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Case Summaries from April – May 2018

Burton v. Smithfield Foods, Inc., WC17-6113 (W.C.C.A. May 21, 2018)

The Employer and Insurer initially denied primary liability for the Employee's August 25, 2016 injury. The Employee filed a Claim Petition seeking, among other benefits, temporary total disability (TTD). The Employer authorized payment of short-term disability wage loss benefits (STD) through its STD policy which was funded and administered by the Employer. The Employer's workers' compensation policy had a deductible of $2 million.

The Employer and Insurer eventually admitted liability and commenced TTD benefits beginning March 27, 2017 through the date of hearing on August 4, 2017. They did not pay TTD benefits from August 26, 2016 through March 26, 2017. The Insurer paid the Employee a sum that represented the difference in tax treatment between the STD and TTD benefits owed.

The Employer and Insurer asserted their right to offset TTD benefits by the STD payments as well as sick and vacation time previously paid to the Employee. They argued that because the Employer funded the STD, sick and vacation pay, the tax differential payment, and the TTD (through the high deductible), the Employee had received all of the benefits he would have if he had received TTD starting on August 26, 2016.

The Employee objected, and a hearing was held before a Compensation Judge. The Compensation judge found the Employer and Insurer were entitled to offset the TTD by only the STD benefits. The Employee appealed.

The WCCA held that the Employer and Insurer were not entitled to offset TTD benefits by the STD benefits. There are two ways to offset benefits by other benefits received. One being a wage continuation program under Minn. Stat § 176.221, Subd. 9, and the second being an offset as a result of an intervenor's right under Minn. Stat. § 176.361.

The Court noted the STD benefits were not a wage continuation program under the Workers' Compensation Act and rejected the argument that because the Employer and STD payor are the same entity, the STD benefits were just like wage continuation. In addition, it found that since no evidence was presented to establish the STD payor and Employer were the same entity, the Court could not conclude that an intervention claim by the STD payor was not necessary to assert a right to an offset.

Summary by: Scott G. Ferriss

***Cathy M. Pietila v. Dept't of Human Servs.*, No. WC17-6119 (W.C.C.A. May 10, 2018)**

The Employee sustained a work injury when she was grabbed on the left arm by a client-patient and the arm was twisted backwards. She was initially diagnosed with left shoulder pain and treated conservatively. Evidence revealed that the employee previously tore her rotator cuff and labrum in a motor vehicle accident, had undergone an open labral repair surgery and previously treated for left-sided neck pain with radiation to the left arm and upper back.

The Employee's left shoulder issues persisted and eventually and MRI was obtained. The MRI showed a mild rotator cuff tendinopathy without evidence of full-thickness rotator cuff tear and moderate glenohumeral degenerative change. The Employee's treating doctor recommended a left shoulder diagnostic arthroscopy with likely biceps tenodesis and possible rotator cuff repair.

The Employer obtained two separate independent medical opinions – one with an exam, and one that was simply a records review. Both doctors opined the Employee's shoulder condition was related to a pre-existing pathology.

The Employee retained an orthopedic surgeon for a supplemental medical opinion who opined that any conditions of her shoulder or spine were significantly aggravated by her work duties.

The Employee filed a medical request for the diagnostic arthroscopy surgery. The Employer denied the surgery. The issue on appeal was whether the compensation judge's finding that surgery was not reasonable and necessary to cure or relieve the effects of the Employee's left shoulder injury was supported by substantial evidence.

In rendering its decision, the WCCA noted the well-established rule that a compensation judge's choice of expert opinions must be upheld unless the opinion lacks adequate factual foundation. *Nord v. City of Cook*, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

In this case, the Employer's expert upon which the compensation judge primarily relied was held to have adequate foundation. The doctor physically examined the employee, took a history from the employee, and reviewed multiple medical records. The court also found that with regard to the MRI interpretation, the findings were supported by the Employee's expert.

The WCCA held that substantial evidence, including the adequately founded expert medical opinion, supported the compensation judge's finding that the proposed arthroscopic surgery of the Employee's left shoulder was not causally related to her work injury.

Summary by: Emily L. Johnson

***Juvenal E. Mendoza Espinobarros v. Installed Bldg. Prods., Inc.*, No. WC17-6122 (W.C.C.A. May 8, 2018)**

The Employee in this case worked for the Employer waterproofing homes. On August 9, 2016, he was digging in the ground with a shovel and the handle of the shovel struck the inside of his right knee. He reported the incident to management the next day when it became swollen. The initial diagnosis was a small joint effusion.

He was placed on light duty restrictions and initially the Employer accommodated the restrictions. However, he was terminated a few months later. The Employer and Insurer claimed the termination was due to misconduct. The Employee testified he did not know why he was fired.

The Employee was denied QRC services and found a new job a few months later on his own, at a lower wage. He continued to have problems with the left knee and eventually saw an orthopedic surgeon, who diagnosed an acute medial meniscus tear. Surgery was recommended but denied by the Employer and Insurer. The Employer and Insurer based the denial on an IME report which agreed the Employee had a meniscus tear but opined the mechanism of injury of a shovel hitting the knee would not have caused the tear and the meniscus injury was not work-related.

At hearing, the Employer and Insurer admitted to a work injury, but alleged it was temporary and had fully resolved. Employer and Insurer also alleged the Employee was not entitled to TTD benefits because he was terminated for misconduct. Further, the Employer and Insurer claimed the Employee was not entitled to TPD benefits because he had self-limited his earning capacity.

The compensation judge found the work injury was a substantial contributing factor in the surgery and awarded indemnity, medical (including the surgery) and rehabilitation benefits. The Employer and Insurer appealed.

The Employer and Insurer argued the compensation judge improperly relied on the Employee's experts' medical opinions, which were without proper foundation, particularly with respect to the description of the mechanism of injury. The WCCA affirmed the compensation judge's adoption of the Employee's experts' medical opinions, citing the well-established rule that a compensation judge has great deference with respect to this issue and that the judge's reasoning for adopting the Employee's experts' opinions was well supported by substantial evidence. Therefore, the WCCA affirmed the finding of a causal connection between the work injury and the need for surgery.

The Employer and Insurer also appealed the award of wage loss benefits, arguing substantial evidence failed to support the compensation judge's finding that the Employee was not fired for misconduct. The WCCA cited *Langworthy v. Signature Flight Support*, slip op. (W.C.C.A. July 8, 1998). "Conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of [the] employer's interest or of the employee's duties and obligations to the employer." Here, the Employer did not provide any evidence to support this claim. Therefore, the compensation judge's determination was affirmed.

The Employer and Insurer also argued the Employee had not engaged in a diligent job search and therefore was not entitled to TTD benefits. Whether an Employee conducts a reasonably diligent job search is a question of fact for the compensation judge. *Hanmer v. Wes Barrette Masonry*, 403 N.W.2d 839, 39 W.C.D. 758 (Minn. 1987). Here, the WCCA found that the employee faced substantial barriers to employment including restrictions, pending surgery, limited English, limited education, a job history of physical labor and had been denied QRC services to help him. Therefore, substantial evidence supported the compensation judge's finding that the Employee had conducted a reasonably diligent job search.

Finally, the Employer and Insurer argued the Employee was not entitled to TPD benefits because he was self-limiting his earning capacity. The WCCA noted that the Employer bears the burden of showing sufficient evidence to rebut the presumption that the Employee's actual earnings are presumed to be an accurate reflection of earning capacity per *Malloy v. Hokanson Plumbing*, slip op. (W.C.C.A. Mar. 19, 1992). Here, the Employer did not rebut this presumption with any evidence of other jobs the Employee could have gotten or that his lower earnings were related to his disability. Therefore, the WCCA affirmed the award of TPD benefits.

Summary by: Emily L. Johnson

***Kathy A. Murphy v. Riverview Healthcare Ass'n*, No. WC17-6088 (W.C.C.A. May 3, 2018)**

The Employee is this case was a supply clerk at an assisted living center. Along with other employees, she was assigned the task to "redo" the storage room. This involved removing contents from the shelves, installing new shelves, and putting things back on the new shelves. The entire project took about 3 weeks. On the third week, she awoke with numbness in her left arm and pain in her left shoulder. She sought treatment and related the issue to her repetitive overhead lifting at work. An MRI revealed a ruptured disc of the cervical spine. She was also quoted in medical records saying she "woke up with these symptoms". She was recommended for and underwent emergency decompression and fusion surgery.

Primary liability was accepted, and benefits were paid. The Employee did not improve following surgery and was diagnosed with complex regional pain syndrome. The Employer and Insurer obtained an IME which stated the condition was idiopathic, unrelated to work and related to pre-existing degenerative disc disease. Thereafter, the Employer and Insurer filed a Petition to Discontinue based on no primary liability and mistake of fact.

An expedited hearing was held on the Petition to Discontinue. The compensation judge accepted the Employer and Insurer's IME opinion as to causation and found the Employee's condition not work related. The Employee appealed. The Employee raised a few issues on appeal, first arguing the Employer and Insure were not entitled to raise their primary liability defense at an expedited hearing on the Petition to Discontinue. Citing *Kulenkamp v. Timesavers, Inc.*, the WCCA stated consideration of primary liability in an expedited hearing is improper only when the opposing party does not have reasonable notice. Here, the Employee had notice of 6 months. Therefore, there was no procedural basis to overturn the compensation judge's determination of primary liability.

The Employee then argued the compensation judge erred in allowing into evidence a supplementary report of the Employer and Insurer's Independent Medical Examiner, which had been provided shortly before the hearing, without leaving the record open for Employee to submit a response. The WCCA opined that evidentiary rulings are the discretion of the compensation judge. Per *Murphy v. Keebler Co.*, "A compensation judge is given broad latitude in conducting a hearing and in the admission of evidence in order to assure that justice and fairness prevail." Here, a recent medical report from the Employee's expert had also been similarly admitted and there was sufficient medical evidence to support both sides. Therefore, the judge reasonably determined that any further evidence would be cumulative, and the judge's ruling was not an abuse of discretion.

Finally, the Employee argued the compensation judge erred in relying on the report of the Employer and Insurer's IME, because it lacked adequate foundation. As is well established, the WCCA "will generally affirm a compensation judge's findings of fact based on the choice between expert opinions, so long as the accepted opinion has adequate foundation." Here, the Employer and Insurer's IME took a history, performed an exam and reviewed medical records. The WCCA held that this level of knowledge will generally be sufficient foundation for a medical opinion. Therefore, the judge reasonably relied on the opinion of the IME and the findings were affirmed.

Summary by: Emily L. Johnson

***Oseland v. Crow Wing Cnty*, No. WC17-6120 (W.C.C.A. May 1, 2018)**

The employee sustained an admitted work-related injury in 1980, was found to be permanently and totally disabled in 1987, and PTD benefits were initiated by Auto-Owners ("Insurer"). Following the existing case law and rules, an offset to these payments was made under Minn. Stat. § 176.101, subd. 4, for Public Employees Retirement Association (PERA) benefits the employer paid the employee after $25,000.00 in PTD benefits had been paid. The employee died in February of 2013.

In August of 2014, the MN Supreme Court issued two decisions, Ekdahl v. Indep. Sch. Dist. No. 213, 851 N.W.2d 874, 74 W.C.D. 463 (Minn. 2014) and Hartwig v. Traverse Care Ctr., 852 N.W.2d 251, 74 W.C.D. 795 (Minn. 2014), in which it held that the offset under Minn. Stat. § 176.101, subd. 4 for "any old age and survivor's insurance benefits" applied only to Social Security retirement benefits. In September of 2015, DOLI alerted insurers that Ekdahl and Hartwig would apply prospectively and retroactively to all cases. As a result, some employees had been underpaid, and the Special Compensation Fund ("SCF") had made overpayments in past supplementary benefit reimbursements to the insurer. Insurers were advised to pay employees any underpayments owed.

In response, the Insurer reviewed its files and noted that now-disallowed offsets had been made to the employee. In June of 2016, SCF sent the Insurer its calculation of underpayments to the employee, which was about $10,000.00 higher than the calculation the Insurer found.

In September of 2016, the employee's heirs were notified that the Insurer had calculated an underpayment of approximately $159,000.00 and requested to send information to the Insurer so that payment could be made. The heirs retained an attorney to address the underpayment and filed a Claim Petition in November of 2016 seeking underpayment of PTD benefits as initially calculated by the SCF and related interest. The Answer admitted the underpayment and requested the estate tax information so that payment could be made.

In a March 2017 partial stipulation for settlement agreement, the employer and Insurer agreed to pay the amount of underpayment it had calculated. The issues of additional payment, interest, and penalties was unresolved and later addressed by a compensation judge in August of 2017. The compensation judge found that the Insurer's calculation was correct, that penalties were denied, and that interest was owed starting when original benefits were owed with the interest rate determined by the statute in effect when benefits should have been paid. Taxable costs in obtaining the decree were denied the employee.

The employee's heirs appealed the amount of interest, the denial of penalties, and the denial of taxable costs. The employer/insurer cross-appealed the date on which interest was owed and filed a motion to dismiss the employee's appeal. The W.C.C.A noted that legislation enacted in 2017 clarified Ekdahl and Hartwig and that the SCF had similarly issued guidance of its application. These applications had not been considered by either of the parties, nor the compensation judge. Because the relevance of this application needed consideration, the W.C.C.A vacated.

Summary by: Megan M. Oliver

***Benson v. McQuay Int'l/AAF McQuay Inc*. No. WC17-6123 (W.C.C.A. Apr. 26, 2018)**

The employee sustained a number of admitted work-related injuries to her left knee, shoulders, wrists, and elbow in the years 1990, 2000, and 2001 for which various benefits were paid. In 2009, the parties entered into a stipulation for settlement for a full and complete settlement including all past, present, and future claims with the exception of future reasonable, necessary, and related medical.

The matter went to a hearing to address: payment of intervenors' medical claims, payment to employee for out-of-pocket medical expenses, and whether the employee must use the pharmacy chosen by the employer and insurer. At hearing, the employee relied on the reports of her physician, Dr. Detert, who opined that the employee had developed chronic pain syndrome as a result of the work injury and had reactive depression; a number of the prescriptions were to directly address these. The employer and insurer relied upon the opinion of Dr. Starzinski, who opined that the employee's medication was suboptimal for controlling chronic pain, that morphine was counterproductive, and that a pain-modulating agent should be used.

The compensation judge found that the prescriptions supplied by Injured Workers Pharmacy and services of Allina Northfield were reasonable, necessary, and casually related to the work injuries. The services of District One Hospital were found to be not casually related to the work injuries. The employee was found to be required to use the pharmacy chosen by the employer and insurer. Employer and insurer appealed.

On appeal, the employer and insurer contended that the decision of the compensation judge was not supported by substantial evidence and sought to alter the medical prescriptions to align with Dr. Starzinski's opinion. The court noted that the compensation judge found Dr. Detert's opinion more persuasive as to reasonableness, necessity, and casual relationship, that Dr. Detert had treated the employee for a year before the hearing and was familiar with her medical records, and that Dr. Detert had enough information to establish foundation for her opinion. Because of the court's precedence for affirming a compensation judge's decision when based on a medical opinion with adequate foundation, the W.C.C.A affirmed.

Summary by: Megan M. Oliver

***Corey Fenske v. W. Steel Erection, Inc.*, No. WC17-6107 (W.C.C.A. April 16, 2018)**

This case involved an Employee petitioning to vacate an Award on Stipulation on the grounds of a substantial change in medical condition that was not clearly anticipated. The Employee's petition was granted.

The Employee had sustained a work injury his left tibia and fibula when he fell from a ladder in November 2008. He underwent surgery and received benefits. In January 2011, the parties reached a settlement. The only future medical treatment reserved was treatment to his left ankle. He had no restrictions and was working full-time.

From January 2011 to August 2017, he performed iron work and continued to experience pain in his left ankle. By May 2014, he sought treatment. He was diagnosed with post-traumatic arthritis of the left ankle. He was also noted to have significant left calf muscle atrophy and was diagnosed with traumatic arthropathy. He was recommended for a below-the-knee amputation. In August 2017, the Employee underwent the amputation procedure.

Upon review of the petition, the WCCA reviewed the five factors: change in diagnosis, ability to work, additional permanent partial disability, additional medical care, and contemplation of the parties. The Court found that due to the need for amputation, his substantial change in job opportunities, the increase in PPD to either 19% or 25%, the fact that ongoing medical care was left open in the settlement, and the fact that the parties could not have reasonably foreseen a scenario where the injury would have caused the need for leg amputation, the Court vacated the Award on Stipulation.

Summary by: Parker T. Olson

***Wilton Grieger v. Menards*, No. WC17-6091 (W.C.C.A. April 10, 2018)**

In this case, the Employee retired and sought part-time employment. At age 69, he was hired by Menards as a stock person. On November 27, 2015, he slipped in the parking lot at Menards and died as a result of a head injury. Primary liability was admitted the dependency benefits were paid to the Employee's spouse based on the Employee's average weekly wage of $205.18.

A Claim Petition for underpayment of dependency benefits was filed by his spouse. She claimed that the weekly compensation for dependency benefits is not based on the employee's AWW, but rather the number of hours *normally worked in the employment or industry* pursuant to Minn. Stat. 176.111. At the hearing, multiple experts testified about how many hours stock clerks normally work. The testimony ranged from 21-32.3 hours per week. The Employee's average weekly wage calculation was the equivalent of him working less than 20 hours per week. Nevertheless, the compensation judge still found that the Employer/Insurer were paying the correct amount.

On appeal, the WCCA reviewed the calculation of dependency benefits. The Court concluded that the AWW formula has no application for death benefits when the employee is not full-time. Rather, the plain language of Minn. Stat. 176.111 requires a judge to determine the total number of hours normally worked in the employment or industry. As such, the WCCA reversed the compensation judge's decision on this issue because he improperly calculated the dependency benefits off the Employee's AWW.

The other issue on appeal was whether the $60,000 minimum payment required under dependency benefits under Minn. Stat. 176.111, subd. 5 was going to be reached within ten years. The WCCA held that the dependency benefit payments are subject to cost of living adjustments, which cannot be predicted. It is conceivable that the spouse would receive sufficient dependency benefits to reach $60,000 within ten years. In the event that the payments did not reach said amount, the difference would be payable to the spouse at that time. So, such a claim by the spouse on this issue was premature at this point.

The key takeaway in this case, is that even if an employee works minimal hours, and dies in the scope of employment, dependency benefits are calculated using the number of hours normally worked in the employment or industry, which may cause liability exposure to drastically increase in some situations.

Summary by: Parker T. Olson