**Minnesota Case Law Update**

By

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## "Arising out of and in the course and scope of"

**Dykhoff v. Xcel Energy, 840 N.W.2d 821 (Minn. 2013).**

The Supreme Court's decision was handed down on December 26, 2013, and calls into question the way the WCCA had been addressing some kinds of "arising out of and in the course of" cases. In *Dykhoff,* the Minnesota Supreme Court declared that the "increased risk test" determines whether an injury arises out of and in the course of employment. This case brought needed clarity to the confusing case law surrounding the issue by rejecting the less demanding "positional risk test" and the balancing test used in the past ten to fifteen years.

Facts of the Case:
Ms. Dykhoff was attending a required training session when she slipped and dislocated her patella. There was no clear explanation of what occasioned the injury. She did not trip. She was simply walking over a shiny, dry floor on the employer's premises. The Compensation Judge rejected the employee's contention that the floor had been slippery, and denied her claim because she had failed to establish "a risk related to her work activity… that heightened the likelihood of an injury beyond the level of risk experienced by the general public."

The Workers Compensation Court of Appeals reversed, reasoning that the "increased risk" test was not the proper test to apply. They instead applied a balancing test under which a strong "in the course of" showing can balance out a weak "arising out of" showing. In this scenario it was clear that an injury occurred on the employer's premises during work hours, making the "in the course of" element is very strong. The WCCA reasoned that this element's strength made up for any deficiencies in the "arising out of" element. Therefore, the WCCA found the claim compensable.

The Supreme Court then reversed the WCCA. The Court emphasized that employees bear the burden of proving two distinct elements to establish causation. The "in the course of" element requires an injury within the time and space of employment. The "arising out of" element requires a causal connection between employment and the injury. This causal connection is proven by identifying some *increased risk* or *special hazard* associated with the employment. Any test that does not require separate showings of both elements "fails to give effect to all parts of M.S. § 176.021."

The Court went on to affirm the Compensation Judge's finding that the employee's employment presented no "special hazard" which subjected her to a greater risk than her everyday affairs. Therefore, she failed to prove that her injury "arose out of" her employment.

**Kainz v. Arrowhead Senior Living Community, W.C.C.A. April 1, 2013.**

The employee here was a licensed practical nurse who worked at a senior living community. Her job included dispensing medications. On the date of injury, the Employee left the main floor to retrieve medications from a locked cage in the basement. She had to walk down two flights of stairs. While going down the second flight of stairs, the Employee twisted her ankle, causing an avulsion fracture. The employer and insurer denied the injury on the basis that it did not arise out of and in the course and scope of her employment.

The compensation judge found the injury did arise out of and in the course and scope of employment. The judge found that the general public was excluded from using that stairway and that there was no hand rails on the portion of the stairway where the employee twisted her ankle. So, the judge used the increased risk test.

On appeal, the WCCA affirmed. They noted, as they had in Dykhoff, that given the strong "in the course of element," together with the unexplained nature of the injury, the compensation judge did not err by finding that the ankle injury arose out of and in the course and scope of her employment. Under the Supreme Court's decision in Dykhoff, we now know the W.C.C.A.'s analysis in Kainz was wrong. It is no longer acceptable to find in favor of the employee just because the "in the course of" element is strong. However, the outcome of Kainz likely would be the same under the new analysis set forth in Dykhoff, because the fact that the stairway did not have a railing presented enough of an "increased risk" to the employee such that her injury arose out of her employment.

**Villarreal v. AAA Galvanizing, W.C.C.A. Oct. 4, 2013.**

This is another case that the WCCA decided before Dykhoff. In Villarreal, the employer and insurer unsuccessfully appealed a compensation judge's finding that an employee's left knee injury arose out of and in the course of his employment. On the date of the injury, the employee had arrived 10 to 20 minutes before his scheduled shift and parked in the employer's parking lot. As he exited his vehicle, he placed his left foot on the parking lot surface, turned to the left, and felt a popping sensation and pain in his left knee. The compensation judge found that this constituted a compensable injury.

The WCCA determined that the injury arose out of and in the course of employment, and although the analysis in the case would be slightly different after Dykhoff, the outcome would likely be the same. In Villarreal, the WCCA analyzed both prongs of the "arising out of" and "in the course of" requirement. They found that the time, place, and circumstances indicated the employee was "in the course of his employment." He was in the process of exiting his vehicle in order to walk from the employer's parking lot to the employer's building. With respect to the "arising out of" element, even though the activity the employee was engaged in at the time of the injury (departing from his car) was not unique to his employment, the WCCA correctly pointed out that injuries that occur as a result of actions which could have occurred just as easily elsewhere may be compensable. This is still true after Dykhoff. The difference between the facts in Dykhoff and the facts in this case was that in Dykhoff, there was no explanation for the employee's mechanism of injury. In Villarreal, the compensation judge found that that the injury was not without explanation; it occurred because of the way that the employee needed to pivot his leg when exiting his vehicle, due

to the origin of the parking spaces in relation to the employer's building. The injury was "caused by the manner in which the employee moved as he was starting to walk from the employer's parking lot into the employer's building," so it was compensable.

**Weismann v. Tierney Bros. Constr., W.C.C.A. Oct. 18, 2013.**

On the date of the injury, the employee and the company owner were traveling together between work locations – the employee was effectively a traveling employee at the time. They came upon the scene of a car accident. The employee told the owner to stop the vehicle so they could get out and help. The owner initially refused, but then agreed to pull over, at which point he and the employee both ran toward the accident scene. The owner helped a motorist who was trapped in his vehicle. The employee pulled one of the motorists out from her burning vehicle, which exploded. The employee was exposed to fire and smoke, and claimed entitlement to certain workers' compensation benefits based on pulmonary injuries and post-traumatic stress disorder. The employer and insurer denied primary liability, arguing that the employee had not been acting in the course and scope of his employment when he was allegedly injured. The compensation judge awarded the benefits.

The WCCA acknowledged that the employee was not *required* to help the accident victims, but also noted that the owner of the employer had been driving and had pulled over and stopped. The fact that the owner pulled over, ran to the accident scene, and helped a motorist was an implicit direction to the employee to participate in the rescue. It is implied that the outcome would have been different had the employee been in the driver's seat and decided to pull over and help against the wishes of the employer owner.

**Walch v. W.L. Hall Co., W.C.C.A. Sep. 12, 2013.**

An injury sustained by a construction worker while driving from his employer-provided motel lodging to a fixed out-of-town job site did not arise out of and in the course and scope of employment. The employee was not a traveling employee because he worked at a specific job site for several months, during specified hours, and was not engaged in performance of his job duties at the time of the accident.

## Causation and other issues/defenses affecting primary liability

**Schuette v. City of Hutchinson, 843 N.W.2d 233 (Minn. 2014).**

The Minnesota Supreme Court decided this post-traumatic stress disorder (PTSD) case on March 5, 2014.

In *Schuette*, the employee, a police officer for the City of Hutchinson, responded to an accident at the local high school. He administered CPR on a girl who had fallen out of the back of a pick-up truck and sustained serious head trauma. The employee realized he knew the girl and her family. The girl died from her injuries, and the employee brought a workers' compensation claim after developing symptoms that were diagnosed as PTSD.

At the hearing, the employee and employer presented expert witnesses who presented divergent opinions on whether or not PTSD causes a physical injury to the brain. After considering the expert reports and radiographic evidence, the compensation judge adopted the employer's expert witnesses' opinion, denied the claim, and found the employee's PTSD represented a mental disability that was not compensable.

The WCCA unanimously affirmed citing *Lockwood v. Independent School District No. 877*, 312 N.W.2d 924 (Minn. 1981), which stands for the proposition that a mental injury resulting from mental stimulus is not compensable. In order to be compensable under the Act, there must be a physical component to the employee's claim and the physical symptoms must be independently treatable physical injuries. Because the Compensation Judge found these symptoms were absent from the employee's claim, the Minnesota Supreme Court affirmed.

Due to a recent legislative amendment that took effect on October 1, 2013, there is now a clear distinction between how workers' compensation judges will treat PTSD claims brought before and after that date (the claim in *Schuette* pre-dated the amendment). PTSD claims after October 1, 2013 may be compensable if certain statutory requirements are met.

**Bitterman v. Safe Way Bus Co., Inc., W.C.C.A. Oct. 31, 2013.**

The employee was occupied doing maintenance work when he allegedly fell from a short ladder hitting his head and back. Without a telephone to call for help and in a daze, he attempted to drive to his daughter's home, but ended up in the middle of her yard slumped over the steering wheel with the horn blaring. When the employee arrived at the hospital his blood alcohol level was found to be 0.29, about three and a half times the legal limit to drive a motor vehicle.

The employee testified at hearing that he drank 12 to 15 beers at a party the night before. However, he testified that he was not intoxicated that night. In fact, he testified that he would drink six to eight beers a day, on average, and that he would need to drink a case of beer to become intoxicated.

The employer and insurer called a forensic toxicologist who offered the opinion that the employee was intoxicated. A supervisor did concede that the employee did *not* show signs of intoxication the day of the accident, nor on any work day.

M.S. §176.021, sub. 1, provides that the employer is not liable for compensation if "intoxication of the employee is the proximate cause of the injury." A proximate cause is more than a simple a contributing cause. The compensation judge found that while the employee was intoxicated, this intoxication was not the proximate cause of the employee's work injury.

On appeal the WCCA affirmed the compensation judge citing the high legal standard of proximate cause. Even in the face of uncontroverted expert testimony, the compensation judge must determine if the evidence meets the proximate cause standard. If there is substantial evidence to support the judge's finding it will be upheld and and that is what the WCCA did in this case.

**Bowman v. A & M Moving & Storage Co., W.C.C.A. Aug. 14, 2013.**

In January 2014, the Minnesota Supreme Court affirmed, without an opinion, this WCCA decision affirming a compensation judge's finding that the employee's death from a prescription drug overdose was causally related to the work injury.

On July 27, 2007, the deceased employee sustained a work-related lower back injury while working as a mover for A & M Moving & Storage Company. The employee was placed on several prescription medications, including Oxycodone. The employee had back surgery on November 26, 2008. Approximately six months later, his doctor recommended fusion surgery. The employee reported a history of alcohol abuse and chemical dependency treatment. He was still taking Oxycodone pending approval of the fusion surgery.

Initially the insurer denied the request for fusion surgery based on an Independent Medical Examination. In August 2009, the employee filed a medical request and a hearing was ultimately scheduled for December 22, 2009. Until then, the employee was prescribed, among other things, Oxycodone (although the prescribing doctor advised to cut back on pain medication). A neutral evaluator examined the employee.

A few days later, on November 26, 2009, the employee was found dead in his apartment. An autopsy report concluded the cause of death was Oxycodone toxicity. The Oxycodone level was at least 500 percent higher than what is considered therapeutically typical. The medical examiner ruled out death by natural causes, homicide, and suicide. The ME also determined the death was an accident, and the level of Oxycodone found in his blood could be reached either inadvertently or by recreational use.

A compensation judge found that the employee's death *was* causally related to his July 2007 work injury and awarded payment to the employee's estate, as well as funeral and burial expenses.

Employer and insurer appealed asserting that the compensation judge had used an inappropriate causation standard when considering whether or not the employee's death was causally related to the work injury. The WCCA indicated that for a causal relationship to exist between the employee's death and the employee's work injury condition need not be a sole or even direct cause provided the employee demonstrates that the compensable injury was a contributing factor in the death. The WCCA outlined evidence, including evidence based upon the medical examiner's opinion, that supported such a causal link and indicated that there was sufficient evidence to support the compensation judge's finding under the clearly erroneous standard of review.

**Couette v. Parsons Electric, LLC, W.C.C.A. Sep. 20, 2013**

This case involves an employee who suffered an admitted left ankle injury requiring two surgical procedures to the left ankle which were paid by the employer and insurer. Subsequently, after the failure of the second surgical procedure, it was recommended that the employee undergo a left ankle fusion procedure. Over a period of three months surrounding the second surgery date, the employer and insurer conducted multiple days of surveillance. During this time the employee was

shown involved in several weight bearing activities involving the relevant lower extremity. This was contrary to his work restrictions as assigned by his treating physicians and various recommendations of the treating physicians.

The request for the fusion surgery was disputed by employer and insurer who asserted that the employee's unreasonable and negligible behavior constituted a superseding, intervening cause in his need for surgery.

The independent medical examiner in the case opined that the need for the fusion surgery was due to two prior failed attempts to repair the left ankle. The failure of prior surgeries was caused by the employee's failure to follow recommendations to remain non-weight bearing. The employee's treating physicians opined that the scientific evidence was not clear as to the exact amount of time the employee should remain non-weight bearing following the first two surgeries that were performed. As such, the treating physician felt that the employee's level of compliance would not be on top of the list of possible causes for the failure of the surgical procedure.

The compensation judge adopted the opinion of the independent medical examination doctor and denied the employee's entitlement to the proposed fusion surgery.

The WCCA noted that this was a question of fact and that there was substantial evidence to support the finding of the compensation judge. They outlined that the applicable legal standard in this case was that "treatment is compensable, so long as it could be said that the additional care was 'a natural cause flowing from the primary injury' and not the result of 'unreasonable, negligent, dangerous or normal activity on the part of the employee.'" Further, they affirmed that if a "subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the employee's customary activity in light of the employee's condition, then such additional medical care for the aggravation is not compensable." As the compensation judge applied this standard, and the factual determinations were supported by substantial evidence of the ruling of the compensation judge was affirmed.

**Colic v. TCF Fin. Corp., W.C.C.A July 11, 2013**

The employee was walking in the employer's premises when she slipped and fell, landing on her right side. She had previously experienced low back symptoms with symptoms radiating down into the right lower extremity, but claimed that the symptoms were increased following the work incident.

The employee's treating physician opined that the employee had a diagnosis of low back pain and leg pain. Subsequently he wondered if there was possible irritation of sacroiliac joint. Based upon the employee's report of symptoms, such problems would have been consistent with that type of injury.

An independent medical examiner opined that the employee had no evidence in the objective clinical findings and that there was no physical evidence of any abnormality. He described the treating physician's diagnosis as "not really a diagnosis, but a description of symptoms."

The compensation judge determined that the employee had failed to prove that she suffered a personal injury arising out of her employment. The Court of Appeals interpreted the judge's memorandum as suggesting that the judge felt that a specific diagnosis with objective findings were necessary to establish a personal injury. They noted that while objective findings were necessary for a determination of permanent partial disability, there was no such requirement in determining the existence of a personal injury as defined by the statute. The Court of Appeals went on to further state that a medical expert need not pinpoint the exact etiology of the disease or condition for the resulting disability to be compensable. The case was remanded for further consideration as it appeared that the compensation judge may have used the inappropriate legal standard.

## Issues with IME reports

**Harvey v. Central Lutheran Church, W.C.C.A. May 28, 2013.**

This was an admitted low back injury with an IME performed three years after the date of injury. The IME doctor opined that the work injury was a low back strain, that maximum medical improvement had been reached within six weeks of the date of injury, and that the employee needed no further medical care or restrictions. The compensation judge wrote that he was adopting the IME doctor's opinions and that the employee's work injury was temporary and had fully resolved within six weeks.

In this case, the WCCA actually reversed the compensation judge and found that substantial evidence did not support the compensation judge's decision. The first reason was that the IME doctor had written that MMI had been reached in six weeks, but had not written that the injury had fully resolved in six weeks, so therefore it was incorrect to use the IME doctor's report as a basis for finding that the injury fully resolved within six weeks. Second, the court found deficiencies in the IME doctor's report, including that he did not explain *why* he felt MMI had been reached within six weeks. Due to the chronology of events in this case, the evidence presented, and the distinction between MMI and resolution of a temporary injury, the WCCA reversed the compensation judge.

**Huebbe v. Dairy Farmers of America, W.C.C.A. April 16, 2013.**

This was another case in which the WCCA overturned a compensation judge's decision due to inadequacies in the IME report upon which the compensation judge relied when making the decision. In this case, the employee sustained an admitted, specific low back injury at one employer, and subsequently began work at a new employer. The first employer's IME doctor did find that the employee had sustained a low back injury at the first employer, but he also opined that the employee sustained a second injury at the second employer, and that this second injury was responsible for the employee's low back condition and need for treatment. The second employer's IME doctor opined that no injury occurred at the second employer. The compensation judge found that, on the basis of the first employer's IME doctor's report, the employee had sustained a Gillette injury at the second employer, but that the low back condition and need for treatment could be apportioned 50/50 between the first, specific injury and the later Gillette injury.

The WCCA found that the compensation judge erred in relying on the first employer's IME doctor's report to find that a Gillette injury had occurred at the second employer. The first employer's IME report had several problems. First, the doctor gave no explanation for why he felt the employee had sustained an injury at the second employer, nor did he state whether this injury was specific or Gillette in nature. Also, he gave no indication of what he understood her work duties at the second employer to be, or how long she had worked there. The doctor had referred to "updated information" in support of his finding that a second injury had occurred, but did not indicate what this "updated information" was, nor did he explain why it supported his conclusions.

## Determining entitlement to benefits where injury is admitted

**Goetzinger v. K-Mart Corp., W.C.C.A. Aug. 23, 2013.**

In 1983, the employee sustained a work-related low back injury while working as a retail clerk at a K-Mart store. The employee underwent surgery and was placed on permanent work restrictions not to lift or carry more than 25 pounds. The employee worked several jobs over the next 30 years. In May 2012, after quitting a job for personal reasons, the employee saw a Qualified Rehabilitation Consultant, who determined she was qualified for rehabilitation services. A few months later the employee began working part-time as a school cook

An employee is "qualified" for rehabilitation services if, "because of the effects of a work-related injury" the employee "is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation" and "can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability." Minn. R. 5220.0110, subp. 22, items A and C. In this case, the WCCA upheld the finding that the employee was qualified because there was ample evidence in the record that the 1983 injury precluded her from engaging in her "usual and customary" occupation as a retail clerk, an occupation which requires significant lifting, bending, and stooping. The employee testified that she was unable to perform these job duties following her injury. Additionally, in January 2013, another doctor examined the employee and stated that the 1983 injury substantially contributed to the employee's ongoing low back pain and disability, and provided several restrictions, including no lifting over 25 pounds.

The WCCA noted that pre-injury, the employee had a full-time job with fringe benefits, including generous employer-paid healthcare, life and disability insurance. But post-injury, she only had part-time employment and had to pay out-of-pocket for medical benefits. K-Mart and its insurer argued that the lack of employer-paid fringe benefits is an economic trend that is not causally related to the disability in question. But the WCCA stated the question of eligibility centers on whether an employee's economic status as a whole is "as close as possible to that which the employee would have enjoyed without the disability." K-Mart and its insurer also pointed out that the employee had a higher hourly wage in 2012/2013 than she did in 1983. The WCCA explained an employee's eligibility for rehabilitation services is measured differently than wage replacement benefits. The WCCA also adopted the Qualified Rehabilitation Consultant's testimony that the part-time job as a school cook did not return the employee to a suitable economic status when con-

sidering the cost of living increase since 1983.

Although the employee voluntarily resigned from her job at Quik Trip for personal reasons that were unrelated to her injury, the employee was not barred from rehabilitation services. The record showed she made a diligent job search by seeking the assistance of the Qualified Rehabilitation Consultant. The WCCA did not wish to deny rehabilitation services to someone simply because she was able to find some form of employment. The WCCA also pointed out the employee is now 58-years-old and has a high school education. Despite a desire to find full-time employment, she has been dealing with a 30-year work-related injury, which limits her employment opportunities.

**Bell v. State Dept. of Transportation, W.C.C.A. Oct. 30, 2013.**

The WCCA affirmed a compensation judge's decision to deny additional penalties under Minn. Stat. § 176.225 for failure to pay permanent partial disability benefits where the employer/insurer had good faith defenses.

In March 2010, the employee sustained traumatic injuries to multiple body parts while working on a highway construction crew for the Minnesota Department of Transportation.

According to an HCPR, the employee had reached maximum medical improvement with a combined permanent partial disability rating at 21%. Because an 8% rating for a jaw fracture was omitted, the adjuster mistakenly believed the permanent partial disability rating for the total body was 21% when in fact it was 29%. The chart notes, which were emailed to the claims adjuster, listed the correct total body rating, but the adjuster was unaware of the discrepancy. No minimum ascertainable ratings were paid at that time.

Approximately two months later, in December 2011, the adjuster wrote the employee a letter stating permanent partial disability payments would not be made at that time, that the total amount of permanent partial disability ratings was 21%, and that an independent medical examination for a second opinion on the permanent partial disability rating would be scheduled at some point. The employee retained an attorney who contacted the adjuster, explaining there was an error in the report and requested the insurer begin paying the minimum permanent partial disability payments based on the correct 29% total body rating. A few days later, the employee received a permanent partial disability payment but only for one body part, his rotator cuff, which was rated at 6%.

The employee brought a claim for penalties under to Minn. Stat. § 176.225 claiming the employer unreasonably or vexatiously delayed payment, neglected or refused to pay compensation, and for an inexcusable delay in payment.

If a rating is disputed, periodic payments must begin on the undisputed minimal ascertainable amount and, within 30 days, the employer and insurer also notify the employee in writing they have scheduled independent medication examination. Minn. R. 5220.2550. If there is a delay in payments, a compensation judge may impose penalties on the employer and insurer under M.S. §176.225. Whether a penalty is appropriate is generally a question of fact for the compensation judge and is discretionary.

In this case, the rules clearly were not followed by the insurer and employer. There were multiple missed deadlines for permanent partial disability payments, which most likely should have begun after receiving the occupational medicine specialist's report in October 2011. The compensation judge found the delay in the initial minimum payments was unreasonable and inexcusable, and awarded penalties on those grounds.

But the judge also found that penalties were not appropriate where the employer raised defenses in good faith that were not frivolous or for the purpose of delay. For instance, the judge found the employer was not solely responsible for the delays in obtaining signed authorizations to retrieve the employee's medical records. This delay slowed down the process and, in part, contributed to the late payments. The WCCA affirmed the compensation judge's decision allowing some penalty claims and denying others.

**Eager v. Haugen Transit, 73 W.C.D. 207 (W.C.C.A. April 1, 2013).**

This case involves a 1981 date of injury and a dispute over the employee's entitlement to temporary total and/or temporary partial disability benefits from July 2011 through March 2012. The case was tried on stipulated facts.

The employee suffered an admitted low back injury that was permanent and resulted in permanent work restrictions. Leading up to July 2011 he returned to work at a permanent position with a different employer that resulted in ongoing wage loss and the employee was receiving temporary partial disability benefits. During the period of claimed wage loss the employee became unable to work because of a personal medical condition that was not related to his employment or work injury. During that time period he did not conduct job search because the current employee was holding open his position for when he returned from the personal medical condition.

The employer and insurer actually paid wage loss during this time and claimed an entitlement to credit for overpayment. The compensation judge found that the employee was not entitled to temporary total disability or temporary partial disability benefits when he was disabled for reasons unrelated to the work injury.

The Court of Appeals reversed the determination of the compensation judge indicating that the compensation judge erred in the application of law in effect for the 1981 date of injury. It was pointed out that though the 1981 law required an employee to be able to work in order to receive temporary partial disability benefits, that employee need not actually be working. It wasn't until 1983 when the wage loss provisions were revised to eliminate temporary partial disability where the employee was not employed. Prior to that point in time, temporary partial disability benefits were based upon a reduction in earning capacity.

The Court of Appeals determined that the employee's personal medical condition did not alter the employee's ability to work or his earning capacity as related to the 1981 injury and so he was entitled to receive benefits at the temporary partial disability rate during the period when he was off work from 2011 through 2012.

**Beekman v. JPS Lawn Service, W.C.C.A. Feb. 18, 2014.**

This case presented the WCCA with an opportunity to review a compensation judge's determination of temporary total disability entitlement based upon a compensation judge's determination that the employee had been released to return to work without restrictions for a period of one month following ongoing medical treatment but before a subsequent surgery.

The employee suffered a 2011 date of injury leading to a fracture of his left clavicle. The employee underwent ongoing medical treatment including ORIF with continuing symptoms. On April 1, 2013, after a significant amount of medical treatment, the employee's treating physician completed a return to work form indicating that the employee could return to work with no restrictions effective April 1, 2013. However, on the same date he issued a medical note indicating that the employee will probably need restrictions and he would recommend either a work hardening program and/or functional capacity assessment before clearance would be given for the employee to return to work. At hearing the QRC testified that the doctor had also expressed the desire to have the employee complete work hardening and a functional capacity assessment before returning to work.

At the same time the employee was receiving additional treatment from separate physicians for a non-work related medical condition that may also have played a role in his inability to work.

The Court of Appeals reviewed the case under a Hengemuhle standard and determined that the compensation judge's finding was not supported by the evidence. They pointed out the inconsistency of the release without restrictions from the employee's treating physician on the date of which the release was issued. They also noted the long history of two years of medical treatment with restrictions being in effect the entire time, and then restrictions subsequently being reinstated one month later with a second surgical procedure. Given the context they felt there was insufficient evidence to support the factual findings of the compensation judge and reversed.

**Spoelstra v. Wal Mart Stores, W.C.C.A. Jan. 27, 2014**

This case involved an employee suffering a permanent and admitted right wrist injury leading to light duty work restrictions. The date of injury employer was able to keep the employee working in a series of temporary positions without ongoing wage loss. When the employee's restrictions became permanent the employer offered a permanent position as a pharmacy technician with work specified as occurring between 8:00 a.m. and 10:00 p.m. and with an indication that the position required meeting state requirements to work as a pharmacy technician, but not specifying what those requirements were. In follow up conversations with the QRC the employee was unable to determine what those specific requirements would be and what times she would be required to work. It was also determined that the wage would be slightly less than what the employee was making at the time of the job offer, but still in excess of the date of injury average weekly wage.

The employee declined the job offer and the employer treated this as a voluntary termination of employment. Less than one week later the employee took a part time position as a housekeeper

working 15 to 20 hours per week. She had a claim for six days of temporary total disability benefits and ongoing temporary partial disability benefits after that time.

The employer and insurer denied the temporary total disability asserting there was a refusal of a job offer and denied the temporary partial disability alleging that this didn't accurately reflect the employee's earning capacity.

With respect to the temporary total disability claim the compensation judge determined that the employee's rejection of the job offer was reasonable and therefore this did not constitute a bar to the temporary total disability claim. However, on review, the Court of Appeals didn't even address that aspect of the compensation judge's finding, determining that the statutory defense asserted by the employer and insurer under M.S. §176.101, Subd. 1(i) was inapplicable because this statutory section allowed for temporary total disability benefits to cease when an employee refuses an offer of work that fulfill such statutory requirements. As the employee was not receiving ongoing temporary total disability benefits at the time of the refusal, this defense was held to be inapplicable.

With respect to the temporary partial disability claim, the courts outlined how actual earnings are presumed to be an accurate reflection of the employee's earning capacity and further pointed out that the job offer presented by the employer was inapplicable as the position was no longer open during the claimed period of temporary partial disability. Further, under applicable case law regarding termination for reasons unrelated to the work injury, the employee only would be subject to suspension of entitlement to workers' compensation benefits until the employee re-established entitlement to benefits by showing a causal relationship between the work related disability and the loss of earning capacity. This is ordinarily established by showing ongoing work restrictions and demonstrating job search.

**Ahmed v. Loop Parking Co., W.C.C.A. Oct. 15, 2013.**

The employee unsuccessfully appealed an order granting discontinuance of temporary total disability benefits because he had refused an offer of work under M.S. §176.01, subd. 1(i).

The employee worked as a parking lot attendant during the day shift. The employer lost its account with the parking lot the employee attended. But instead of terminating him, the employer temporarily moved the employee to the night shift at a different parking lot. While working the night shift, the employee sustained an admitted work injury to his right knee in January 2012. He had right knee surgery in October 2012 and on December 6, 2012 he was released to work with restrictions (no running or retrieving vehicles). The employee was receiving ongoing temporary total disability.

On December 14, 2012, the employer offered employee a parking lot cashier job during the night shift. The employee did not dispute the job was within his restrictions.

On Saturday, December 15, the employee called the general manager back and stated he would need until Monday in order to arrange child care. He called again on Monday stating he was having difficulty making such arrangements. The parties agreed the employee would let the employer know whether or not he accepted the job by December 24, 2012.

The general manager claims prior to December 24, the employee said he was having new health issues and declined the offer. But the employee claims he never said that. Before the end of business on December 24 (the last day to accept the job) the general manager sent the employee's QRC an email stating the employee "was unable to return to work at the position we offered him" and the employer had to fill the position with another employee.

Under M.S. §176.01, Subd. 1(i), temporary total disability benefits shall cease if the employee refuses an offer of work consistent with a plan of rehabilitation filed with the commissioner or, in the absence of such a plan, if the employee refuses an offer of suitable employment that the employee can do in his physical condition. Refusal of a job offer may be construed where it is clearly apparent from the employee's conduct. An example is when there is an unjustifiable and intentional failure to respond to the job offer in a reasonable time. *Opsahl v. K & S Hearing*, No. WC06-134 (W.C.C.A. August 15, 2006).

Here, the compensation judge weighed the credibility of the employee against the general manager, who testified the employee had refused the job during the phone conversation on December 22. The judge concluded [i]t is reasonable to consider it a refusal of the job offer when the employee did not accept the job by the deadline, request an extension of time, or provide medical documentation of [an]inability to work." Temporary total disability was denied and the WCCA affirmed.

## Wage/Rate issues

**Olson v. Dart Distrib., Inc., 73 W.C.D. 227 (W.C.C.A. April 4, 2013)**

In this case, there was no dispute that the employee was permanently and totally disabled and that for purposes of permanent total disability benefits, he was entitled to 65% of the statewide average weekly wage on the date of his injury. The dispute was over how that permanent total disability compensation rate should be adjusted over time. The employee argued that he should be continued to be entitled to 65% of the statewide average weekly wage as it changed each year but the employer and insurer argued that he was entitled to 65% of the state average weekly wage on the date of his injury, subject to adjustments based on the more moderate adjustments outlined in M.S. §176.645. The compensation judge and the WCCA both found that the employer and insurer were correct. Where an employee's average weekly wage leads to the employee receiving 65% of the statewide average weekly wage as the permanent total disability compensation rate, that amount is then subject to the 176.645 adjustments, and not the adjustments that are made to the statewide average weekly wage each year.

**Halls v. Minnesota Swarm Lacrosse, 73 W.C.D. 311 (W.C.C.A. Apr. 30, 2013).**

In this case, the employee received both Minnesota workers' compensation benefits from the employer and insurer, and Canadian Unemployment benefits. The Canadian Unemployment Office did not intervene, and the compensation judge allowed an offset for the unemployment benefits based on the evidence that the Canadian government had no intention of requiring the employee to

reimburse them for the unemployment benefits that he received. However, the WCCA reversed and found that the compensation judge did not have jurisdiction to allow this offset due to the Canadian Unemployment benefits. An offset can be allowed for workers' compensation benefits received from another jurisdiction in some cases, but this case did not involve workers' compensation benefits from another jurisdiction, but instead involved unemployment benefits from another jurisdiction. Therefore, it was an error for the compensation judge to find that the offset was allowed.

**Hartwig v. Traverse Care Center, W.C.C.A. Dec. 23, 2013**

In this case, the WCCA found that once the employer and insurer had paid $25,000 in compensation, they were entitled to reduce the employee's permanent total disability benefits by the amount of retirement benefits being paid to the employee through the Public Employee's Retirement Association.

**Ekdahl v. I.S.D. 213, W.C.C.A. Dec. 24, 2013.**

Once $25,000 in weekly compensation had been paid, the employer was entitled to reduce the employee's permanent total disability benefits by the amount of retirement benefits that he was receiving through the Teacher's Retirement Association.

**Larson v. PDI Foods, W.C.C.A. Feb. 18, 2014.**

Shortly after the employee's injury, the employer changed their pay system from a salary based system to an hourly rate system. The employer and insurer argued that due to this company wide change, the employee's wage and earnings were lower than they had been when he was on salary leading up to the injury, and his average weekly wage should be lower. However, the compensation judge found, and the WCCA agreed that this post injury change from salary to hourly does not have any affect on the proper average weekly wage to use for purposes for calculating the employee's ongoing wage loss benefits.

## Medical treatment – reasonableness, necessity, treatment parameters, fees, etc.

**Kuhnau v. Manpower, Inc., W.C.C.A. Dec. 16, 2013.**

In Minnesota, an employer has a responsibility to provide medical treatment that is reasonable and necessary to care and relieve the employee from the effects of a work injury. M.S. §176.135. This includes providing whatever transportation assistance is reasonably required to allow the employee to obtain proper treatment, and an employee is entitled to reimbursement of reasonable medical mileage expenses.

In this case, the employee sustained an admitted low back injury in 1988 and entered into a stipulation for settlement, settling past and future claims for indemnity benefits but leaving open reasonable, necessary, and causally related medical expenses. In 2012, the employee requested authorization for a multi-level fusion surgery, which a compensation judge granted. Following the surgery,

the employee could not drive himself to medical appointments, so he claimed entitlement to payment, on an hourly basis, for his wife's time in caring for him, which included the time she spent driving the employee from Alexandria to the Twin Cities for treatment. Her time was calculated using the wage she had earned in her job prior to retirement.

At a hearing on the matter, the compensation judge found the wife's services were "necessary for transportation" to medical appointments and awarded reimbursement of mileage and meals associated with medical travel, but denied the claim for reimbursement of the wife's time.

On appeal, the WCCA reversed the judge's decision and remanded for a decision and award of reasonable compensation for the employee's wife's assistance for driving the employee to necessary medical appointments. The WCCA noted, the wife was "simply providing a service incidental to the required medical treatment itself, and, if an employer would be liable for the cost of medical or other transportation without such help, there is no basis for denying a reasonable fee to the spouse. In fact, the help of family and friends in cases such as this one is likely to be less expensive than other forms of transportation. As such, compensating family and friends for the employee's necessary transportation to medical treatment is likely to reduce overall costs to the system."

The WCCA provided some guidance as to what the compensation judge should consider when deciding what constitutes reasonable reimbursement. Time is one factor. Additionally, a judge may also award payment for meals and mileage separately, or may include those expenses in her decision as to what constitutes a reasonable transportation expense overall.

The holding in this case was limited to transportation for medical treatment. The WCCA highlighted other necessary driving may be compensable if the employee is permanently and totally disabled, under other case law, and did not expand upon that.

**Dahl v. Rice County, W.C.C.A. Oct. 2, 2013.**

The employee unsuccessfully appealed from a compensation judge's denial of his claims for neuropsychological testing and psychotherapy treatment.

The employee worked as a deputy sheriff for the employer, Rice County, from 1992 until 2005 during which time he sustained four admitted work injuries:

1. The first injury happened in 1996, when the employee twisted his back reaching in to his squad car to retrieve files. Four months later, he underwent back surgery.

2. The second injury occurred in 1999 when the employee was responding to an emergency call. While traveling at a high rate of speed, the employee rolled his squad, hit his head and was temporarily knocked unconscious. He was diagnosed with a head trauma and a mild concussion, but a CT scan did not show any abnormalities. The employee testified at the hearing that he had memory and concentration problems following this injury.

3. The third work injury occurred in April 2002, when a flash-bang grenade detonated causing permanent hearing loss in his right ear.

4. The fourth injury took place in August 2005 after his boss, the sheriff, struck him in the chest during an argument causing him to fall backwards. The employee was diagnosed with an exacerbation of his back condition.

From August through January 2005, the employee was treated by a psychologist for symptoms of anxiety, depression, and post-traumatic stress disorder associated with the altercation with the sheriff. He was given prescription medication. In March 2007, the employee was still in therapy sessions for his mental health symptoms, including concentration problems, which he related to the 1999 and 2005 work injuries. The employee was diagnosed with ADHD and given medication.

The employee had back surgeries in 2006 and 2009, but his back symptoms continued to worsen. His family doctor referred him to pain clinic where he saw Dr. Matthew Monsein. The employee told Dr. Monsein he was being treated for depression, anxiety, ADHD, *and had been diagnosed with a traumatic brain injury from the 1999 motor vehicle accident*. Dr. Monsein recommended a formal neuropsychological evaluation to determine whether the employee's memory and concentration issues might be related to a traumatic brain injury.

Dr. Paul Arbisi, a psychologist, evaluated the employee in December 2011 and again March 2012 on behalf of the employer and insurer. Dr. Arbisi concluded psychiatric treatment was unrelated to any of his work injuries and did not consider Dr. Monsein's proposed neuropsychological evaluation reasonable or necessary.

From January through March 2012, the employee had six visits for chronic pain and neuropsychological evaluation with Dr. John Patrick Cronin. He concluded the employee had a traumatic brain injury caused by at least one work injury, and that the work injuries were a substantial contributing cause of the employee's psychiatric condition, including chronic pain, anxiety, depression and post-traumatic stress disorder. He recommended further psychotherapy treatment.

In January 2013, Dr. Monsein again examined the employee. Although he could not state within a reasonable degree of medical certainty whether the employee's current mental health issues, (including concentration, memory, and depression) were due to a traumatic brain injury, he did believe these problems were related to the employee's work injuries. He recommended the employee be evaluated at the VA Hospital in Minneapolis.

A compensation judge determined the employee had sustained a psychological injury in the form of depression resulting from chronic pain syndrome associated with his four work injuries. The judge found the treatment for depression was reasonable and necessary.

However, the judge denied reimbursement for the six visits with Dr. Cronin because the evidence failed to support a finding that the employee's ADHD or memory problems were causally related to the work injuries. The judge further found that the evidence failed to support a finding that the employee had a traumatic brain injury and that the neurological evaluation with Dr. Cronin was not reasonable or necessary for treatment or diagnosis of the effects of the employee's work injuries. The judge also denied the employee's request for additional psychotherapy sessions for the same reason.

The employee argued that even if the purpose of medical testing was to assess a potential

non-work-related condition, it was still compensable where it would have assisted the treating doctors in their treatment of the employee's work injuries by ruling out an alternative explanation for some of the reported symptoms. It is true that diagnostic testing to "rule out" other possible causes for the employee's apparently work-related symptoms may be considered a reasonable medical expense to be covered by workers' compensation. *Abdelrazig v. American Bottling Co.*, No. WC06-166 (W.C.C.A. Nov. 16, 2006).

But in this case, there was an incorrect assumption on the part of the medical provider (Dr. Monsein) making the recommendation for further testing because *the employee had never been diagnosed with a traumatic brain injury.* Whether the purpose of diagnostic testing is to rule out other causes of work-related symptoms or, instead, is only to help diagnose a non-work condition is a question of fact for the compensation judge. *Stolp v. Cardinal Drywall, Inc.*, slip op., (W.C.C.A. July 19, 1994). The W.C.C.A. did not disturb the compensation judge's findings on these issues.

**Colindres v. ABM Janitorial Servs., W.C.C.A. Oct. 1, 2013.**

The employer and insurer unsuccessfully appealed a compensation judge's findings that the employee had incapacitating back pain and the proposed back surgery was reasonable and necessary. The arguments of the employer and insurer were based upon the treatment parameters.

The employee injured his low back on two occasions in 2011 while working for the employer as a janitor. In addition to this full-time job, the employee had his own janitorial business on the side.

The employee underwent chiropractic treatment, home exercise and epidural steroid injections.

An IME was performed. The employee's diagnosis was Grade I spondylolisthesis in the lumbar spine with subjective low back pain. Dr. Wicklund stated surgery at this point was not reasonable or necessary based on "the lack of any specific effort to try and reestablish core muscle strength" and recommended a three-month supervised exercise program.

A few weeks later, the employee's left leg had gone completely numb and he began dragging his leg due to the pain. However, the employee continued to work because he needed the money. In April, the treating physician, Dr. Sinicropi wrote to the employee's attorney stating that any type of physical therapy at this point would be "completely useless" and recommended surgery.

On appeal, the employer and insurer argued substantial evidence did not support the finding that the proposed fusion surgery was reasonable and necessary. They also alleged the judge committed reversible error because the applicable treatment parameters require conservative modalities before surgery.

There are three phases of the course of treatment for low back pain. Minn. R. 5221.6200, subp. 2.B. The first calls for "initial nonsurgical management which may include active treatment modalities, passive treatment modalities, injections, durable medical equipment and medications." *Id.* at subp. 2.B.(1). The employer and insurer argued this treatment modality has not been properly explored based on Dr. Wicklund's opinion the employee should undergo a three-month supervised exercise program before surgery is considered.

The WCCA determined the rule cited above lists conservative treatment modalities that *may* be undertaken, but the rule does not require *all* conservative modalities be exhausted before surgery. The chiropractic and medical records in this case reflect the employee was consistently performing home exercise programs as part of his conservative treatment, and that chiropractic care and epidural steroid injections did not yield significant improvements.

The employer and insurer also alleged the compensation judge erred in finding the employee had incapacitating low back pain that lasted longer than three months, which is one of the criteria applicable to lumbar fusion surgery under Minn. R. 5221.6500, subp. 2.C.(1)(d). They argued that because the employee continued to work two jobs and his symptoms did not worsen since the injuries in 2011, his pain cannot qualify as "incapacitating."

An employee may experience "incapacitating pain" within the meaning of the rule without being totally disabled from work. *Kappelhoff v. Tom Thumb Food Markets*, 59 W.C.D 479 (W.C.C.A. 1999). And this determination as to "incapacitating low back pain" is a fact question for the compensation judge to determine. *Klinefelter v. Quicksilver Express Courier*, slip op. (W.C.C.A. Jan. 6, 2003). Here, the medical records established that since the 2011 injury, the employee had increased symptoms and needed additional work restrictions. The WCCA affirmed the compensation judge's finding that the proposed surgery was reasonable and necessary.

**De la Cruz v. Sunrise of Edina, W.C.C.A. Aug. 9, 2013.**

This is a case in which the employee filed a medical request seeking approval of a MedX Program as recommended by Physicians' Diagnostics and Rehabilitation (PDR), after sustaining an admitted December 6, 2011 injury to her low back. The employee underwent various treatment modalities, including chiropractic care and occupational medicine care, as well as physical therapy in 2012.

Employer and insurer asserted both a causation defense and a 12 week passive treatment parameter defense. The only issue on appeal was whether or not treatment parameters could apply in a situation such as this where the claim is an admitted claim, but the IME doctor opines that it is a temporary injury only.

The WCCA found that case law is established that where the employer and insurer deny an admitted injury continues to be causally related to the ongoing affects or condition, it is similar to where the employer and insurer deny primary liability and therefore, the treatment parameters are not an applicable defense. Because the employer and insurer in fact did raise a defense on medical causation and not just the treatment parameters, or in the alternative the reasonableness and necessity of treatment, the treatment parameters which would limit passive treatment modalities included in the MedX Program were not an applicable defense to that treatment at issue.

**Lehto v. Community Memorial Hospital, W.C.C.A. Jan. 28, 2014.**

The employee in this case received substantial treatment, including surgeries, for her low back injury but her symptoms continued and her condition remained unchanged. In December 2012, at the employer's request, Dr. Starzinski, a neurologist, reviewed the employee's medical records and

issued a report. He concluded the employee's use of certain prescription medications, including analgesic narcotics, were inappropriate to treat her chronic pain syndrome because the use of such narcotics could be "perpetuating and exacerbating the chronic pain process."

Following a medical request, the employer requested a formal hearing, which took place in July 2013. The compensation judge considered all of the testimony, the medical records, and opinions of the employee's treating doctors, as well as Dr. Starzinski's report. The judge adopted Dr. Starzinski's opinions and denied the employee's claim.

On appeal, the employee argued that the judge erred in relying on Dr. Starzinski's report because his opinion lacked foundation. The employee's argument relied on the fact that Dr. Starzinski never examined the employee, he only reviewed her medical records. Despite this lack of personal examination, the WCCA determined that because the employee had been taking the disputed medication for about four years, any benefit from the medications would have been documented in the voluminous medical records reviewed by Dr. Starzinski. Therefore, adequate foundation to render an opinion on whether the prescription medication was reasonable and necessary to treat the 2001 work-related injury was established by a review of the medical records and a response to a hypothetical question. The compensation judge's opinion was affirmed.

**Cayo v. Precision, Inc., W.C.C.A. Jan. 3, 2014.**

In this case, the employee sustained a significant work-related low back injury in January 1997. She underwent surgery, but was never pain free following the incident. She sought treatment on a number of occasions over the years, and medical records from several providers indicate the employee had chronic low back and leg pain, nerve root damage, and degenerative disc disease. Her treating doctor had prescribed oxycodone, but not on a regular basis. Employee was then involved in a motor vehicle accident in 2004, which purportedly flared up her back symptoms requiring additional medical treatment and narcotic prescriptions, including oxycodone, to manage her pain.

At the hearing in 2013, the compensation judge found the prescription for oxycodone was reasonable, necessary, and causally related to the admitted work injury from 1997 and ordered the employer and insurer pay for the employee's oxycodone prescription.

In making this finding, the compensation judge relied on an inaccurate chart note, which stated the treating doctor had seen the employee before the motor vehicle accident in 2004. The employer and insurer argued on appeal that relying on this chart note affected the ultimate conclusion that the need for the oxycodone prescription was causally related to the 1997 work injury. But the WCCA affirmed, deciding the error in the chart note was not material to the treating doctor's opinion and does not demonstrate any inadequate factual foundation for the treating doctor's opinion on causation.

The WCCA clarified the issue in this case: it was not whether the 1997 work injury was the *sole* cause of the employee's ongoing need for oxycodone, rather, the issue was whether the work injury was a *substantial contributing factor* to the ongoing use of the oxycodone for pain. The WCCA found that it was not unreasonable for the compensation judge to conclude the 2004 motor vehicle accident, combined with the employee's work-related low back condition stemming from the 1997

injury, aggravated or accelerated her condition, causing the employee's need for oxycodone.

**David v. Bartel Enterprises, W.C.C.A. Oct. 23, 2013.**

Employer and insurer unsuccessfully appealed a $13,000 attorney fee award under *Roraff*/*Irwin*.

In this case, the employee's attorney submitted his statement of attorney fees and costs at the end of September 2012, claiming a $36,810.90 contingent *Roraff* fee based on recovery of $233,054.50 in medical expenses.

The employer and insurer claimed the fees exceeded the maximum allowed under M.S. §176.081 ($13,000) and pointed out there may be a potential claim for other indemnity benefits, meaning additional fees could be assessed, and the employee's attorney had no documents to support a claim for excess fees.

The compensation judge found the employee's attorney had substantial legal experience in workers' compensation matters, had provided 13.1 hours of legal service, and the litigation involved no narrative reports, depositions, or independent medical examinations. The judge noted "the proof that was adduced by [the employee's attorney] was extremely minimal" and that his assumption of responsibility on the case was minor since the health care providers and insurer settled the medical treatment expenses and the employee's attorney was not involved in negotiation.

But, the compensation judge also found the employee's attorney had obtained a favorable result for the employee and awarded a contingency fee of $13,000 under Section 176.081, without analyzing the reasonableness of the fee and finding such amount adequately compensated the employee's attorney for legal services related to the medical dispute. The judge also found an award greater than $13,000 was not warranted under *Irwin*.

In *Irwin v. Surdyk's Liquor*, the Minnesota Supreme Court determined it was unconstitutional to prohibit deviation from the statutory maximum fee of $13,000 in cases where the resulting attorney fees would be inadequate to reasonably compensation the employee's attorney. 599 N.W.2d 132, 141-42 (Minn. 1999). Courts were instructed to consider the reasonableness of the fee involved based on a number of factors, including "the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained." *Id.*

In *Cahow v. Brookdale Motors*, the WCCA determined the *Irwin* factors may not be applied to reduce otherwise available statutory attorney fees. 61 W.C.D. 427 (W.C.C.H. 201). The employer and insurer constitutionally challenged Section 176.081, subd. 1 as applied in *Cahow* claiming the statute violates the separation of powers clause of the Minnesota Constitution because mechanical application of 25/20 fees violates the judiciary's exclusive power to regulate and make findings as to the reasonableness of attorney fees.

Additionally, the employer and insurer alleged attorney fees under Section 176.081 are awarded statutorily and not contractually. Even though the employee and her attorney entered into a standard retainer agreement (contract), which provides for a contingent fee based on the 25/20 formula,

there is no contract between the employee's attorney and the employer and its insurer.

The WCCA stated it was beyond their jurisdiction to interpret the statute and that analyzing the *Irwin* factors in every case involving the disputed medical benefits could potentially create "a significant burden" on the Office of Administrative Hearings and affirmed the compensation judge's decision to award $13,000 in attorney fees under M.S. §176.081.

This case is currently before the Minnesota Supreme Court, which did hear oral arguments.

**Washek v. New Dimensions Home Health, 73 W.C.D. 267 (Minn. 2013).**

Minnesota Supreme Court April 10, 2013 decision stating that the costs of making structural modifications to the residence of a permanently injured employee to permit installation of equipment deemed reasonable and necessary are not medical costs and so they are not subject to M.S. §176.135, but instead are remodeling costs subject to the limits of §176.137. This case dealt with the installation of a ceiling mounted motorized lift system in the employee's home. The system itself cost $15,414. The cost of the lift was not disputed; however, the other work needed on the home in order to install the lift ran an additional $27,753. The problem here was that the employer and insurer had already paid $58,000 in prior remodeling costs and so the employer and insurer said that all they had liability for was an additional $2,000 due to the $60,000.00 cap.

The compensation judge decided that these were all medical costs under §176.135 and awarded the whole thing. The Workers' Compensation Court of Appeals reversed stated that these were remodeling costs and thus the employer and insurer were only responsible for $2000 of the bill. The Supreme Court upheld the findings of the WCCA that these were remodeling costs and subject to the $60,000 limit.

## Vacation of Settlement Awards

**Gabrielson v. McIntosh Embossing, W.C.C.A. Oct. 2, 2013.**

The employee successfully petitioned to vacate a Stipulation for Settlement and Award on the basis of showing a substantial unanticipated change in medical condition and establishing good cause under M.S. §176.461.

In this case, the employee injured his right shoulder in 1988. The employer and insurer accepted primary liability and two months later, the employee had a surgical repair for a torn rotator cuff. Subsequently the employee required a second and third right shoulder surgery.

The parties reached another settlement in 1992 after the employee claimed additional permanent partial disability for his right shoulder and a new body part: his cervical spine. They made a compromise payment to close out permanent partial disability to the right shoulder to the extent of the dispute. The employer and insurer also admitted primary liability for the employee's cervical spine condition.

Later in 1992, the employee had a third surgery on his right shoulder for a recurrent tear of the rotator cuff. In 1993, the employee's surgeon noted the employee had a full range of motion in his right shoulder and that *no additional treatment was necessary*. In January 1994, the employee's surgeon stated the employee had a 6% permanent partial disability for his right shoulder condition.

By January 1996, the employer and insurer had paid over $155,000 in indemnity benefits and over $66,000 in medical expenses. The employee claimed additional temporary partial disability benefits due to this continuing wage loss. All of the claims except for some medical expenses were settled on a full, final, and complete basis and the employee received $100,000.

The employee continued to have right shoulder problems after the full and final settlement and ended up having three more surgeries in September 1999, July 2000, August 2010 and August 2012.

An award may be set aside for cause if there has been "a substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably have been anticipated at the time of the award." To make this determination, the WCCA applied the factors found in *Fodness v. Standard Café*, 41 W.C.D. 1054 (W.C.C.A. 1989), which are: (1) a change in diagnosis; (2) a change in the employee's ability to work; (3) additional permanent partial disability; (4) a necessity for more costly and extensive medical care than previously anticipated; and (5) a causal relationship between the injury covered by the settlement and the employee's current condition.

Looking at the last settlement and award in 1996, the WCCA determined all five *Fodness* factors were met.

1. Diagnosis

Although the employer and insurer argued the diagnosis had not changed since 1988 (rotator cuff tear), the WCCA reasoned the medical records "amply demonstrate severe complications from that initial condition which support a conclusion that there has been a change in diagnosis of the employee's right shoulder condition between 1996 and 2013."

2. Ability to work

The WCCA believed this factor was easily met because the employee had not worked in any capacity since August 2001 and, at the time of the petition, was receiving Social Security disability income.

3. Additional permanent partial disability

The employer and insurer conceded there had been a change from the six percent permanent partial disability rating from 1996, but argued it was not clear from the record what effect, if any, this change had on the employee's function. Although no medical report provided a more current rating, the WCCA stated "a cursory reading of Minn. R. 5223.0110 would suggest a rating significantly in excess [of that]. . . ."

4. Treatment

In terms of medical treatment, the employee had four surgeries since the final settlement in 1996, including a shoulder replacement and a subsequent revision of that surgery. The WCCA pointed out the medical opinion in 1993, given by the employee's surgeon, stated that no additional treatment was necessary. Thus, there was a necessity for more costly and extensive medical care than previously anticipated.

*5. Causation*

An IME report from 2010 concluded the right shoulder condition was caused by the 1988 injury. Also, the answer filed by the employer and insurer to the employee's petition admitted that the employee's present shoulder condition was due to the 1988 injury.

**Zobel v. Littfin Lumber Co., W.C.C.A. May 16, 2013.**

The employee in this case sought to vacate an Award on Stipulation based upon substantial change in medical condition.

This case involved an employee who suffered a 1982 work injury with a two level fusion performed in 1983. The parties entered into a 1985 settlement agreement with the employee claiming 25% permanent partial disability for the back and approval of a retraining program. Future medical benefits causally related to the work injury were left open.

By 2001 the employee was having increasing symptoms and in 2009 he underwent a three level fusion covering two levels which had previously been fused in 1983. Following this procedure he continued to have symptoms and underwent a hardware removal procedure and chronic pain treatment.

The Court of Appeals determined that there had been a change in the diagnosis of the employee's condition due to the increase in the levels involved and non-union of the previous fusion. They determined there had been a change in the ability of the employee to work and additional permanent partial disability likely as a result of additional surgical procedures. They also found there was no dispute that the employee had incurred a substantial additional medical costs and that these were all causally related to the work injury in question.

Having established that all factors were in the employee's favor, the Petition to Vacate based upon the substantial change in condition was granted.

**Klennert v. SNG Construction,W.C.C.A May 29, 2013.**

The employee in this case sought to vacate a prior Award on Stipulation alleging a mutual mistake of fact. As with any vacation of Stipulation for Settlement, this matter came before the Workers' Compensation Court of Appeals.

This involves an admitted low back injury in 2001 leading to fusion procedure performed in 2002. The employee was eventually released to return to work with light duty level of work restrictions after a functional capacity evaluation. He was having some level of ongoing symptoms but his treating physician found him to be at maximum medical improvement and rated permanency and approved final restrictions.

While this was going on the employee had applied for social security benefits, was initially denied and had filed a request for hearing.

Near the time of the social security hearing the parties entered into a Stipulation for Settlement based upon the employee's claims to ongoing temporary partial disability. This was a complete settlement of all claims with the exception of future non-chiropractic medical expenses. Within two months following the issuance of the Award on Stipulation, the employee was awarded social security retroactive to the date of injury.

The employee subsequently began treating with another physician who opined that the employee had pseudoarthrosis at two levels and re-fusion was recommended. This was supported by an independent medical examination with respect to causal relationship and reasonableness and necessity.

Pursuant to statute, an Award on Stipulation may be set aside based upon mutual mistake of fact. A mutual mistake of fact occurs when opposing parties to the Stipulation for Settlement both misapprehend some fact material to their intended settlement of the claim.

The Workers' Compensation Court of Appeals noted that there were not competing medical opinions at the time of the Stipulation for Settlement with both parties relying upon the opinions of the treating physician who believed there had been a successful fusion. The assessment of the employee's status was incorrect. It appears from the description contained within the Decision that the Stipulation for Settlement was targeted towards the claims of the employee for temporary partial disability, not permanent total disability. Further they found that the amount of the settlement was not reflective of a settlement of a contemplated permanent total disability claim. Finally, they noted that the employee's SSDI Decision did not come down until after the Stipulation for Settlement was entered into and at the time of the settlement agreement the parties were only aware of the FCE restrictions allowing the employee to return to light duty work.

Based upon all of these factors, the court determined that the records supported that there had been a mutual mistake of fact by the parties and as such the Petition to Vacate the Award on Stipulation should be granted.

## Intervention

**Gamble v. Twin Cities Concrete Products, W.C.C.A. July 8, 2013.**

On May 24, 2010, the Employee fell while performing his job duties for the Employer. The Employer and Insurer admitted that the incident occurred, but denied that the incident substantially contributed to the Employee's low back condition and medical treatment, and denied that he was

entitled to fusion surgery as claimed.

A hearing was scheduled for June of 2011, and despite the employer's denial, the employee had the fusion done at Lakeview Hospital on April 20, 2011, and put it under his personal health insurance. At the time of the June 2011 hearing, Lakeview had not been put on notice of its right to intervene. Several other parties had been put on notice, but only MN Laborers Health & Welfare Fund actually intervened in the case. The Fund had paid for the Employee's fusion surgery. At the hearing, Judge Mesna found that the work injury substantially contributed to the Employee's low back condition and need for the surgery, but that the surgery was not reasonable and necessary.

Judge Mesna ruled that the Employer and Insurer were still required to reimburse the Health & Welfare Fund for the surgery. He did not order any of the providers to reimburse the Employer and Insurer, but instead noted in his findings that after the Employer and Insurer reimbursed the Health & Welfare Fund, the Employer and Insurer could then seek reimbursement from the providers who had been paid by the Fund for treatment that was not reasonable and necessary. The Insurer fully reimbursed the Health & Welfare Fund for the payments it had made toward the Employee's medical treatment of his work injury. Next, a complicated series of procedural steps resulted in the Employer and Insurer asserting a claim that they were entitled to reimbursement of medical expenses from Lakeview and other providers that had been paid by the Fund, and Lakeview asserting a claim that it was entitled to payment of its Spaeth balance due to not being put on notice of right to intervene before the June 2011 hearing.

In September of 2012, a second hearing was held before Judge Mesna. Each party made legal arguments regarding the proper procedure to follow in the case, since Judge Mesna had heard the case previously and issued a Findings and Order in which he found that the April 20, 2011 fusion surgery at Lakeview was not reasonable and necessary, but Lakeview had not been put on notice of its right to intervene. Lakeview argued that it should be automatically paid in full, while the Employer, Insurer, and Employee argued that Lakeview should not automatically be paid in full but should instead have an opportunity to present additional evidence regarding the reasonableness and necessity of the April 20, 2011 fusion surgery. After making these arguments, additional testimony was heard. Lakeview called two witnesses and introduced a supplemental report that the treating surgeon had written in response to Judge Mesna's June 2011 findings.

In his Findings and Order of September 21, 2012, Judge Mesna ruled that Lakeview was not automatically entitled to full payment of its Spaeth claim just because it had not been put on notice prior to the June 7, 2011 hearing. He further ruled that after reevaluating the evidence in the case and considering additional evidence, his finding was still that the April 20, 2011 fusion surgery was not reasonable and necessary. Judge Mesna ordered that Lakeview must reimburse the Employer and Insurer in the amount of $52,809.36, and that it was not entitled to its Spaeth balance.

On appeal, Lakeview argued that it was entitled to payment in full for its bill for the fusion surgery because it was not given timely notice of its right to intervene prior to the June 2011 hearing. The W.C.C.A. agreed with Lakeview, and reversed the compensation judge's decision. The court stated that where a potential intervenor is excluded from settlement negotiations or other proceedings resulting in a final resolution of the employee's claim, the potential intervenor is entitled to full payment of its claim, relying on some prior cases that were similar, but not exactly the same as, the

situation in this case.

The WCCA dismissed the employer and insurer's argument that Lakeview had a full and fair opportunity to present its position at the September 2012 hearing. The WCCA stated that, in examining whether an intervenor has been precluded from exercising its intervention rights, the ultimately compensability of the treatment is irrelevant and has no bearing on the question of whether the intervenor had in fact been excluded. Despite the second hearing in September 2012, the WCCA found that Lakeview had already effectively lost at the time of the June 2011 hearing without ever having been given an opportunity to present its interest at the hearing. The court found that an award of full payment to Lakeview is consistent with the policy of protecting an intervenor's interest.

This case was appealed to the Supreme Court of Minnesota, and oral arguments were held on March 31, 2014.

## Subrogation

**Quinn v. Excelsior & Grand II, LLC., Ct. App. Minn. Aug. 5, 2013.**

This is a case where the employee settled his workers compensation case and the employer reserved their subrogation rights. The employee then sued the property owner where the injury occurred but did not serve the employer with the complaint. A mediation was held and the attorney for the employer was not notified about it until that morning and was not able to attend. The employee and the third-party tortfeasor did settle and the settlement provided that payments "include(s) subrogation claims or liens" but it did include a handwritten indication it was *Naig* settlement. The attorney for the employer objected to the settlement. The attorney for the employer intervened into the employee's District Court proceeding and objected to the employee's motion to approve the settlement.

The first issue was whether or not the employer was given sufficient notice. The court went into a detailed explanation and stated that the employer was not given notice in writing as is required by serving the complaint upon them. Further, the notice of the mediation, which was left by voicemail late on Friday and retrieved Monday for a Monday morning mediation, was not enough notice.

The next issue was, since notice was lacking, whether the employer could contest the court's determination that the settlement was a valid *Naig* settlement. The court pointed out that the settlement agreement was contradictory on its face because it stated that it closes out all subrogation claims or liens but then states that is a *Naig* settlement. The court found that this would be a valid *Naig* settlement which would allow the employer to pursue a claim against the third-party tortfeasor . However as they were not given notice of the claim and settlement negotiations, they were entitled to other remedies as well.

The final issue was the remedy. The employer then argued that it was entitled to an actual share in the settlement money rather than merely getting a credit against future benefits. The employer argued that they will not be paying the employee any additional amounts under the Worker's Compensation act so there is no future compensation to take a credit against. The employee argued the case law

states all the employer gets in this type of situation is a credit against future benefits. The Court of Appeals stated that under the *Adams* case the employer can actually get a portion of the settlement money in this circumstance. The court remanded the case for calculation as to what the employer would receive from the settlement proceeds.