Minnesota Case Law Update

By

Sarah A. Bennett and Kelly P. Falsani

ARISING OUT OF AND IN THE COURSE OF

The W.C.C.A. addressed this topic in many cases during the past year, and in November provided a very thorough and lengthy review and analysis of this area of the law in the Dykhoff opinion, which is summarized below.

To be compensable, an injury must "arise out of" and occur "in the course of" employment. "In the course of" means that the injury occurred within or near the time, place, and circumstances of the employment. "Arising out of" means that there is a causal connection between the employment and the injury. The "increased risk" test is often used in connection with analysis of whether an injury arose out of employment. If a hazard incidental to the employment placed the employee at an increased risk of the injury, over and above the risk to the general public, then the "arising out of" factor has been satisfied. There are many cases, including many within the past year, in which the compensation judge's analysis of "arising out of and in the course of" consisted solely of applying the increased risk test, or where the compensation judge found the outcome of the increased risk test to be dispositive. The Dykhoff case clarified that the increased risk test is not necessarily dispositive, and that the compensation judge should look at the totality of the circumstances of the injury to determine its work-relatedness.

Whether an injury arises out of and in the course of employment is a mixed question of fact and law. What makes it a partially legal issue is that the compensation judge must apply the proper analysis to the facts when determining whether an injury arose out of and in the course of employment. Of the first seven "arising out of and in the course of" cases below, only Dykhoff reversed the compensation judge's finding on the issue of whether the injury arouse out of and in the course of employment. The reason for the reversal was that the compensation judge did not properly analyze the facts and used a test that was insufficient as a matter of law. None of the compensation judge's findings of fact were disturbed by the W.C.C.A. in Dykhoff. Like so many issues in workers' compensation, the issue of "arising out of and in the course of" is very fact specific and it is extremely difficult to win a reversal on appeal.

Some of the "arising out of and in the course of" W.C.C.A. cases this past year include:

Stans v. Long Prairie Mem'l Hosp. & Home, No. WC11-5354 (W.C.C.A. May 14, 2012). Affirmed in part and vacated in part.

The employee was a records clerk who felt sudden and severe neck and left shoulder pain when she stretched her arms over her head and leaned from side to side. Because the employee was stretching to relieve the stiffness and soreness she felt after doing

repetitive work, the repetitive work placed her at an increased risk for sustaining the injury she suffered while stretching, so her injury arose out of her employment.

Kanable v. Service Master of Rochester, No. WC12-5466 (W.C.C.A., Jan. 21, 2013). Affirmed.

The employee was working in an office building near a frontage road along a highway. There was no barrier between the highway and the building, and the highway was on an embankment that sloped down toward the building. One day, a runaway tractor-trailer semi went off the road at 50 to 60 miles per hour, barreled down the embankment, and went through the entire building. The employee was injured from collapsing debris and having to be extricated from that debris. The location of the building was found to have put the employee at an increased risk of sustaining her injuries, so the injury did arise out of her employment. The employer and insurer had tried to argue that she was at no greater risk of what happened than any member of the general public, and that this was simply a freak accident.

Baldwin v. I.S.D. #877, No. WC11-5348 (W.C.C.A. April 10, 2012). Affirmed.

The employer and insurer argued that the employee's knee injury, which occurred when her knee buckled while she was walking in a hallway, was caused by her preexisting condition and her obesity, and did not arise out of her employment. The compensation judge found that despite her history of knee problems and the fact that she was just walking along when her knee buckled, her injury was not idiopathic, and it did arise out of her employment. The W.C.C.A. affirmed this decision and referenced an early case, Caizzo v. McDonald's, in which mere standing was found to put the employee at an increased risk. However, this is not a good application of the McDonald's case, because in that case, the employee's injury was found to arise out of his employment because he was required to stand for a long period of time, which caused him to faint. While it was reasonable for the judge in that case to find that the prolonged standing caused the employee to faint, it is quite the stretch in Baldwin to find that the simple act of walking down a hallway could cause the Employee's knee injury. The fact that the W.C.C.A. affirmed the compensation judge shows how difficult it is to win a reversal in an "arising out of and in the course of" case on appeal.

Cummings v. Kelly Servs., No. WC12-5447 (W.C.C.A. Oct. 17, 2012). Affirmed.

After exiting her work building in downtown St. Paul, the employee crossed a public plaza and then fell as she was walking down some steps. The employee's route across the public plaza and down the stairs did not expose her to an increased risk of injury in comparison with the general public. If this would have happened while she was actually exiting the building, the injury probably would have been compensable. But it happened when she was already well into the public space, so there was no increased risk.

Eide v. Award Constr. Co., No. WC12-5435 (W.C.C.A. Oct. 16, 2012). Affirmed.

The employee was a construction worker in charge of traveling around the country to convert photo stands into storage closets at Target stores. The employee and a coworker completed a project in California and spent the next day traveling to the next location, having dinner, and watching a hockey game. The employee was found dead of a heart attack in his hotel room the next day. Because he was a traveling employee, the injury did occur in the course of his employment. However, it did not arise out of his employment because there was no evidence that his activities exposed him to a greater risk of a heart attack than he would have been exposed to as a member of the general public.

Dykhoff v. Xcel Energy, No. WC12-5436 (W.C.C.A. Nov. 30, 2012). Reversed.

The W.C.C.A. did not create any brand new standards or tests in the Dykhoff decision, but it did provide a very in-depth analysis of the "arising out of" and "in the course of" components of compensability. It also clarified the role of the increased risk test, and explained how compensation judges should approach the analysis. This case is currently on appeal to the Supreme Court of Minnesota.

The employee fell on a marble floor in a hallway on her way to a required training session. The compensation judge found that the employee's injury did not arise out of her employment. The employee appealed. The W.C.C.A. reversed the compensation judge and held that the employee's injury did arise out of her employment.

The employee usually worked at a Maple Grove Xcel location, but was visiting the headquarters in downtown Minneapolis for computer training. She was told to wear dress clothes instead of her usual jeans, and she chose to wear two-inch wooden heels as part of her outfit. She entered the building and walked across the exact location of the incident at least twice before the incident actually happened on the third time that she crossed the same location. She testified that first her right, and then her left foot "slipped" out from underneath her and she felt the left knee pop. She landed on her buttocks on the floor and felt left knee pain. She testified that she thought the floor was slippery, but an employer witness testified that he examined the floor after her fall and it was not slippery.

The compensation judge denied the claim. She found that in order for the employee to prevail, the employee had to show that the condition of the floor put her at an "increased risk" of injury. The judge then found that the floor was not slippery, and she also found that because the floor was not slippery and there was nothing to explain the employee's fall, the employee had not been at an "increased risk" of falling because of the floor condition, and therefore her injury did not "arise out of" her employment.

The W.C.C.A. explained that "in the course of" and "arising out of" are two separate elements of a single test of work-connectedness. First, to occur "in the course of" employment, an injury must occur within the time and space limits of employment, as well as occur while the employee is engaged in work or in activities reasonably incidental to work. Second, to "arise out of" employment, an injury must have a causal connection

with work activities. If the "in the course of" element is present but weak, but the "arising out of" element is strong (or vice versa), an injury can still be work-related.

The W.C.C.A. found that the employee was certainly in the course of her employment when she fell, because she was on the employer's premises, on her way to a required training session. The W.C.C.A. then found that the compensation judge erred when she found that the employee had to show she was at an "increased risk" of injury in order to prove that her injury arose out of her employment. While the "increased risk" test is a starting point for determining whether an injury "arose out of" employment, it is not the ending point. If there is no explanation for a fall because it was not contributed to by an idiopathic condition, and if there was no "increased risk" involved, then there should be further analysis. For example, the compensation judge could and should have applied the "positional risk" analysis. Under this test, if the employment placed the employee in a particular place at a particular time, and the employee was then injured by a "neutral" risk, then the injury still "arose out of" employment.

In Dykhoff, the marble floor did not place the employee at an increased risk, and the injury could not be explained by an idiopathic condition. However, her employment did place her in the hallway, and she was injured by a "neutral" risk (the floor). While the "arising out of" element was weak, it was still present. Because the "in the course of" element was very strong, the claim should be compensable under an overall work-relatedness analysis. The W.C.C.A. did not hold that a certain test (such as the positional risk or increased risk test) would always be applicable; instead, the compensation judge should analyze overall work-connectedness considering the facts of the case and the strength of each of the two elements ("in the course of" and "arising out of").

The W.C.C.A. also noted that the compensation judge's analysis would prevent compensation for all unexplained injuries of the kind that the employee suffered, which would put an unreasonable burden of proof on employees and which would be inconsistent with the "no fault" nature of the workers' compensation system.

This case could narrow the types of falls that are not work-related. After this case, if a fall occurs on a normal, flat surface and there is no explanation for the fall, it may be found to arise out of the employment as long as the "in the course of" element is somewhat strong.

Milbrat v. The Marketplace, Inc., No. WC12-5448 (W.C.C.A. Oct. 22, 2012). Affirmed in part and vacated in part.

In this case the employee suffered an admitted work-related injury. Over two years later, she was on her way from her treating doctor's office to the pharmacy to fill her work injury-related prescriptions when she was injured in a car accident. The compensation judge found that the injury from the car accident was a compensable consequence of her original work injury, and the employer and insurer appealed.

The W.C.C.A. reviewed the case law and noted that injuries have been found to be compensable when they occurred while the employee was on her way from her home to

reasonable and necessary medical treatment of the work injury, or vice versa. However, compensation has been denied for injuries that occurred while traveling to or from an IME or retraining. The employer and insurer argued that because the employee was not on her way home from the doctor's office but was instead on her way to get medications, the injury was not compensable. The W.C.C.A. held that injuries sustained while traveling to or from a pharmacy are compensable if the trip is being made to obtain medications that are reasonable and necessary to treat the work injury.

Paskett v. Imation Corp. and Traveler's Group, No. WC12-5494, (W.C.C.A Jan. 3, 2013). Affirmed.

The employer and insurer denied a claim because the employee's injury occurred during a voluntary employer-sponsored recreational activity pursuant to Minn. Stat. § 176.021, subd. 9. That provision provides that injuries occurring at certain voluntary recreational activities that are sponsored by an employer, including wellness programs, athletic events, parties, and picnics are not compensable. The exclusion does not apply where the employer required the employee to participate.

In this case, the employee participated in a flag football game during an employer-sponsored charity week to benefit the United Way. The employer paid him his regular wage for the time spent at the event. He did not have to take any paid time off or vacation time to participate. During the flag football game, the employee injured his Achilles heel tendon, needed surgery, and missed two weeks of work.

The workers' compensation judge denied the employee's claims for workers' compensation benefits pursuant to Minn. Stat. § 176.021, subd. 9. The W.C.C.A. upheld the finding of the compensation judge, indicating that the facts of the case supported the employer's contention that this was strictly a voluntary recreational activity. The court did not find persuasive the employee's contention that he was not told about alternatives to participation. The court also noted that the statute was added in order to specifically exclude certain recreational activities that are sponsored by an employer from being potential compensable injuries and, therefore, denied any analysis under previous case law in which those types of activities were previously compensable.

NOTICE

Anderson v. Frontier Communications, No. A11-0834 (Minn. Aug. 10, 2012). Reversed.

This case was a departure from the employee-friendly notice case law. The employee worked for a cable company from 1987 until 2007. His work activities included lifting up to 70 pounds, bending and stooping on a regular basis, and pulling and digging out cable. The employee stated that one of the most physical aspects of the job was bending over to place flags to mark cable locations at construction sites. He testified that during an annual construction season, he would place between 7,000 and 10,000 flags.

In 1996, the employee sought medical treatment, stating that he had low back pain after shoveling dirt all day. In 1998, he treated for low back pain he experienced after getting out of his work truck. He testified that his low back pain progressed in 2004 and 2005, and that it was worse at the end of a work day and at the end of a work week. However, he did not seek medical treatment because he thought he was just getting old.

In March 2007, he saw his doctor and reported that he was icing his back every night. At that doctor visit, the employee reported back and right leg pain and said 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 diagnosed degenerative disc disease. The employee's medical records showed that his job was discussed at his initial consultation. The employee testified that, after talking to his surgeon in May 2007, he knew that his work activities were a cause of his low back problems or were aggravating his low back problems. 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. When he went off work for the surgery, he did not tell his employer that his back condition was work-related. Mr. Anderson was not able to return to his job after surgery. He applied for SSDI and consulted an attorney about the coordination of those benefits, and while visiting with that attorney, he learned what a Gillette injury was. In April 2009, the employee's attorney wrote to his treating physician and received a report from the doctor, stating that the employee's work activities had aggravated his pre-existing low back condition. In May 2009, the employee's attorney gave Frontier written notice that the employee was claiming a work-related low back injury.

The compensation judge found that the employee had sustained a work-related Gillette injury, culminating on his last date of work, July 4, 2007. The compensation judge found that the employee knew in April 2007 that his work aggravated his low back and found that the employee had not given timely notice of the work injury. The compensation judge therefore denied the employee's claim for benefits.

The Workers' Compensation Court of Appeals reversed the denial of benefits. The WCCA noted that the employee's family doctor attributed his back problems to degenerative changes and that the employee should not have been required to give notice where there was no medical evidence making that causal connection and where the existing medical evidence provided a different reason for his problems.

The Minnesota Supreme Court reversed. It noted that the employee's work was discussed at the initial surgical consultation. The Court also relied on the employee's testimony that he was aware that bending over irritated his low back, which made him realize that after years of bending over, his discs had worn out. The Court found that the information available to the employee – whether or not it was documented in the medical records – was that the wear and tear on his discs was the result of his work activities. Therefore, there was sufficient evidence to support the finding that the employee should have realized that the work he did caused or aggravated his back problems. Also, although his family doctor said that his back problem was degenerative in nature, the Court found that a degenerative condition is not inconsistent with a work-related injury.

CAUSATION

May v. Delta Air Lines, Inc., No. WC12-5468 (W.C.C.A. Dec. 27, 2012). Affirmed.

This case is interesting because it involved a repetitive use injury but the nature of the injury was a humerus fracture. The W.C.C.A. found that although it is unusual for repetitive activities to lead to an injury of that nature, substantial evidence supported the compensation judge's finding that work activities caused the injury. This evidence included the treating doctor's opinions that repetitive loading and unloading of carry-on luggage caused a stress fracture, which led to the gradual displacement of the humerus.

Walsh v. K-Mart Corp., No. WC12-5442 (W.C.C.A. Nov. 19, 2012). Affirmed.

The main issue in this case was whether a pneumonia-induced coughing spell that led to back pain constituted a superseding, intervening cause of the Employee's back pain and disability, such that the original work-related back injury was no longer a substantial contributing cause of the Employee's condition.

The employee had a compensable 1990 back injury with the Employer that led to a laminectomy. Her pain was mostly relieved, but she had some intermittent flare-ups through the years. She continued to work for the employer for over 15 years, and needed little time off due to back pain. She had a fusion surgery after experiencing increased back pain following a sneezing episode in 2007. After the fusion, she returned to work for the Employer at a very light duty job. In 2009 she developed pneumonia, and during a coughing spell at home, she developed increased back pain, after which time she did not return to work. The compensation judge found that she was permanently and totally disabled due to her original 1990 back injury. The Employer and Insurer appealed, arguing that the coughing spell from pneumonia was a superseding, intervening cause of the employee's disability. Although they acknowledged that a cough or sneeze, in and of itself, does not rise to the level of "superseding, intervening cause" under the law, (and admitted that the 2007 sneeze was not a superseding, intervening cause), they argued that because pneumonia is an "abnormal" illness, and because the pneumonia caused the cough, the cough was a superseding, intervening cause of the disability. The W.C.C.A. rejected this argument and found that a cough or sneeze was not sufficient to be a superseding, intervening cause, regardless of the underlying cause of the cough or sneeze.

FACTORS AFFECTING ENTITLEMENT TO WAGE LOSS BENEFITS

Arbach v. Stevens Cnty. Ambulance Serv., No. WC12-5459 (W.C.C.A. Dec. 18, 2012). Affirmed.

In this case, the W.C.C.A. affirmed the compensation judge's decision to deny the employee's claim for temporary partial disability benefits after two low back injuries on 9/10/2008 and 11/16/2009, both of which were admitted injuries. The employee worked as an EMT and a full-time training coordinator at the time of both injuries with a high average weekly wage due to significant overtime leading up to both injuries.

Subsequently, the employee's job as an EMT was terminated because the County decided to contract with an outside company for those services.

Ultimately, the employee's claims for TPD benefits were denied because the employee failed to conduct a diligent job search, even though she remained employed after both injuries and after leaving the County. She obtained a job at North Memorial Health Care System in August 2010, and worked full-time, but had a claim for ongoing wage loss of about $200.00 per pay period. She did not have any restrictions with respect to the number of hours she could work per week, and had not sought overtime work.

This was a substantial evidence case in which the compensation judge had found that the employer and insurer successfully rebutted the presumption that the employee's actual wages were an accurate reflection of her earning capacity. The compensation judge found in favor of the employer and insurer because the employee had worked significant overtime prior to both injury dates, but then after leaving the County job, she had not continued to work overtime once she obtained other employment.

Here, the compensation judge required the employee to attempt to work overtime if her date of injury weekly wage included significant overtime. However, had the employee shown that she continued look for work or sought overtime, or that she diligently followed the rehabilitation plan, the employee likely would have prevailed on her claim for temporary partial disability benefits.

Garner v. Mobile Washer, et. al., No. WC12-5441 (W.C.C.A. Dec. 4, 2012). Reversed.

This case is very good for Employers and Insurers because it supports the case law that denies an employee temporary total benefits during a period of incarceration. The employee had an admitted right ankle injury and the employer and insurer paid for multiple surgeries and wage loss benefits prior to the employee being incarcerated at Lino Lakes Correctional Facility. He even had a subsequent surgery while incarcerated.

The employer and insurer filed a petition to discontinue benefits alleging that the employee's incarceration constituted a withdrawal from the labor market pursuant to Minn. Stat. §176.101 Subd. 1(f), but the compensation judge denied the petition because the employee's removal from the labor market was primarily because of his medical condition after injury and surgery.

On appeal, the W.C.C.A. overturned the compensation judge and found that this issue has been considered in Hutchins v. Champion Int'l Corp., and what matters most is that incarceration is a withdrawal from the labor market regardless of the employee's work restrictions or being totally disabled to work medically – even after surgery.

This case reiterates a bright-line rule that an incarceration of the employee – who otherwise might be able to claim wage loss benefits – is a withdrawal from the labor market, plain and simple, and discontinuance is appropriate.

MEDICAL TREATMENT & EXPENSE

Schatz v. Interfaith Care Center, No. A11-1171 (Minn. Apr. 11, 2012). Affirmed.

This Minnesota Supreme Court decision affirmed the W.C.C.A.'s decision. The employee sustained a work-related shoulder injury in 2009. Sometime after the injury, she moved to Wyoming, where she continued to treat. The Wyoming medical providers submitted their charges to the work comp insurer, which made payment in accordance with Minn. Stat. § 176.136, subd. 1b(d), which governs payment to out-of-state providers. Pursuant to this statute, the insurer paid the providers the amounts they would have been paid under the workers' compensation laws of Wyoming. Each provider then submitted its unpaid balances (about $7,000.00) to the employee. The employee asked the employer and insurer to pay the balances, but the employer and insurer refused, so the employee filed a medical request. The compensation judge found that the medical charges at issue were within the usual and customary ranges charged in the providers' regions. The compensation judge also found that Minn. Stat. § 176.135 , subdivision 1 was controlling and that the employer and insurer were liable for the balances due to the Wyoming medical providers. Minn. Stat. § 176.135 is the statute requiring the employer and insurer to furnish medical treatment that is reasonably required to cure and relieve from the effects of the work injury. The compensation judge felt it would not be just to require the employee to pay the outstanding balances.

The WCCA had reversed the compensation judge. 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.

The Minnesota Supreme Court affirmed the W.C.C.A., finding that there is no conflict between Minn. Stat. §176.135, subd. 1 and Minn. Stat. § 176.136, subd. 1b(d). The Court noted that the intention of the statutes is to provide benefits to the employee at a reasonable cost to employers. The legislature must change the statutes if it disagrees.

RORAFF FEES

Watson v. Wil-Kil Pest Control, No. WC12-5445 (W.C.C.A. Nov. 1, 2012). Affirmed.

The employee had an admitted right foot and ankle injury in 2008, and the employer and insurer had paid for multiple surgeries. In the summer of 2011, an additional surgery was recommended. In June 2011, when the insurance representative found out the surgery was scheduled, her repeated requests for information about the surgery and the rationale behind the doctor's recommendation were unanswered. The surgery was performed as scheduled on August 15, 2011, and the employee put it under his health insurance. The

employer and insurer scheduled an independent medical examination, and the employee then filed a claim petition on August 26, 2011, seeking approval for the surgery. The records attached to the claim petition constituted the first time the insurer had received any indication of the doctor's rationale for recommending the surgery. The employee canceled a September 17, 2011 IME, and attended a rescheduled IME on October 12, 2011. In his report of November 10, 2011, the IME doctor agreed that the surgery was reasonable, necessary, and related to the work injury. The insurer then agreed to pay for the surgery. The employee's attorney filed a statement of attorney's fees (including a claim for Roraff fees and subdivision 7 fees), but the compensation judge declined to award any attorney's fees since he found that there had not been a genuine dispute.

The W.C.C.A. affirmed the compensation judge. The failure of the treating surgeon to provide the insurer with information about the surgery, and the employee's cancellation of the first IME appointment, were the causes of the delayed approval. The surgery was not an emergency procedure, and it was not delayed by the insurer's actions. The insurer had not taken an unreasonable amount of time to take a position on liability for the surgery, considering the sequence of events.

The lesson from this case is that where there is difficulty in obtaining information about a proposed procedure, which causes a delay of approval of that procedure, it is important to document the attempts to obtain the information from the doctor's office. That way, in the event the employee's attorney claims Roraff fees, the documentation can be used to show that there was no dispute and that the insurer was having difficulty obtaining information about the procedure through no fault of its own.

EVIDENCE

McCarney v. Malt-O-Meal Co., No. WC12-5497 (W.C.C.A. March 5, 2013). Reversed and remanded.

In this case, the compensation judge, Judge Wolkoff, had agreed with the independent medical examination doctor, Dr. Dick, who opined that the employee had not sustained a specific work injury to his low back. Dr. Dick had written that the 60-year-old employee had a preexisting degenerative lumbar spine condition and that his "incident" bending over at work had not really been an injury. Dr. Dick also wrote that it is typical for someone of the employee's age to become symptomatic from time to time, whether it is spontaneously or from "incidents" such as what had happened to the employee when he bent over.

The employee appealed, arguing that Dr. Dick based his medical opinion on an erroneous interpretation of what constitutes an injury under Minnesota Workers' Compensation law. The W.C.C.A. agreed with the employee and reversed the compensation judge, noting that it is well-settled law in Minnesota that if an employee's work activities substantially aggravate or accelerate a preexisting condition, the resulting disability is compensable. It appeared from Dr. Dick's opinion that he did not believe activity-related aggravations should be characterized as injuries. To the extent the compensation judge

relied on this part of Dr. Dick's opinion, the judge had erred. The W.C.C.A. remanded the case back to the compensation judge, because it was possible that Judge Wolkoff interpreted Dr. Dick's opinion in some other way that was not apparent to the W.C.C.A. and that was consistent with Minnesota law.

Based upon this case, questions posed to an IME doctor should be carefully crafted to make sure that the doctor is giving his or her professional medical opinion without contradicting established law. In this case, the employer and insurer could have asked Dr. Dick for a supplemental report clarifying whether the incident at work substantially aggravated or accelerated the employee's condition. Based on the quotes from Dr. Dick's report that are contained within the W.C.C.A.'s decision, Dr. Dick would have answered that the work incident did not substantially aggravate the employee's condition, and then the W.C.C.A. would not have had a reason to reverse and remand Judge Wolkoff's decision.

Copies of these cases can be located at: search.state.mn.us/workerscomp