NOTICE

Anderson v. Frontier Communications, 2011 MN Wrk. Comp. LEXIS 30 (WCCA April 11, 2011) Reversed.

The employee began working for the employer in 1987, doing cable installation. His work activities included lifting up to 70 pounds, sitting, standing and stooping on a regular basis, and pulling and digging out cable. In 1996, the employee sought medical treatment, stating that he had low back pain after shoveling dirt all day. In 1998, he returned to the clinic with low back pain he experienced after getting out of his truck. He testified that his low back pain progressed in 2004 and 2005, but that he did not seek medical treatment because he just thought he was getting old. In March 2007, he saw his doctor and reported that he was icing his back every night so that he could get to sleep and go to work the next day. At that doctor visit, the employee reported back and right leg pain and reported that his leg hurt with anything he did. There was no mention of his work activities. In May 2007, the employee was referred to Dr. Pinto, who assessed the employee with degenerative disc disease. The employee continued to do his regular job until July 4, 2007. On July 6, 2007, the employee underwent a two-level fusion with Dr. Pinto. The employee was not able to return to his job. He applied for SSDI and consulted an attorney about the coordination of those benefits, and there learned what a Gillette injury was.

In a response to a letter from the employee's attorney, the employee's doctor wrote a report dated May 8, 2009, opining that the employee's work activities from 1987 to 2007 were a substantial aggravation to his preexisting condition. A Claim Petition was filed on June 12, 2009. The employer and insurer denied liability. The employee was the only witness to testify about notice. He stated that he knew his work made his back worse, but that all activity, including golf, made his back worse. He had concluded that his back condition was the result of getting older. He was not aware that his low back condition might be considered a work injury until he met with a lawyer. His doctors had not told him that his back condition might be related to his work. The compensation judge held that it should have been reasonably apparent to the employee by July 4, 2007, when he stopped working, that he had a compensable disability. The compensation judge held that the employee's failure to give notice within 180 days of that date barred his claim to benefits.

The WCCA reversed. The court pointed out that the employee's doctors attributed his problems to his degenerative condition and that there was no discussion of his work activities. The employee did know that work bothered his back, but also that all activity bothered his back. None of his doctors ever discussed with him the possibility that his condition may be work-related. The court held that the employee should not be expected to give notice when there was no medical evidence making that connection and where the existing medical evidence provided a different reason for his problems. Considering the evidence as a whole, the court felt that the evidence did not support a conclusion that a "reasonable" person would have known he had a compensable injury, until his doctors provided reports establishing causation.

ARISING OUT OF AND IN THE COURSE AND SCOPE

Burlingame v. Becker Bros, 2011 MN Wrk. Comp. LEXIS 11 (WCCA February 2, 2011) Reversed.

The employee was a journeyman carpet installer. The employer provided the employee with a company van to drive to and from work. The van was used to haul materials and tools to and from work sites. The employer paid for fuel, but the employee paid the employer $25.00 per week as partial reimbursement for travel costs. He was not compensated for travel time unless he was driving between work sites. On October 15, 2009, the employee was driving home from a work site in the company van, when he was involved in a motor vehicle accident. This went to arbitration, where the arbitrator decided that the employee's travel between the job site and his home was governed by the "coming and going" rule and therefore the injury did not arise out of and in the course and scope of his employment.

The WCCA reversed, finding an exception to the general rule that injuries sustained when commuting to and from work are not compensable. The court relied on the case of Gilbert v. Star Tribune, 480 N.W.2d 114 (Minn. 1992), noting that the important factor is the need for the employee to have a vehicle on the job to perform aspects of his duties. The court found that, although the use of a company vehicle was permissive and not mandatory, the crucial fact was that the employee was provided with the cargo van to transport necessary tools, materials, and employer-provided equipment to job sites. The court found that transporting these tools was an integral part of the employee's job. As such, an injury sustained during his drive home was compensable. The court also noted that the fact that the employer did not compensate the employee for his travel was not determinative.

Miller v. St. Mary's Regional Health Care, 2011MN Wrk. Comp. LEXIS 9 (WCCA February 14, 2011) Reversed.

The employee was a home health aide who provided in-home care. The employer required the employee to have a car to travel to clients' homes. The employee was paid on an hourly basis, and she was paid for her driving time, which included her first trip from home in the morning and the trip from her last appointment in the afternoon, to her home. She was paid for her travel time based on mileage. Travel pay was calculated as 10 minutes of pay for 10 miles traveled, and 15 minutes of pay for 10 to 20 miles traveled. She was also paid mileage for her travel. On May 8, 2007, the employee was working at a client's home, and this was her last appointment of the day. She left that client's house and drove to her mother's house to have some coffee. She spent 15 minutes at her mother's home. There was conflicting testimony about whether the employee was going home from there, or whether she was going to the employer's office. While driving from her mom's house, the employee was involved in a motor vehicle accident. The accident occurred two blocks from the employer's office. The compensation judge found that accident occurred subsequent to the completion of the employee's work duties and therefore the injury did not occur in the course and scope of employment.

The WCCA reversed. The court found that the fact that the employee was paid an identifiable amount as compensation for time spent traveling made her trip home an exception to the general coming and going rule and brought her trip within the course and scope of her employment. The

court also noted that the deviation to the mother's house did not change their opinion because the employee's deviation or personal errand at her mother's house was completed and that at the time of the accident the employee was back on the route which she would have taken to either her employer's office or her home and therefore the deviation did not contribute to the accident.

Jensen-Linnel v. ISD #831, slip op. (WCCA April 29, 2011) Reversed.

The employee worked as a school bus driver. Generally, her schedule involved doing a route for high school students the morning, then taking a 15 to 20 minute break, and then driving a route for elementary students. The drivers were paid during their 15 to 20 minute break in the morning. The bus drivers were allowed to take their paid morning break at the bus garage or at other nearby locations such as shopping centers, restaurants, or coffee shops. The drivers were allowed to drive their busses to these locations. The drivers were also allowed to run errands or to return home during this break. The employee usually drove her bus home for her break since she lived three blocks away from the bus garage, and the employer had specifically given her the ok to do this. On January 19, 2010, the employee drove home for her morning break. She parked the bus outside of her house and, when walking around the bus to go into her house, she slipped on some ice in the road and broke her arm. The employer and insurer denied the injury on the basis that it did not arise out of and in the course and scope of employment. The compensation judge agreed, and denied the employee's claim.

The WCCA reversed, basing their decision on the personal comfort doctrine. The court stated that, "while the employee was not on the employer's premises at the time of her injury, her injury occurred during her usual hours of service on a paid personal break at a location specifically approved by her employer, and we conclude that the employee's injury arose out of and in the course of her employment."

Smith v. Metro Transit, 2011 MN Wrk. Comp. LEXIS 104 (WCCA October 17, 2011) Affirmed.

On February 2, 2010, the Employee was operating a bus with two passengers remaining on board. One of the passengers asked to get off at a non-designated bus stop. The Employee believed the location was unsafe and refused to stop for the passenger. The passenger began to exit the bus at the next designated stop, and as he did so, from approximately two feet away, he turned toward and spat in the Employee's face, laughed and then ran off the bus. Enraged, the Employee left the bus and chased the passenger, catching up with him near the back of the bus. The passenger pushed the Employee causing him to fall on his left side, injuring his shoulder.

Rule 534 of the Employer's publication, a Bus Operator's Rule Book & Guide, "Metro Transit bus operators should avoid physical confrontations wherever possible. This means refraining from leaving the bus operator's seat to settle disputes unless it is necessary to do so to defend yourself or customers from physical attacks . . . If you use more force than necessary, you may be personally liable for having acted outside the scope of your employment."

On March 14, 2010, the Employer issued Bulletin No. 12, which provided, in part, "Leaving the bus seat and pursuing assailant(s) is expressly forbidden when they are for the purpose of retaliation."

Prior to the alleged injury, the Employee had received a written Final Record of Warning, which stated that the Employee had violated Rule 534 and Bulletin No. 12, and that involvement in another incident would subject the Employee to severe disciplinary action up to and including termination.

The Employee was terminated from his employment following the February 2, 2010 incident. He was later reinstated, but was not able to return to work as a bus operator due to the left shoulder injury. The Employee filed a Claim Petition seeking benefits arising from the February 2, 2010 injury. At hearing, the compensation judge found the Employee's left shoulder injury arose out of the performance of a prohibited act and denied compensation under the Minnesota Workers' Compensation Act. The Employee appealed.

In Hassan v. Spherion Corp., 63 W.C.D. 491 (WCCA 2003), the court identified six factors to be considered in resolving the issue of whether compensation should be barred under the prohibited act doctrine:

1. Whether the employee knows of the prohibition;
2. Whether the prohibition was customarily observed;
3. Whether the employer took reasonable steps to enforce the prohibition;
4. The reason for the prohibition;
5. Whether the performance of the prohibited act was reasonably dangerous; and
6. Whether it was reasonably foreseeable by the employer that the expressly prohibited act would occur.

In affirming the compensation judge, the WCCA found the judge considered these factors in reaching the conclusion that the Employee's injury was not compensable because it occurred as a result of the performance of a prohibited act. The Court noted that there was no question that the Employee was well aware of the prohibition, having been disciplined in 2009 for similar conduct.

AVERAGE WEEKLY WAGE

Lensegrav v. M.E. Robinson, 2011 MN Wrk. Comp. LEXIS 34 (WCCA April 12, 2011) Affirmed in part and reversed in part.

The employee was a school bus driver. He sustained an injury on September 17, 2008. At issue was the employee's average weekly wage. During the summer of 2008, the employee's earnings were less than they were during the school year because he did not have his regular school route, and was working less. The employee testified that he expected, by the summer of 2009, to be working full time during the summers. The compensation judge found that in late summer 2008, the employee's job changed from part time to full time and held that the employee's average weekly wage was forty times his hourly wage.

The WCCA disagreed with the compensation judge's average weekly wage. The compensation judge erred by accepting the employee's claim that he would be working on a full-time basis, year round, in the future, and that his weekly wage should be based on a forty hour work week. The court found that the prospect of future full-time, year-round work was speculative and that the potential post-injury full-time work was irrelevant for purposes of determining the weekly wage at the time of the injury. The weekly wage should not be based on what the employee's earning capacity might be, but should be based on the employee's actual earnings prior to and on the date of injury. The court then considered what method should be used to calculate the wage in this case. They felt that using the 26 weeks prior to the injury would be an unreliable measure because, although the employee worked full time three-quarters of the year, one-half of the 26 calendar weeks prior to the injury consisted of summer months where the employee's earnings were about 1/3 of what they were during the regular school year. The court felt that a 52 week wage calculation would be a fairer approximation of the employee's future earning capacity impacted by the work injury.

PSYCHOLOGICAL/MENTAL INJURIES

Cartagena v. Heikes Farm, slip op. (WCCA May 4, 2011) Affirmed.

The employee was involved in a work-related motor vehicle accident on June 3, 2008. He was diagnosed with post-concussive syndrome and cervical disc herniations. The employee was eventually seen by Dr. Monsein, who noted that the employee had depression and anxiety due to his ongoing pain and the resulting effects on his life. The employee contended that he suffered a psychological injury in the nature of depression and anxiety, as a consequence of his work injury. The compensation judge found that the employee had not suffered a consequential psychological injury, and the WCCA affirmed.

The court adopted the IME's opinion (Dr. Gratzer) that the psychological condition was the result of psychosocial stresses, including family stresses, relationship difficulties, and acculturation issues, which he maintained were unrelated to the work injury. The employee argued that these stressors were the result of the work injury. The court noted that the employee was not arguing that the work injury was a medical cause of his depression but instead, that the work injury caused him to be unemployed, which resulted in family and financial problems. The court therefore found that there was an intervening, non-medical factor – unemployment – which separated the personal injury from the claimed psychological condition. The court noted that, the more remote the claimed consequence is from the personal injury; the less likely it is the claimed consequence is compensable. Here the depression was caused by the unemployment, and not by the work injury directly, so the depression was not compensable.

MEDICAL TREATMENT - EXPENSE

Schatz v. Interfaith Care Center, slip op. (WCCA June 16, 2011) Reversed.

The employee sustained a work-related shoulder injury in 2009. Sometime after the injury, she moved to Wyoming, where she continued to treat for her shoulder. When she entered into treatment with her orthopedist in Wyoming, she initialed a document stating that out-of-state workers' compensation patients would be responsible for any remaining balance not covered by

the workers' compensation insurer. The medical providers submitted their charges to the work comp insurer, which made payment in accordance with Minn. Stat. § 176.136, subd. 1b(d). Pursuant to this statute, the work comp insurer paid the providers the amounts they would have been paid under the workers' compensation law of Wyoming. Each provider then submitted its unpaid balances (about $7,000.00) to the insurer, claiming that its entire charges had been within the usual and customary range for the same or similar treatment in its region and should be paid. The insurer denied liability for the remaining balances. The employee filed a Medical Request and the compensation judge found that the medical charges at issue were within the usual and customary ranges charged in that provider's region. The judge also found that the employee had personal liability for the unpaid balances for the Wyoming healthcare providers. The judge found that if the employer and insurer were relieved from liability under Minn. Stat. § 176.136, subd. 1b(d), that liability would then flow to the employee "in conflict with Minn. Stat. § 176.135." The judge held the employer and insurer liable for the employee's unpaid medical expenses.

The WCCA reversed. It acknowledged the compensation judge's concern that the cost of this medical treatment may be unfairly shifted to the employee. However, the court felt that it was their job to strictly interpret the statute (§176.136, subd. 1b(d)) and that it was up to the legislature to change the statute, if they found the result too harsh; that it is the responsibility of the legislature to change the statute to balance the interests of the employee, employer and insurer. The purpose of the statute was to limit the costs of medical expenses for the employer and insurer, and the court's interpretation of the statute was consistent with that purpose.

Washek v. New Dimensions Home Health, 2012 MN Wrk. Comp. LEXIS 16 (WCCA February 7, 2012) Reversed.

The Employer and Insurer appealed from the compensation judge's determination that structural modifications to the Employee's home which were necessary to install a ceiling mounted track system were compensable under Minn.Stat.§176.135.

The Employee was permanently and totally disabled as a result of December 18, 2002 work related injuries including a closed head injury resulting in cognitive difficulties, internal injuries, and a spinal cord injury resulting in paraplegia.

Minn.Stat. §176.137 provides up to $60,000.00 for alteration or remodeling of the residence of a permanently disabled employee. The statute provides, in part, that the employer shall furnish such alteration or remodeling of the employee's principal residence as is reasonably required to enable the employee to move freely into and throughout the residence to otherwise adequately accommodate the disability.

The Employee's primary residence had been remodeled to accommodate her wheelchair to which she was confined as a result of the work injury. The Employer had paid approximately $58,000.00 in remodeling expenses

In March 2009, an access specialist and designer recommended the installation of a ceiling mounted lift system, which would extend from over the employee's bed into the bathroom to over the toilet and the shower to assist with transfers and showering and provide greater general

independence. The cost of the system itself, delivered, and installed was estimated at $15,414.00. The Employee received two bids for installation of the system; one for $28,424.00 and the other for $30,317.00.

The Employer and Insurer's accessibility specialist testified that the purchase and installation of the ceiling track system would be a medical expense but that the necessary structural changes to the Employee's residence would be remodeling. Having already paid $58,000.00 under the statute, the Employer and Insurer argued that their liability was limited to $2,000.00 for structural remodeling.

The compensation judge concluded that the structural changes necessary to install the ceiling track were a compensable medical expense under Minn.Stat.§176.135 and ordered the Employer and Insurer to pay all reasonable costs associated with the track system, including the construction modifications necessary for its installation in the Employee's home.

The issue on appeal was whether the cost of the structural changes to the Employee's home necessary to the installation of the ceiling mounted track lift system is compensable under Minn.Stat.§176.135 as a medical expense or whether those changes constitute alteration or remodeling of the Employee's residence under Minn.Stat.§176.137.

The Employee argued the purpose of the lift was not intended to improve her mobility in her home but was instead necessary to relieve the effects of her injury under Minn.Stat.§176.135 which requires the employer to furnish reasonably required medical treatment and apparatuses.

In their analysis, the WCCA acknowledged that the installation of the lift system would provide the Employee with reasonable and necessary medical benefits and that the medical apparatus could not be "furnished" within the meaning of Minn.Stat. §176.135 until it was installed and available for use by the Employee. However, the court noted that the fact that the lift system is a medical apparatus does not automatically mean that the remodeling required for its installation is also a medical expense. The court cautioned that if a major structural change to a residence necessary to install or make usable a piece of medical equipment was construed to constitute a medical expense, then Minn.Stat.§176.137 would become essentially superfluous.

The court reversed the compensation judge and declined to adopt the Employee's position and instead concluded that the structural changes necessary to install the lift system in the Employee's residence constituted remodeling under Minn.Stat.§176.137.

Rezaie v. Wal Mart, 2012 MN Wrk. Comp. LEXIS 10 (WCCA January 20, 2012) Affirmed in part and modified in part.

The Employee sustained work related injuries to her right foot and ankle. In a previous proceeding, the compensation judge determined the Employee had developed reflex sympathetic dystrophy (RSD) as a result of the work injuries.

The Employee filed a Claim Petition alleging entitlement to permanent partial disability benefits, permanent total disability benefits, and payment of nursing services.

The Employee reported to the QRC that she was not able to walk on her right foot, so she often crawled in her home and used a wheelchair outside the home. Because she was unable to

tolerate standing to prepare meals, she relied upon her sons to bring frozen food from the basement freezer and assist her with cooking and meal clean-up. The Employee reported cleaning her home was very difficult for her because of her lack of mobility and that her sons performed most of the housekeeping, as well as the yard work. The Employee said she was unable to do the laundry because she was unable to go up and down the basement stairs where the washer and dryer were located. The Employee said she was independent in bathing, grooming, and toileting.

Based upon the QRC's evaluation, she found the Employee required one hour of assistance per day seven days a week for cooking and cleaning after meals; three hours per week for housekeeping assistance; and three hours per week for shopping, errands, banking, and doctors' appointments. In total, the QRC recommended the Employee needed services for sixteen hours a week. The QRC valued those services at $12.65 per hour or $202.40 per week.

The Employer and Insurer arranged for a home care assessment with a certified life care planner. The Employer and Insurer's expert determined the Employee did not require home care for cooking or cleaning up after meals as her sons performed the majority of those tasks which she considered part of their household production. Based upon the Employee's self-reporting that she used a taxi for shopping and errands in the community and did some shopping online, the Employer and Insurer's life care planner recommended three hours a week of services were reasonable, one hour for cleaning, one hour for laundry, and one hour for shopping.

The compensation judge found the Employee sustained a 17% permanent disability with respect to each leg due to the RSD and 21% permanent disability due to depression. The judge found the Employee was unable to engage in sustained gainful employment activities due to the effects of her work injuries, and further, that the Employee was unable to perform many of her daily life activities due the work injury. The judge concluded the Employee required assistance for three hours a week which would be compensated at a rate of $12.00 per hour. The Employee cross-appealed the compensation judge's award of nursing services.

In their analysis of the compensation judge's decision regarding nursing services, the WCCA looked to Minn.Stat. §176.135, subd. 1(a) which provides that in cases of permanent total disability, the employer shall pay "the reasonable value of nursing services provided by a member of the employee's family." Pursuant to case law, those services may include meal preparation, driving an employee who is unable to drive, and performing certain homemaking or maintenance chores.

In their analysis, the court cited to Sorcan v. USX Corp., 58 W.C.D. 159, 172 (W.C.C.A.) 1997, summarily aff'd (Minn. Apr. 7, 1998), noting that the compensation judge must carefully consider whether personal services and household tasks which may well have been performed out of affection prior to the injury may, at some point, become compensable when performed – and performed more frequently – out of necessity."

The court acknowledged that the Employee's three sons assisted their mother out of affection for her; however, found that they also performed those tasks out of necessity due to her disability. The court disagreed with the recommendations of the Employer and Insurer's life care planner, finding that they did not believe the Employee was obligated to remain confined to her home in order to reduce the cost of reasonable trips into the community for shopping or other errands.

Based upon the foregoing, the court modified the compensation judge's award of nursing services to include seven hours per week for cooking and cleaning and three hours a week for shopping and errands in the community.

Troyer v. Vertlu Management Company/Kok & Lundberg Funeral Homes, 2011 MN Wrk. Comp. LEXIS 42 (MN Supreme Court August 17, 2011). Affirmed.

The Employee sustained an admitted work related low back injury. As a result, he underwent surgical implantation of a spinal cord stimulator at St. Joseph's Hospital, owned by HealthEast Care System. The work comp Insurer paid part, but not all of the expenses related to the surgery; withholding the portion of the expenses attributable to a price markup added by HealthEast to the price HealthEast paid for the implant. In addition, the Insurer argued that the manufacturer of the implant hardware should be required to charge directly for the implanted hardware pursuant to Minn.Rule 5221.0700, subp. 2A(2009).

At hearing, the compensation judge determined that HealthEast could charge directly for the implant hardware. The judge also determined that he did not have the authority to determine a reasonable price for the implant hardware below the 85% of HealthEast's usual and customary price. The Workers' Compensation Court of Appeals affirmed the compensation judge and the Employer and Insurer petitioned for a writ of certiorari.

The facts in the case were undisputed. Of importance, the Employee's August 27, 2008 surgery included the implantation of an Implantable Pulse Generator (IPG) spinal cord stimulator implant system. The IPG system was manufactured by Advance Neuromodulation Systems, Inc. (ANS) and consisted of four components. St. Joseph's does not keep the components in stock and had ordered them at the direction of the Employee's physician.

HealthEast's usual and customary charge for the ANS components totaled $73,320.00. CorVel requested the invoices from HealthEast on behalf of the Employer and Insurer, but HealthEast refused to provide the invoices asserting that the price paid by HealthEast was confidential and proprietary in nature. CorVel recommended the Employer and Insurer pay HealthEast in full for all charges with the exception of the implant hardware. As such, the Employer and Insurer paid a total of $24,440.00. HealthEast claimed an unpaid balance of $37,822.00, the difference between 85% of his usual and customary charge, and the price the Employer and Insurer actually paid to HealthEast.

Minn.Rule 5221.0700, subp.2A provides:

> Charges for services, articles, and supplies must be submitted to the payer directly by the health care provider actually furnishing the service, article, or supply. This includes but is not limited to the following: equipment, supplies, and medication not ordinarily kept in stock by the hospital or other health care provider facility, purchased from a supplier for a specific employee;

The two issues before the Supreme Court were whether HealthEast was entitled to charge directly for the surgical implant hardware, and second, did the compensation judge have the authority to determine a reasonable price for the implant hardware below 85% of HealthEast's usual and customary price.

In analyzing the first issue, one of rule construction, the Court went through a lengthy and detailed analysis of the definition and meaning of "health care provider" and "furnished" within the language of the Minn.Rule 5221.0700.

Ultimately, the Court established that a health care provider may be "any other person" who furnishes "any . . . thing . . . provided for the purpose of curing or relieving an injured worker." Minn.Stat §176.011, subd. 12a; Minn.Rule 5221.0100, subp. 15.

Assuming that both ANS and HealthEast were health care providers, the court interpreted the word "furnished" as used in 5221.0700 and concluded that a service, article, or supply is provided for the purpose of treating an injured employee when given to the employee it is final , usable form. Therefore, as applied to Rule 5221.0700, subp. 2A, the term "furnish" means to provide to an employee in a final, usable form.

The Court concluded that when more than on health care provider is responsible for the creation or transmission of a service, article, or supply, the health care provider that provides the service, article, or supply in its final, usable form to the injured employee has "actually furnish[ed]" the service, article, or supply, and is entitled to charge for that service, article, or supply under Minn.Rule 5221.0700, subp. 2A. Application of this rule in the present case, the Court held that HealthEast "actually furnished" the implant hardware to the Employee, not ANS, and as such HealthEast is entitled to charge for the implant.

As to the second issue, the Court held that Minn.Stat §176.136, subd. 1b(b), does not give the compensation judge the authority to determine a reasonable value of a treatment, service, or supply that is lower than 85% of the provider's usual and customary charge, or 85% of the prevailing charges for similar treatment, articles, and supplies furnished to an injured person when paid for by the injured person.

EARNING CAPACITY

Hoover v. ISD #84, slip op. (WCCA June 29, 2011) Reversed.

The employee sustained a work-related knee injury in 1989. Her average weekly wage was $876.40. At the time of the injury, the employee had a Master's degree in physical education. Her job required her to be physical as she was involved in athletics. She had three surgeries to her knee and, after the third surgery; she concluded that she could no longer do her pre-injury job. She accepted an early retirement package in 1992. After that, the employee went back to school and obtained a Ph.D. in psychology and, in 2000; she found a new job working as a school psychologist, with no wage loss. Several more surgeries were done to her knee between 2005 and 2009 and during this time, she was off work and her employer was not able to hold her job open for her. She began job placement in May 2009. She was able to find some teaching and counseling work, but at a wage loss. She filed a Claim Petition for temporary total and temporary partial disability benefits. The judge denied the temporary partial disability claim and found that the employee's ongoing wage loss was not related to the work injury as there had been no impact on earning capacity. The judge found that the employer had rebutted the presumption that the employee's post-injury earnings were a measure of earning capacity." In this decision, the compensation judge had relied on the employer's vocational expert. That expert opined that other jobs existed which the employee would be physically able to perform

and which would pay her more than her current position. To support this, he identified six career areas that he said were within the employee's restrictions and that he believed would provide greater earnings than the employee's current employment. However, he did not do a labor market survey. He also testified that the employee's work restrictions from the 1989 injury did not affect her ability to work in her present position.

The WCCA reversed on appeal. It was undisputed that the employee had work restrictions as a result of the injury and that she had cooperated with rehabilitation services and found a job below her pre-injury wage. The court focused on the vocational expert's failure to do a labor market survey. They pointed out that the vocational expert did not offer testimony on the number of these theoretical jobs which might exist in the employee's labor market, and did not provide evidence of any jobs in those occupations which might have been actually available at any time since the employee had been released to return to work and did not identify any actual employers who were looking for employees in those occupations.

The potential jobs cited by the vocational expert were merely speculative and hypothetical and therefore the earning capacity presumption was not rebutted. There was no evidence as to any actual employers, how many jobs were actually available, etc. It could not be said that the employee was qualified for those jobs without any actual information about what those jobs were.

DISCONTINUANCE OF BENEFITS

Frandsen v. Ford Motor Co., 801 N.W.2d 177 (Minn. 2011). Reversed.

The issue here was whether an employer waived the retirement presumption by failing to expressly reserve that presumption in a Stipulation for Settlement. The parties had entered into a Stipulation for Settlement in which they agreed that the employee was permanently and totally disabled as a result of the work injury. The employer and insurer continued to pay permanent total disability benefits. The Stipulation did not mention the discontinuance of benefits or the statutory retirement presumption. Around the employee's 67th birthday, the employer and insurer petitioned the WCCA to discontinue PTD benefits pursuant to the retirement presumption under Minn. Stat. §176.101, subd. 4. The WCCA denied the petition to discontinue, concluding that the employer and insurer had waived the retirement presumption because the parties did not incorporate the retirement presumption into the Stipulation, nor did they include language reserving the right to discontinue benefits at age 67.

On appeal, the Minnesota Supreme Court analyzed whether the retirement presumption had been waived. Waiver is the intentional relinquishment of a known right. Therefore, valid waiver requires (1) knowledge of the right and (2) an intent to waive the right. Waiver can be either express or implied. The WCCA had erroneously concluded that waiver could be implied by the inaction of the parties. Here, the employee had to prove that the employer and insurer intended to waive the retirement presumption. The court reviewed the Stipulation and found no indication that the employer and insurer intended to waive the retirement presumption. The court also noted that the Stipulation was a to-date settlement and therefore did not purport to close out any future claims of the parties. The Stipulation did not indicate that the employer and insurer intended to continue paying PTD beyond age 67.

The court noted that whether an employer intended to waive the retirement presumption is a "factually-intensive inquiry." The employee has the burden to show some evidence that the employer and insurer intended to waive their right. In this case, there were no affirmative actions by the employer, language in the Stipulation, or circumstances surrounding the agreement that evidenced any intention to waive the retirement presumption.

Eike v. Fairview Ridges Hospital, 2011 MN Wrk. Comp. LEXIS 87 (WCCA August 29, 2011) Affirmed.

The Employee was a Registered Nurse at Fairview Ridges Hospital. She sustained an admitted injury to her low back while she was assisting a co-worker move a patient. The Employee underwent surgery on June 17, 2010. As of August 3, 2010, Dr. Sinicropi noted the Employee had no back pain and his examination was "completely unremarkable." Dr. Sinicropi did not release the Employee to return to work as she was withdrawing from the use of narcotic medication.

On September 1, 2010, Dr. Sinicropi released Employee to return to work with an 80-pound lifting limit. On September 30, 2010, Dr. Sinicropi changed the restrictions to a 50-pound lifting limit and restricted the Employee to an eight hour work day. In November, he recommended a Functional Capacity Examination which was denied by the Employer and Insurer.

On August 6, 2010, the Employer notified the Employee that her position in the ER had been filled and that she would be placed on a leave of absence. On September 10, the Employee was notified that her employment with Fairview Health Services was terminated as of September 5, 2010.

The Employer and Insurer's IME, Dr. Friedland, recommended an 80-pound lifting limit with the ability to work "reasonable" overtime.

David Berdahl evaluated the Employee's vocational status via a record review and opined that employment as a R.N. required lifting up to 50 pounds and as such concluded that the Employee had not suffered a loss of earning capacity as a result of her work injury since she continued to be employable as an R.N.

The Employer and Insurer filed a NOID on September 2, 2010 seeking to discontinue temporary total disability benefits based upon the release to return to work by Dr. Sinicropi with an 80-pound lifting restriction which enabled the Employee to return to her job at Fairview and also allowed her to work as an R.N. with other employers.

Following an Administrative Conference on October 4, 2010, the NOID was denied and the Employer and Insurer subsequently filed a Petition to Discontinue.

At hearing, the Employee testified that she had ongoing low back pain that increased with activity. She reported applying for R.N. jobs in the Twin Cities area, with the majority of her contacts being made on the internet.

The compensation judge found the Employee was able to meet the job requirements of Twin Cities hospitals for a Registered Nurse; she had no loss of earning capacity as a result of the work injury; her disability did not impact her employability; and despite her restrictions, she was

not precluded from her usual and customary occupation as a Registered Nurse. Lastly, the judge determined that the "concept of earning capacity is not related to temporary total disability; rather, it is related to claims for temporary partial disability." The judge denied the employer's petition to discontinue.

On appeal, the Employer and Insurer argued that there was no nexus or causal relationship between the Employee's injury and the current unemployment and that the Employee had not sustained a loss of earning capacity related to the work injury. In support, the Employer and Insurer allege that despite her injury, she would be able to perform the job she held at Fairview at the time of her injury.

The court affirmed the compensation judge's conclusion that the Employee remained entitled to temporary total disability benefits, citing to Serra v. Hanna Mining Co., 65 W.C.D. 532, 597 (W.C.C.A. 2005):

> An employee's earning capacity depends directly on the employee's value in the labor market in light of his age, experience, disabilities and restrictions. To impute an earning capacity on the absence of evidence establishing that a job affording the imputed level of compensation is actually available is to essentially deny the employee the possibility of proving a causal relationship between subsequent demonstrated wage loss and the employee's disability.

The court reiterated the holding in Passaforo v. Blount Constr. Co., 49 W.C.D. 535, 544 (W.C.C.A. 1993), "testimony as to hypothetical positions paying hypothetical wages will not act to rebut the presumption of actual earnings raised by actual wages."

SETTLEMENTS

Griffin v. Kindred Hospitals, 2011 MN Wrk. Comp. LEXIS 32 (WCCA April 4, 2011) Reversed.

The employee sustained a work-related low back injury on January 9, 2004. The parties entered into a Stipulation for Settlement in 2006. This was a full, final and complete settlement with the exception of certain future medical expenses. The Stipulation closed out "soft" medical expenses, including "multidimensional in-patient and out-patient chronic pain treatment programs." In 2009, the employee was referred for a consultation at Midway Pain Center (MPC), which specializes in the treatment of chronic pain. From there she was referred to Impact Physical Medicine, and they recommended pool therapy. The employee returned to MPC and received an epidural steroid injection. The employee filed a Medical Request for a consultation and treatment at MPC, as well as payment for three epidural steroid injections. The employer and insurer denied the requests on the grounds that the treatment was not reasonable and necessary, exceeded the treatment parameters, and that the treatment was closed out under the Stipulation. At the hearing, it was admitted the treatment options at MPC included physical therapy, medial branch blocks, medication management and the chronic pain program itself. However the employee was never enrolled in the chronic pain program itself and her treatment there consisted only of two injections, medication monitoring, and a referral to Impact Physical Medicine. The compensation judge found that the treatment at MPC constituted

multidimensional outpatient chronic pain treatment and was therefore closed out under the prior Stipulation and therefore did not address the insurer's other defenses.

The WCCA reversed. In its decision, the court looked to Minn. R. 5221.6600, Subpart 2E, defining chronic pain treatment programs. The court felt that the employee's treatment at MPC did not fit the definition under the Rule. For example, the employee's treatment did not appear to have been provided by any clearly constituted multidisciplinary "team" and there was not much evidence that the treatment included the physical rehabilitation, education, relaxation, training, and psychological counseling that are mandatory under the Rule. Therefore, the court held that the treatment at issue did not constitute a multidimensional chronic pain program and therefore was not foreclosed by the Stipulation.

PRACTICE AND PROCEDURE

Johnson v. Midwest Precision Machining, 2011 MN Wrk. Comp. LEXIS 6 (February 16, 2011) Dismissed.

This case involves an admitted injury in March 2010. The employer and insurer paid benefits and eventually obtained an IME which provided them with a temporary aggravation defense. Based on the IME, the employer and insurer filed an NOID, and the employee requested an administrative conference. The parties were notified that the case had been assigned to Judge Ellefson. Following the conference, Judge Ellefson issued an Order on Discontinuance, finding no reasonable grounds to discontinue temporary total disability benefits. His decision explained that he rejected the opinions of the IME doctor and found the treating doctor's opinions more persuasive. The employer and insurer filed a Petition to Discontinue. Following that, OAH issued a hearing notice and this stated that the hearing was scheduled to be heard before Judge Ellefson. The employer and insurer filed a Petition to Disqualify, requesting reassignment, and argued that Judge Ellefson was prejudiced in that he had already prejudged the facts and issues, contrary to the employer and insurer's right to a de novo hearing. The Petition to Disqualify Judge Ellefson was denied, and the employer and insurer appealed.

On appeal, the WCCA explained that it is a court of limited jurisdiction, pursuant to Minn. Stat. §176.241, subd. 1, and that appeals to the court may be taken from "an award or disallowance of compensation or other order affecting the merits of the case." The court explained that it does not favor interlocutory appeals – an appeal from an order that does not result in a final determination of the case. Appellate courts have generally held that an order denying a motion to remove or disqualify a judge is a nonappealable interlocutory order. The court held that the Order Denying Petition to Disqualify carried with it no finality and resulted in no final determination on the merits and therefore it was a nonappealable interlocutory order, over which the court lacked jurisdiction. The court stated that, if the employer and insurer went on to lose before Judge Ellefson at hearing, they were entitled to have that order appealed, and could raise the issue at that time.

WORKERS' COMPENSATION AGREEMENT AND NO-FAULT ARBITRATION

Gjevre v. State Farm Mutual Automobile Insurance Company, 2012 MN Wrk. Comp. LEXIS 18 (WCCA March 5, 2012).

The Employee sustained work related injuries as a result of a motor vehicle accident in early 2009. The Employee began chiropractic treatment shortly after the accident and filed a claim for workers' compensation benefits. The Employer and work comp Insurer denied the claim. While the claim was pending, the Employee submitted his medical and chiropractic bills to his auto insurer, State Farm Mutual Automobile Insurance. State Farm paid the claims and intervened in the workers' compensation action.

State Farm stopped paying no-fault benefits on July 30, 2009 based upon an adverse medical examination that concluded the Employee had returned to "pre-injury status" and no longer required treatment for the accident. The Employee requested arbitration on his no-fault claims.

Before arbitration on the no-fault claim, the Employee and a State Farm representative attended a settlement conference with the Employer and work comp Insurer. The work comp Insurer offered to reimburse State Farm for medical benefits paid to-date, but indicated it would deny all future chiropractic benefits under the Treatment Parameters.

The Employee, Employer, and work comp Insurer agreed to the terms of an "Order of Agreement" to be submitted to the compensation judge. Pursuant to the agreement, the work comp Insurer would satisfy State Farm's intervention interest, the Employee would withdraw the Claim Petition and based on the applicable Treatment Parameters and case law, the Employee would *not* submit any additional and/or future chiropractic bills to the workers' compensation Insurer for payment related to the claimed injury. The agreement was signed by the compensation judge on October 19, 2010.

At the no-fault arbitration hearing in November 2010, State Farm argued that the Employee's no-fault chiropractic claims for treatment that occurred after the agreement were barred by the agreement. The Employee argued that the agreement made no-fault insurance his exclusive remedy for payment of his chiropractic expenses. The arbitrator issued an award in favor of the Employee. State Farm brought a motion in district court to vacate the award. The district court granted the motion, concluding that the Employee's no-fault claims are barred under Am. Family Ins. Group v. Udermann, 631 N.W.2d at 424 (Minn.App. 2001), review denied (Minn. Sept. 25, 2001) because the agreement defeats State Farm's reimbursement rights.

In Udermann, the WCCA held that "because workers' compensation benefits are primary with respect to no-fault benefits and because [the employee-insured] entered into a settlement with the workers' compensation carrier that compensated him for chiropractic expenses and defeated [the no-fault insurer's] reimbursement rights, the [employee-insured] is precluded from recovering no-fault benefits for chiropractic expenses."

The WCCA disagreed with and pointed out two flaws in the Employee's assertion that the workers' compensation carrier was no longer obligated to cover his claims for

chiropractic treatment. First, the court stated that the treatment parameters do not apply to his case based upon the Employer and workers' compensation Insurer's denial of primary liability, and second, the necessity for medical treatment reses in the discretion of workers' compensation judges, not workers' compensation insurers, and "the treatment parameters for low back pain, provided in Minn.Rule 5221.6200, subp. 3 [do not] place absolute limits on the duration of treatment." Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 33 (Minn. 1998).

The WCCA concluded that the district court did not err in holding that appellant's agreement with the workers' compensation carrier precludes his recovery of no-fault benefits for chiropractic treatment arising out of the accident.