to her physical problems, but I believe that from a psychological and emotional point of view that she would not have significant problem with attention, concentration, persistence or pace at entry-level work-like tasks."

The employee's physician, Dr. Douglass, an occupational medicine specialist, recommended the employee make arrangements for further psychiatric evaluation and treatment for her depression. The employee reported an inability to seek further psychological treatment because she had no insurance and could not afford the treatment. Dr. Douglass rated employee with a 20% PPD rating relative to her depression under Minn. R. 5223.0360, subp. 7D(2), for mild emotional disturbance present at all times.

Dr. Rauenhorst reviewed the employee's medical records and prepared a report wherein he found the employee did not meet the statutory guideline for any permanent partial disability because she did not have "signs or symptoms for organic brain dysfunction." Acknowledging that the Weber decision would allow for a rating under this section, if appropriate, it was his opinion that the employee would not receive a rating under subsection D because her symptoms, while present, were not severe enough to qualify her for even the least serious section, or a 10% impairment. Dr. Rauenhorst's opinion was based on the fact that the employee did not require the "intervention of a caregiver" at any time.

The employee filed a Claim Petition seeking permanent total disability benefits. The compensation judge found the employee was vocationally, permanently and totally disabled. The compensation judge in adopting the opinion of Dr. Rauenhorst determined the employee did not qualify for a disability rating for depression and accordingly found the employee did not meet the 15% permanent partial disability requirement set forth in Minn.Stat §176.101, subd. 5(2)(ii), and denied the employee's claim for permanent total disability. The employee appealed.

In their analysis, the Workers' Compensation Court of Appeals noted that the compensation judge had accepted the opinion of Dr. Rauenhorst and had denied the employee's claim. Further, that if this case were truly a question of the compensation judge's choice of medical experts, the decision of the compensation judge would typically be upheld. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). However, the court made clear that a decision will

not be upheld where the facts assumed by the expert are not supported by the evidence. Klapperich v. Agape Halfway House, Inc., 281 N.W.2d 675, 31 W.C.D. 641 (Minn. 1979).

The Workers' Compensation Court of Appeals rejected Dr. Rauenhorst's opinions because he did not examine the employee and offered no diagnosis of her condition.

Next, the court rejected Dr. Rauenhorst's opinion that the employee's symptoms were not severe enough to qualify for a PPD rating because she did not require the intervention of a caregiver. The court, acknowledging that the word "caregiver" is not defined by the rule, turned to Dorland's Illustrated Medical Dictionary 298, 911 (29th ed. 2000) in offering the following interpretation: "care" means "the services rendered by members of the health profession for the benefit of a patient. Called also treatment." "Intervention" means the act of "interfering so as to modify" "specifically, any measure whose purpose is to improve health or to alter the course of disease."

Applying the definition, the court found the employee required medical care to prescribe medications to treat her depression and that medical care constituted intervention by a caregiver within the meaning of Minn. R. 5223.0360, subp. 7D. The court held that the compensation judge's denial of permanent partial disability benefits for the employee's emotional condition was not supported by substantial evidence and remanded the case for reconsideration of the employee's claim for permanent partial disability benefits and new findings of fact.

Rezaie v. Wal-Mart Stores, Inc., 2010 MN Wrk. Comp. LEXIS 57 (June 21, 2010). Reversed.

The employer and insurer appeal from the compensation judge's determination of permanent total disability in the absence of the required permanency rating. The compensation judge found that there was insufficient evidence at the time of hearing to determine the level of the employee's permanent partial disability rating.

Minn.Stat §176.101, Subd. 5 provides three levels of requisite permanent partial disability: (a) the employee has at least a 17% permanent partial disability rating of the whole body; (b) the employee has a permanent partial disability rating of the whole body of at least 15% and the employee is at least 50 years old at the time of the injury; or (c) the employee has a permanent partial disability rating of the whole body of at least 13% and the employee is at least 55 years old at the time of the injury, and has not completed grade 12 or obtained a GED certificate.

The Workers' Compensation Court of Appeals made clear that without a finding that the employee has met the applicable statutory threshold, the employee cannot be determined to be permanently totally disabled for purposes of receipt of permanent total disability benefits.

Other factors considered when determining if an employee is permanently totally disabled include the employee's age, education, training and experience, which may only be considered in determining whether an employee is totally and permanently incapacitated *after* the employee meets the threshold criteria of clause (a), (b), or (c). (emphasis added).

PRACTICE AND PROCEDURE – EVIDENCE

Herman v. Polka Dot Dairy, 2010 MN Wrk. Comp. LEXIS 111 (W.C.C.A. October 25, 2010). Vacated and remanded.

The employee had an admitted low back injury in 1989, and another 2008, both admitted. One employer and insurer had obtained surveillance of the employee doing some physical activities inconsistent with his claimed disability. Each employer/insurer had an independent medical examination, and their doctors either reviewed or referenced the activities in surveillance video. At the hearing, the employer and insurer offered the surveillance DVD and reports into evidence. The DVD contained clips of the surveillance activities which corresponded to the surveillance reports. The employee's attorney objected to the surveillance DVD because the surveillance on it had been edited, as the DVD contained only excerpts of all of the surveillance video taken.

The investigator from the surveillance company attended the hearing and testified that he himself had not personally edited and produced the videos, but that another investigator in their firm did. The compensation judge subsequently removed the DVD from evidence on the basis that it did not have the proper foundation because the individual who produced the surveillance DVD was not present at the hearing. However, the judge did allow into evidence the IME reports that referenced the surveillance videos.

The compensation judge found in favor of the employee. She stated in her Findings & Order that the opinions of the treating doctor (who had not reviewed the surveillance) were more persuasive than those of the IME doctor. She also explained that although she considered the IME opinions, she had not considered the references to the videos because they were not allowed into evidence.

The employer and insurer appealed, arguing that the compensation judge erred by not considering the surveillance videos. The court agreed that the judge erred by not considering the surveillance video. The court stated that the surveillance video clips were relevant to the credibility of the employee. Furthermore, although the compensation judge did not allow the videos into evidence, they influenced the independent medical examiner opinions and were therefore part of the record and should have been considered by the compensation judge.

PSYCHOLOGICAL INJURY

Trautner v. State of Minnesota Highway Patrol, 2010 MN Wrk. Comp. LEXIS 119 (W.C.C.A. November 12, 2010). Affirmed.

The employee worked as a state trooper. According to the court, he was subjected to a number of stressful incidents at work, many involving car accidents with bodily injury and death. He estimated that he had seen more than 400 fatalities. In October 2004 the employee was pursuing a suspect when the suspect's vehicle crashed and he died. The employee apparently felt responsible for the suspect's death because he felt he was pushing the pursuit too aggressively. He was placed on administrative leave following that incident. He eventually returned to work

but was then suspended in May 2005 after he was accused of sexual assault. He served time for that and never returned to work with the Highway Patrol. In June 2005 he began seeing a therapist and was diagnosed with post-traumatic stress disorder (PTSD). He was later hospitalized due to suicidal thoughts. He was placed on medical retirement as of December 27, 2005. A Claim Petition was filed in 2008, alleging work-related PTSD which culminated on October 14, 2004.

The employee's treating psychiatrist opined that the employee's PTSD was work-related, and that there were physical consequences from the PTSD including headaches, fatigue, dizziness and chest pain. The psychiatrist also opined that the PTSD had resulted in a physiological change in the brain with regards to norepinephrine, serotonin and dopamine levels. The employer and insurer's independent medical examiner also agreed that the employee had work-related PTSD. The compensation judge found that the employee's PTSD and depression resulted from the mental stresses sustained in connection with his work activities as a state trooper. However, the compensation judge decided that these conditions were not compensable personal injuries, and denied the employee's claims. The employee appealed.

The Court of Appeals agreed that the employee's work-related mental stress, resulting in a psychological impairment, was not a compensable injury, pursuant to Lockwood v. Independent School District #877, 312 N.W.2d 924 (Minn. 1981). The employee tried to argue that his claim was compensable because his psychological condition resulted in physical consequences. He argued first that the PTSD resulted in altered brain chemistry which constituted a physical injury. The court stated that the evidence only showed that there were "probable" changes in the chemical levels of the brain and, further, there was no evidence that the employee's disability was the result of those possible chemical changes.

The employee also argued he did in fact have a physical injury based on the physical conditions identified by his psychiatrist as a result of stress including headaches, fatigue, chest pain and dizziness, resulting in a compensable injury. The court disagreed, stating that in order to find a compensable injury resulting from mental stress, the physical impairment must be capable of discrete treatment apart from any treatment of psychological impairment. Here, the proposed treatment for those physical symptoms was to treat the psychological disorder. Furthermore, the court stated that existence of a physical consequence, even if separately treated, does not make the underlying psychological impairment compensable. In other words, the compensable disability must be the result of the physical consequence and not the underlying psychological condition. The court found that the employee did not have a disabling physical injury that resulted from his PTSD.

REHABILITATION/RETRAINING

Budke v. St. Francis Med. Ctr., 2010 MN Wrk. Comp. LEXIS 83 (W.C.C.A. August 26, 2010). Affirmed.

The employee had a two-year nursing degree and worked for the employer as a registered nurse. She sustained an admitted injury on November 14, 1996. The employer was able to

accommodate her with light duty work for several years. After that, the employee engaged in job search and obtained some part-time work with Center for Natural Healing Arts (CNHA). Eventually the QRC explored retraining, and then prepared a retraining plan which provided for a four year plan at the University of Moorehead to complete a B.S.N. degree and an M.S. degree in nursing so that she could work as a certified nurse practitioner. Before that was implemented, the employee's hours at CNHA increased and by 2006, she was earning more than her date-of-injury wage. The employer and insurer objected to the retraining plan and a hearing was held in September 2006. The compensation judge found that the employee failed to establish that the retraining plan would result in reasonably obtainable employment or that it would provide her with an economic status greater than was available to her with her job at CNHA.

The employee's job with CNHA ended in 2007 and she reentered job search. Eventually the QRC recommended retraining again and filed a Rehabilitation Request, asking that the rehabilitation plan be amended to again include exploration of retraining the employee as a certified nurse practitioner. This eventually went to a hearing in 2010, and the judge found that it was reasonable to allow a change of the rehabilitation plan to explore retraining. The employer and insurer appealed.

The employer and insurer first argued that consideration of the retraining plan was barred by the doctrine of res judicata, based on the 2006 Findings & Order, as a judge had already considered, and denied, the retraining plan. The court rejected this argument. The court stated that the doctrine of res judicata applied only with respect to issues and claims that were decided in an earlier decision. The court stated that the 2006 decision was based on factual findings that reflected the labor market at that time. Therefore the judge's decision was based on factors which might change in the future, and the 2006 decision had no precedential effect because the employee's circumstances had changed since that time. The decision in 2006 was largely based on comparing the employee's retraining plan to her job at that time, CNHA. That job was no longer available to the employee and she was unable to find another job, and therefore her circumstances had changed since the last hearing. In addition, the job market was different than it was in 2006, which also constituted a significant change since the prior hearing.

The court stated that the 2006 denial of retraining was not "the law of the case" because the issues resolved with the 2006 decision were factual, and not questions of law.

Woodford v. Xcel Energy, 2010 MN Wrk. Comp. LEXIS 59 (May 27, 2010). Affirmed in part and reversed in part.

The compensation judge found the employee's request for a rehabilitation consultation was premature. The judge, in the memorandum portion of her decision explained that the employee was not a qualified employee for rehabilitation services, as defined by the Minnesota Rules, "since there is no treating doctor's opinion of his work ability indicating when the employee can be reasonably expected to return to work within specified restrictions, as defined by Minn. R. 5220.0100, subp. 22C." The compensation judge further concluded that it was premature to assume the employee would be unable to return to work for the employer, and, because there was no evidence of the same, the employee "is not a qualified employee at this time."

Minn.Stat §176.102, subd. 4(a) provides, "a rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee, the employer, or the Commissioner . . . If a rehabilitation consultation is requested, the employer shall provide a qualified rehabilitation consultant."

The purpose of a rehabilitation consultation is to determine whether the employee is qualified to receive statutory rehabilitation services. The Rules require that an employee must be determined to be a qualified employee for rehabilitation services before a rehabilitation plan can be implemented.

The court, citing to Schierman v. Diversified Printers, slip op. (W.C.C.A. January 13, 1998), held that an employee is entitled to a rehabilitation consultation as a matter of right, unless the employer or insurer has filed a timely request for a waiver. Whether the employee is a "qualified employee" as referred to in the statute, "is not a threshold issue in determining whether an employee is entitled to a rehabilitation consultation." Wagner v. Bethesda Hospital, slip op. at 3 (W.C.C.A. [23] January 5, 1995).

It is only after the rehabilitation consultation has been held that an employer and insurer have the right to challenge the determination made by the rehabilitation consultant, pursuant to Minn. R. 5220.0950.

TEMPORARY PARTIAL DISABILITY BENEFITS

French v. Special School District #1, 2010 MN Wrk. Comp. LEXIS 18 (W.C.C.A. February 23, 2010), Affirmed.

The self-insured employer appealed from the compensation judge's award of temporary partial disability benefits and the employee cross-appealed from the judge's denial of penalties for the employer's failure to pay temporary partial disability benefits in a timely manner.

Employee was awarded retraining benefits pursuant to Findings and Order issued December 11, 2007. Retraining benefits were awarded retroactively to September of 2006 when employee began a program of retraining in heating and air-conditioning design at Dunwoody College of Technology.

Three days after the Findings and Order were served and filed, the employee advised the claims representative and her attorney that due to financial issues and a pending eviction she needed to drop out of school. Because of class availability, the employee was unable to return to class work until the following September. The payments which were to be made in compliance with the Findings and Order were issued by the insurer approximately one-month late.

In April of 2008, employee returned to work as an independent contractor - daycare helper, working two-hours per day earning $8.00 per hour. The employee's attorney requested the employer/insurer either pay or deny payment of temporary partial disability benefits within 14-

days as required, however, the employer/insurer did not respond to the correspondence. Although payment was eventually issued, the employee filed a Claim Petition seeking payment of temporary partial disability benefits as well as penalties for "failure to pay benefits per Findings and Order of 12/11/07; failure to respond to reasonable inquiries; failure to pay TPD; failure to pay or deny TPD as required; failure to pay attorney fees on a timely basis." The employer/insurer denied the employee was entitled to benefits and denied that penalties were warranted.

At a hearing on the matter, the compensation judge awarded certain penalties for the employer's unreasonable delay in paying benefits pursuant to the December 2007 Findings and Order . The judge also awarded temporary partial disability benefits for a brief period in 2008 and for four weeks in 2009, however, he denied the employee's claim for penalties for late payment of those benefits on the grounds that "[t]he employer/insurer had good faith defenses to those claims." The employer and insurer appealed the award on temporary partial benefits based upon the employee's failure to establish post-injury earnings during the period of her alleged wage loss and although she presented evidence of gross business receipts, she offered no additional evidence of costs/expenses to demonstrate how that revenue translated into income, especially in light of the employee's testimony that she did not file a 2008 tax return because she "didn't really have any income."

In upholding the judge's decision, the Workers' Compensation Court of Appeals held that while an employee's earnings from self-employment must be based on the employee's net income after deduction of reasonable business expenses, there was no evidence in the record that the employee was operating a business. As such, the judge's determination that payment records from the daycare position reflected the employee's post-injury earnings was supported by substantial evidence.

The employer further argued that the employee was released to work full-time, however, she failed to obtain anything more than part time work without conducting a diligent job search, and as such, her part-time earnings were not an accurate reflection of her earning capacity. The Workers' Compensation Court of Appeals affirmed the compensation judge's conclusion that while there was no particular evidence of a diligent job search, the employee had cooperated with rehabilitation efforts, and in light of the brief period at issue, her failure to search for full-time employment was not fatal to her claim.

Anderson v. Wherley Moving & Storage, Inc., 2010 MN Wrk. Comp. LEXIS 101 (W.C.C.A. October 14, 2010). Affirmed in part and reversed in part.

The employee sustained an admitted neck and back injury on July 23, 2007, when the moving van he was riding in rear-ended a tractor. He was eventually released to return to work with light duty restrictions. The employer could not accommodate his restrictions. On August 27, 2007, the employee returned to school to pursue a degree as a surgical technician. In August 2009, the employee obtained a part-time job bartending, and continued to attend school on a part-time basis. He was still under work restrictions. He filed a Claim Petition, seeking temporary partial

disability benefits, among other things. He was awarded temporary partial disability benefits, based on his part-time bartending job.

The employer and insurer appealed the award of temporary partial disability benefits, arguing that the employee's reduced earnings were based solely on his voluntarily decision to attend school, and work part-time only. They alleged that the employee failed to establish a causal relationship between his disability and a loss of earning capacity.

The court reversed the award of temporary partial disability benefits. The court stated that the employee had the burden of establishing a work related disability, and an actual loss of earning capacity that is causally related to the disability. The compensation judge had concluded that the employee's actual earnings, which were part time, created a presumption of earning capacity. However, the court stated that it was not the actual earnings, but the employee's *reduced ability to earn*, that was the material factor in determining entitlement to temporary partial disability benefits. The employee needed to show that the diminution in earnings was causally related to the disability. In this case, the employee had been released to work full time. However, he testified that because of school, he was not able to work 40 hours/week and that he did not look for full time work. Therefore, the employee's wage loss was not causally related to his disability, and he was not entitled to temporary partial benefits.

TREATMENT PARAMETERS

Jackson v. Minneapolis Public School, Special District #1, 2010 MN Wrk. Comp. LEXIS 33 (W.C.C.A. April 8, 2010), Affirmed.

The employee sustained an admitted low back injury on November 27, 2007 as a result of using a broken seat on the school bus he drove for the Minneapolis Public Schools. Employee was initially treated with conservative measures including physical therapy and epidural steroid injection. Given the employee's failure to improve, he was referred to a neurosurgeon, Dr. Nagib. The employee had previously treated with Dr. Nagib as a result of a herniated disc at L5-S1 in 1990 or 1991, at which time Dr. Nagib had performed two surgeries. The employee also had a documented history of obstructive sleep apnea. Attempts to treat with CPAP were unsuccessful. The employee was advised to undergo surgical intervention including septoplasty and uvuloplasty to treat the sleep apnea, however, the surgery was not done.

After obtaining an MRI in 2007, Dr. Nagib recommended surgery for a diagnosis of right-sided L4-5 lateral recess syndrome and an entrapment of the right L4 nerve root.

At the request of the employer, the employee was seen and evaluated by Dr. David Carlson who recommended the employee continue with symptomatic treatment and conservative measures instead of the surgery recommended by Dr. Nagib. Dr. Carlson found the employee to have reached maximum medical improvement with a 7% permanent partial disability with respect to a one-level herniated disc.

On April 29, 2008, Dr. Nagib performed a transfacet L4-5 laminectomy on the right side with decompression of the right L4 nerve root and resection of an apparent synovial cyst which appeared to compress and displace the L4 nerve root. The employee failed to improve following surgery.

On November 28, 2008, the employee underwent additional surgery to include a combined transfacet extended laminectomy of L4 on the left with decompression of both L4 and L5 nerve roots. The employee's leg pain gradually improved following surgery; however, his back pain persisted.

The employee reported an inability to sleep for more than about two hours at a time before his back pain would wake him. Dr. Nagib recommended the employee try a Tempur-Pedic mattress. The employee after having tried the bed in the store found that the Tempur-Pedic mattress allowed him to comfortably lie in one position much longer than any other mattress.

In April of 2009, Dr. Nagib wrote to the employee's family physician indicating that he felt the employee's inability to sleep was contributing to the employee's poor situation. Furthermore, he suggested it might be appropriate to consider use of a special mattress to see if the employee's clinical picture might improve if his sleep pattern improved. Dr. Nagib was concerned that further surgical intervention would likely result in complications with no guarantee to resolve his pain.

The employee filed a Medical Request requesting a Tempur-Pedic bed (mattress and box spring). The employer and insurer denied the requested bed.

An administrative conference was held on the employee's request, wherein the compensation judged denied the request, noting that the treatment parameters disqualified mattresses as a treatment for back injuries. The employee requested a formal hearing.

At the hearing, the employer and insurer relied upon the opinions of Dr. Carlson that a bed or mattress was not reasonable or necessary to cure and/or relieve the employee's low back problems. Further, that he did not consider the situation to be a rare case requiring departure from the treatment parameters.

In a letter prepared at the request of the employee, Dr. Nagib opined that the purchase of a Tempur-Pedic bed was reasonable and necessary treatment. Dr. Nagib stated, "We have to understand the patient's condition is almost desperate" and that the alternative of additional surgeries would "aggravate the problem and make a bad situation worse."

The compensation judge found the Tempur-Pedic mattress and box spring was reasonable and necessary medical treatment and that a departure from the treatment parameters was warranted based upon the employee's medical complications including pre-existing sleep apnea coupled with stenosis, extensive fibrosis, and potential arachnoiditis associated with the work injury. The employer/insurer appealed.

Minn.R. 5221.6200, subp. 8D(2), provides that "beds, waterbeds, mattresses, chairs, recliners, and loungers," are "not indicated for home use for low back conditions." However, Minn. R. 5221.6050, subp. 8A, permits a departure from the parameters where there is a documented medical complication. In Smith v. Country Manor Health Care, 60 W.C.D.1, (W.C.C.A. 2000), the Workers' Compensation Court of Appeals defined "complication" as cited in Dorland's Illustrated Medical Dictionary 363 (28th ed. 1994) as "a disease or diseases concurrent with another disease," and as "the concurrence of two or more diseases in the same patient." In Smith, the court held that a medical complication within the rule includes situations where a work injury, in combination with a pre-existing condition, causes a more complicated course of symptoms, disability and treatment results.

In addition to the language set forth in the treatment parameters, the MN Supreme Court has held that that a departure from the parameters may be appropriate "in those rare cases in which departure is necessary to obtain proper treatment." Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 35, 58 W.C.D. 395, 408 (Minn. 1998).

While acknowledging the Supreme Court's decision in Jacka, the Workers' Compensation Court of Appeals made clear that the departure in the present case was predicated on the specific departure provisions of Minn. R. 5221.6050, subp. 8A and not the "rare case" doctrine.