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Issue: EVIDENCE – EXPERT MEDICAL OPINION

Krumwiede v. GGNSC Slayton, No. WC18-6134 (July 10, 2018)

In this case, the employee was working as an LPN Floor Nurse. She incurred admitted injuries to her low back on two different dates in 2012 and 2013. She tried physical therapy and injections, which did not relieve her pain. She then underwent two Independent Medical Examinations with Dr. Cederberg in 2013. He found in both of his reports that she sustained a temporary aggravation of her pre-existing degenerative disc disease. In 2014, the employee was recommended for a fusion surgery. She underwent a third IME with Dr. Cederberg in 2015. His opinions were unchanged and he opined that the employee was a poor candidate for surgery given her history of smoking. The matter went to a hearing, and the compensation judge found that the surgery was not reasonable or necessary. She found that the employee was a poor candidate for surgery and that she had not yet exhausted her conservative care set out in the treatment parameters.

The employee then began performing physical therapy and an additional seven injections. In 2016, she eventually underwent the recommended fusion surgery. Thereafter, she filed a Claim Petition seeking wage loss benefits and payment for the fusion surgery. The employee did not undergo an updated Independent Medical Examination by Dr. Cederberg.

At a second hearing, the compensation judge found that the employee had not met her burden that the fusion surgery was reasonable and necessary. Wage loss benefits were also denied, but she was awarded PPD benefits. The matter was appealed by the employee.

Before the WCCA, the employee argued that the compensation judge erred by relying on Dr. Cederberg's opinions. The WCCA found that the reports of Dr. Cederberg had adequate foundation as to the issue of the proposed fusion surgery. However, it did not sufficiently address the effects of the additional conservative care when the employee had additional injections and physical therapy. As such, the WCCA vacated the compensation judge's decision regarding the medical benefits is vacated. Additionally, the WCCA reversed the WCCA's decision to deny wage loss benefits.

A key takeaway in this case is to be certain that a relied-upon IME Report adequately addresses the employee's treatment at issue in the hearing. In this case, the third IME Report of Dr. Cederberg was completed in 2015. After that time, the employee underwent the surgery and then underwent additional medical treatment. The issue of whether that additional medical treatment was reasonable and necessary was not adequately addressed by Dr. Cederberg. He also did not address whether the surgery as performed was reasonable and necessary. Because of this, the WCCA reversed and vacated a portion of the compensation judge's decisions.

Summary by: Parker T. Olson

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Issue: EVIDENCE – CREDIBILITY; EVIDENCE – EXPERT MEDICAL OPINION

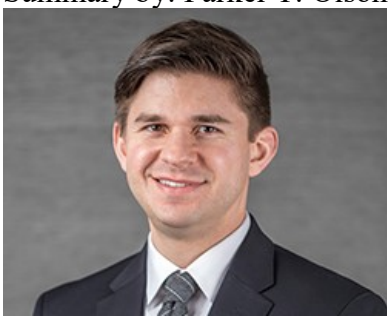
Jungwirth v. YRC Int'l, Inc., No. WC18-6152 (July 13, 2018)

In this case, the employee worked as a dockman and delivery driver for YRC. He was injured when a loading door fell onto his back as he was bending over. Liability was admitted and the employee underwent medial branch injections and radiofrequency neurotomies. He eventually underwent an IME with Dr. Randa, who found that the employee's injuries had resolved by the time of the examination. The employee was offered unrestricted employment with the employer, but he declined and his benefits were discontinued. The claim was settled in 2014 with future medical benefits left open.

Eventually, the Employee was recommended for a lumbar fusion and was seen by Dr. Dowdle. He opined that the employee had sustained a permanent injury, which required ongoing restrictions. The matter proceeded to a hearing to determine whether employee's medical treatment following the settlement was reasonable and necessary. The compensation judge found that the medical treatment was and that the employee's injury aggravated and accelerated pre-existing degenerative condition.

The WCCA affirmed the compensation judge's decision. The Court found the compensation judge's assessment of the employee's credibility to be within her discretion. They also found that the opinions of Dr. Dowdle had adequate foundation to be relied on by the judge. As such, the judge's choice to rely on one medical expert over another shall not be disturbed as long as the opinion has adequate foundation. *Nord v. City of Cook*, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Summary by: Parker T. Olson



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Issue: EVIDENCE – EXPERT MEDICAL OPINION

Larson v. ISD 465, No. WC18-6132 (July 18, 2018)

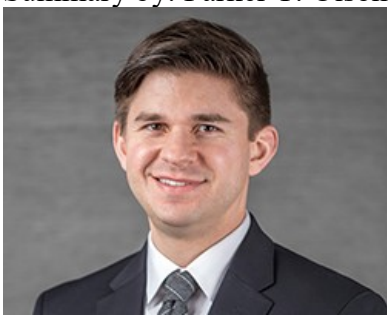
In this case, the employee worked as a paraprofessional. She worked full-time as well as played piano for the school district. She developed pain and symptoms in her upper extremities, and claimed that it was due to these work activities. She also alleged that she sustained two specific injuries stemming from incidents with a child grabbing her by the wrist.

The employee was examined by Dr. Michael Lee, who found that her work activities and the specific injuries were related to her work activities with the employer. The employee was also examined by Dr. William Simonet in an Independent Medical Examination. Dr. Simonet found that the medical records did not support the employee's claimed conditions. In addition, he found that she never had carpal tunnel, and that the employee's weight and hypothyroidism were co-morbidities of her symptoms.

At the hearing, the compensation judge denied the employee's claims based upon the opinions of Dr. Simonet. He found that his opinions were more persuasive than those of Dr. Lee. The WCCA affirmed the compensation judge's decision. It is well-established that a compensation judge has the right to choose an opinion of one medical expert over another if he/she finds one to be more persuasive. *Nord v. City of Cook*, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985.)

There was the potential issue of the compensation judge not considering evidence presented by the employer and insurer's witness at the hearing because the witness was closely aligned with the insurer. However, the WCCA did not need to address this as they affirmed the compensation judge's decision to adopt Dr. Simonet's opinions.

Summary by: Parker T. Olson



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Issue: JURISDICTION; STATUTES CONSTRUED - MINN. STAT. § 175A.01, SUBD. 5; VACATION OF AWARD

Johnson v. Univ. Good Samaritan, No. WC18-6171 (W.C.C.A. July 23, 2018)

On April 20, 2018, the pro se Employee petitioned to vacate a Mediation Resolution/Award, served and filed on October 18, 2004. The settlement was a full, final, and complete settlement of all claims that the Employee might have for his work injuries, including any claims for future medical care and treatment. The Employee had filed two prior Petitions to Vacate, one in 2004 and one in 2014. Both were denied.

The Employee made several assertions regarding alleged wrongful termination and entitlement to unemployment compensation. The W.C.C.A. noted that its authority was limited to the consideration of questions in law and fact arising under the workers' compensation laws of the state. Minn. Stat. § 175A.01, subd. 5, and could not address any issues raised by the Employee outside of this scope.

With regard to the Petition to Vacate, the Court noted its authority to vacate was limited by statute to mutual mistake of fact, newly discovered evidence, fraud, or a substantial and unanticipated change in medical condition.

The W.C.C.A. held the Employee did not adequately identify the basis for his Petition to Vacate. The Employee claimed that his injury was improperly denied by the Employer and Insurer, that the Department of Labor and Industry failed to adequately investigate his claims and that his attorney conspired with the Employer and Insurer during the settlement. Nothing in the Employee's petition satisfied the requirements of the statute and therefore, the Employee's Petition was denied.

Summary by: Emily Johnson

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Issue: EVIDENCE - RES JUDICATA

Johnson v. A Touch of Class Painting, Inc., No. WC18-6170 (W.C.C.A. July 23, 2018)

The parties entered into a Stipulation for Settlement in 2006 that settled all claims for workers' compensation benefits of any type on a full, final and complete basis. The Employee filed a Petition to vacate the award on April 27, 2018.

The Employee had previously filed a Petition to Vacate the Award in 2007 and the W.C.C.A. denied that Petition. Subsequently, the Employee filed two new Claim Petitions against the Employer, in 2009 and 2012. Both Claim Petitions were dismissed. The Employee filed a second Petition to Vacate in 2014. The W.C.C.A. held the claims and arguments of the petitioner in the 2014 Petition had been considered in 2008 and 2012 and that res judicata barred reconsideration of the same claims and the same evidence in a new proceeding. The Petition was denied.

The Court again pointed to the principle of res judicata. "Principles of res judicata otherwise bar subsequent proceedings which were litigated in a prior proceeding." *Alexander v. Kenneth P. LaLonde Enters*., 288 N.W.2d 18, 20, 31 W.C.D. 407, 410 (Minn. 1980). The Employee's petition to vacate the 2006 settlement and award was denied.

Summary by: Emily Johnson

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Issue: VACATION OF AWARD ON STIPULATION DUE TO FRAUD, MUTUAL MISTAKE OF FACT, OR NEWLY DISCOVERED EVIDENCE.

Johnson v. Skil-Tech, Inc., WC18-6167 (WCCA July 23, 2018)

The Employee entered into two settlement agreements with the Employer and Insurer in 2007 and 2015. Future medical expenses were not closed out. The pro se Employee petitioned to vacate both settlements arguing that there was mutual mistake of fact, newly discovered evidence, and fraud. The Employer and Insurer objected.

The WCCA denied the Employee's petition. The Employee's argument that there was mutual mistake of fact was without merit as his own exhibits showed that claims for penalties were considered at the time of the settlement. The Employee also alleged that penalty claims were newly discovered, however he had previously discussed penalties with his then attorney and penalties were included on the Claim Petition. Lastly, the Employee alleged that his attorney committed fraud by advising him that penalties had been claimed when they had not. Again, the Court noted that the Claim Petition filed on his behalf by his the-attorney did include a claim for penalties. Thus, the Court found that the Employee did not establish cause as required by Minn. Stat. § 176.461.

Summary by Scott G. Ferriss

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Issue: SUBSTANTIAL EVIDENCE

Flicek v. Lincoln Electric Co., No WC18-6139 (WCCA July 24, 2018)

The Employee had a significant history of headaches and upper extremity weakness prior to sustaining a low voltage electrical shock in April 2016. He subsequently complained of significant anxiety, nightmares, depression, poor concentration, and memory problems as a result of the electrocution. He was diagnosed with PTSD.

The Employer and Insurer obtained medical experts who opined the Employee did not have PTSD and that the injury would have fully resolved within two weeks. Additional medical benefits were then denied. The compensation judge found the Employee to be credible and relied on the opinions of the Employee's doctors in finding the Employee suffered a TBI or PTSD related to the injury. The Employer and Insurer appealed arguing the Employee's experts lacked appropriate qualifications and that the Employee's testimony was inconsistent with medical records, thus there was not substantial evidence to support the Employee's claims.

The WCCA affirmed, noting that the Employee's doctors were qualified to render opinions on the PTSD and TBI issue. Furthermore, the Court stated that while the presences of inconsistencies between the Employee's testimony and medical records goes to the weight or persuasiveness of such evidence, the inconsistencies in this matter were not of such a level of magnitude to warrant reversal.

Summary by Scott G. Ferriss

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Issue: VACATION OF AWARD ON STIPULATION DUE TO SUBSTANTIAL CHANGE IN CONDITION

Gelhar v. Universal Hospital Services, No. WC18-6157 (WCCA August 7, 2018)

The Employee sustained an admitted low back injury in 2002. Doctors could not discern the cause of ongoing pain she was having, and she was deemed to not be a surgical candidate. The parties settled the matter on a full, final, and complete basis with medical related to the low back left open subject to defenses, in March 2004 with the Award served and filed in April 2004.

The Employee then underwent multiple fusions and surgeries starting in 2006. In 2010, the Employer and Insurer denied an additional series of fusions based on an IME report from 2003 that recommended the Employee undergo an MRI. The MRI was not performed until 2006. The dispute was heard by a compensation judge who found in favor of the Employee. She then underwent the surgery.

The Employee then petitioned the WCCA to vacate the April 2004 Award on Stipulation based on a substantial change in medical condition. In vacating the 2004 Award, the WCCA applied the six factors in *Fondness v. Standard Café*, 41 W.C.D. 1054 (WCCA 1989), in their finding that the Employee provided sufficient evidence to establish 1) a substantial change in her diagnosis; 2) a change in ability to work; 3) additional permanent partial disability; 4) extensive additional medical care was needed; 5) the casual connection between the injury covered by the settlement and her current condition; and 6) that the Employee's current condition could not have been reasonably anticipated at the time of settlement.

Summary by Scott G. Ferriss

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Issue: RULES CONSTRUED – MINN. R. 1420.3700 (FILING OF STIPULATION FOR SETTLEMENT)

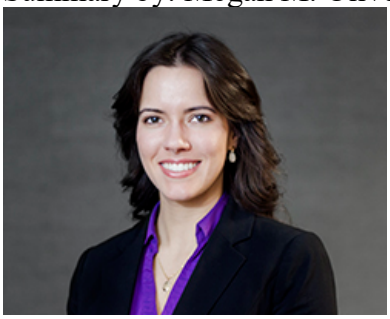
Plung v. Tag Aviation, No. WC18-6159 (W.C.C.A. August 14, 2018)

A workers' compensation claim was initiated following a work injury, and an agreement was reached on or around September 25, 2017. OAH was informed of the agreement, and a stipulation status conference (SSC) was scheduled for November 30 2017. At the SSC, the judge was informed that the employee's attorney had not received the stipulation until November 29, 2017. The attorney appearing for the employer's attorney could not explain why there had been a delay, and the judge issued an Order to Show Cause on December 1, 2017. A hearing on sanctions on January 8, 2018 resulted in an order for the employer's attorney to pay $250.00 in sanctions for the delay in finalizing the stipulation for settlement. The employer's attorney appealed.

On appeal, the appellant argued that sanctions should only be imposed for "willful failure to comply with the applicable provisions of [chapter 176]" under Minn. Rule 1420.3700 and that the "willful" required a "deliberate, intentional decision to violate Rule 1420.2050." The W.C.C.A. noted that the stipulation must be filed within 45 days of the settlement and that if "good cause for the delay is not shown," the compensation judge must take further action. In this case, the compensation judge noted that the appellant's reason was being busy with other matters and found that prioritize other matters over the stipulation was intentional.

Appellants also argued that the responsibility for a joint obligation should not go to them alone, since it was never specified who would prepare the stipulation. However, they failed to argue at the hearing that the employee's attorney contributed to the delay. Absence this showing, appellant's argument was rejected.

Summary by: Megan M. Oliver



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Issue: SUBSTANTIAL EVIDENCE, WAGES – MULTIPLE EMPLOYERS, EVIDENCE – RES JUDICATA

Aguirre v. St. Croix Hospice and Walker Methodist Health Center, No. WC18-6136 (W.C.C.A. August 14, 2018)

The Employee had a history of low back problems before sustaining a work-related low back injury while working for St. Croix on February 1, 2013. She sought medical treatment and was found to be at MMI by her physician on August 20, 2013 with permanent restrictions. A January 2015 IME with Dr. Paul Yellin opined that any medical treatment after August 20, 2013, PPD rating, and restrictions would have been reasonable and necessary, but were unrelated to her February 1, 2013 work injury.

On November 12, 2015, she sustained a second work-related low back injury while working for Walker Methodist Health. A July 2016 IME with Dr. William Simonet found that she would have reached MMI two weeks after the injury and that her current low back condition was unrelated. An August 2017 IME with Dr. Eric Deal opined that the 2013 and 2015 injuries would have been temporary in nature and resolved within six weeks.

At an Administrative Conference of August 30, 2016, Employer Walker argued that the injury was temporary and resolved and that a referral to the VRU was appropriate. The mediator found that the injury was a substantial contributing factor to the employee's condition, terminated the QRC's services, and ordered VRU to commence rehabilitation services.

At hearing on November 29, 2017, the compensation judge found that the February 2013 injury was temporary and resolved by August 20, 2013, the November 2015 injury was temporary and resolved by December 24, 2015, the medical treatment at issue was not reasonable to relieve effects from either work injury, and the AWW calculated for the first injury should not include any earnings from a second employer. Employee appealed.

On appeal, the Employee argued that the medical opinions of Drs. Yellin, Deal, and Simonet lacked adequate foundation. Employer Walker argued that Employee failed to object to the medical reports of the doctors. The W.C.C.A. found that failure to object to the medical opinions' foundation at hearing forfeited the objection on appeal and could not be heard.

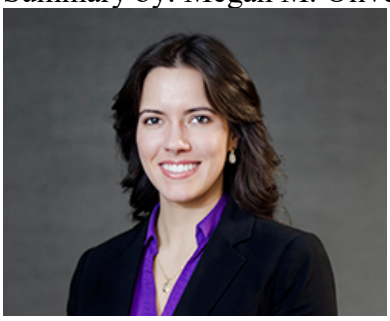
The Employee argued that the compensation judge's findings and order lacked adequate evidence. The W.C.C.A. noted that it was the trier of fact's responsibility to assess witnesses' testimony. As such, conflicts of medial evidence are to be determined by the compensation judge. The medial records and opinions were substantial evidence to support the compensation judge's opinion.

The Employee argued that the average weekly wage (AWW) should have included earnings from a second employer. The compensation judge had determined that she was not engaged in regular

employment with a second employer, since she had last worked for the second employer five months before the 2013 injury, did not work for the employer five months after the injury, and was never scheduled to work in that ten-month period. The resulting AWW accurately reflected the earning power at the time of the February 2013 injury.

Finally, the Employee argued that compensation judge should have applied the doctrine of res judicata to the finding of the 2016 Decision that the work injury was a substantial contributing factor to her condition. The W.C.C.A. noted that, since the Employee had appealed the 2016 Decision by filing a request for a formal hearing, the matter was to be heard de novo. There was no final decision on the merits, and the doctrine of res judicata was not available. The findings of the compensation judge were affirmed.

Summary by: Megan M. Oliver



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Issue: TEMPORARY TOTAL DISABILITY: JOB SEARCH

Schmidt v. Crow Wing, No. WC18-6145 (W.C.C.A. August 15, 2018)

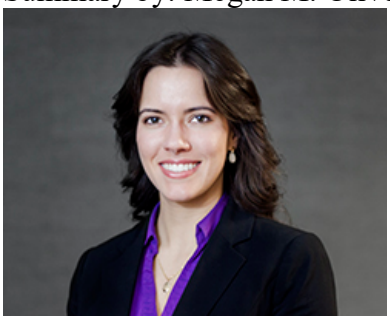
The Employee sustained a work-related injury to his cervical spine on April 29, 2014. The injury was admitted and temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits were paid until the Employee returned to work at full wages on June 23, 2014. He was given a 13% permanent partial disability (PPD) rating, with 10% being attributed to a preexisting condition caused by a 1985 MVA.

On September 24, 2015, his employment was terminated. Following termination, the Employee did not formally look for work. He continued to receive medical treatment, and a spinal surgery was performed in September 2017. After a medical narrative report indicated that the Employee's condition was not caused by the work injury and the surgery was not reasonable or necessary, further benefits were denied.

The Employee filed a claim petition requesting medical expenses, additional PPD, and TTD benefits from last day of work and continuing. At hearing, the compensation judge awarded medical expenses and additional PPD, but denied TTD benefits.

On appeal, the Employee argued that there was no evidence he could work before the surgery, and a job search after the surgery would have been futile and was not required as such. The W.C.C.A. found that substantial evidence supported the finding that the Employee failed to conduct a diligent job search after he was terminated, relying in part upon a vocational expert's finding of multiple jobs within the Employee's work restrictions near him home. Additionally, the court found that Minn. Stat. § 176.101 Subd. 1(e)(2) only allowed recommencement of TTD benefits when an employee is "actively employed" when he becomes medical unable to work. Because the Employee's employment was terminated in September of 2015 and the Employee never returned to work, TTD benefits after the 2017 surgery could not be recommenced.

Summary by: Megan M. Oliver



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Issue: ARISING OUT OF & IN THE COURSE OF

Forrest v. Children's Health Care, No. WC18-6140 (W.C.C.A. Aug. 16, 2018):

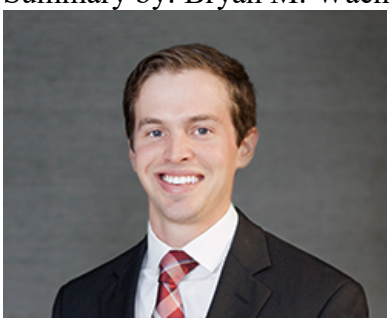
In this case, the Employee worked as a respiratory therapist. The Employee could take the elevator between floors, but typically used the stairs if she was going up or down one or two floors. On September 20, 2016, while descending the stairs to obtain a medical device on the fourth floor, she pivoted on the landing of the staircase to descend the next flight of stairs and felt a sharp pain in her left knee.

The Employer and Insurer denied the employee's claim alleging that the injury did not arise out of her employment. The matter was heard on October 2, 2017, and in his Findings and Order, the compensation judge determined that she sustained an injury to her left knee arising out of and in the course and scope of her work activities on September 20, 2016. The Employer and Insurer appealed.

The issue on appeal was whether the employee's injury arose out of her employment. The WCCA affirmed the Findings and Order of the compensation judge.
The WCCA rejected the Dykoff defense, and reasoned that the injury occurred as she pivoted to descend the next flight of stairs and is, therefore, an explained injury distinguishable from Dykhoff. The WCCA rejected the argument that Employee could have used the elevator per the recent decision in Roller-Dick v. CentraCare Health Sys. The WCCA also held that because no factual dispute was present in the case, Kubis does not control.

The WCCA cited to its recent decision in Lein v. Eventide and held that use of stairs is not a neutral risk but instead represents an increased risk of injury. The Court concluded that the stairs on an employer's premises constitute an increased risk of injury, and for the Employee who is in the course of her employment and is injured on stairs located on her employer's premises, the claim is compensable under Minnesota law.

Summary by: Bryan M. Wachter



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Issue: MENTAL INJURY – SUBSTANTIAL EVIDENCE

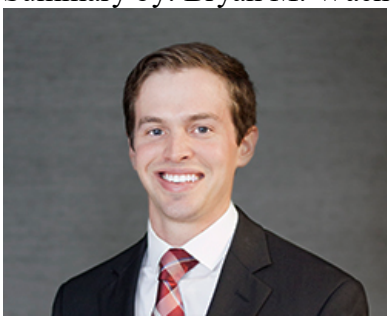
Daniel Kopischke v. Food Serv. Of Am., No. WC18-6155 (Aug. 20, 2018):

In this case, the Employee sustained a work injury to his neck and left shoulder when a load on a truck overturned while driving as a route driver on August 12, 2016. He underwent physical therapy and returned to work with restrictions. On January 2, 2017, he was involved in a motor vehicle accident while driving that caused his truck to jack-knife and stop in a ditch. The following day, he accompanied a driver on a route and began experiencing neck and left shoulder pain which increased over the following days. He was later diagnosed with PTSD and restricted from truck driving. Employer and Insurer denied primary liability for any mental health injury. At hearing, the compensation judge determined that the Employee does not suffer from PTSD as a result of the work injury.

Employee appealed and argued that the compensation judge did not address the issue of whether or not the employee suffered a mental injury arising from a physical injury, and that the opinion of the independent psychological examiner lacked foundation and that the decision is not supported by substantial evidence.

The WCCA addressed the issue presented and found that no evidence was presented that the employee was suffering from any mental condition arising from physical injuries, and as such there was no error by the judge in limiting his findings and conclusions to the claimed PTSD condition. The WCCA affirmed the compensation judge's conclusion that the employee did not experience PTSD after the January 2, 2017. The compensation judge relied upon the opinion of Dr. Arbisi, independent psychological examiner, as well as medical records, and reasonable inferences from the employee's testimony. The WCCA also found there was adequate foundation for Dr. Arbisi's opinion on the employee's psychological condition.

Summary by: Bryan M. Wachter



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Issue: ARISING OUT OF & IN THE COURSE OF

Daniel James v. Duluth Clinic, No. WC18-6128 (W.C.C.A. Aug. 21, 2018):

In this case, Employee sustained a right knee injury as he stood from his chair and pivoted to his right. The Employer and Insurer denied the claim, asserting the injury did not arise out of employment. The matter was heard on October 31, 2017. Two theories were proffered by the Employee as to why his right foot did not move when he pivoted (1) a substance on the floor, and (2) the traction on his shoes. The compensation judge found the employee credible but rejected the theories as speculative. The judge concluded that there was no increased risk and the employee's injury did not arise out of his employment. Employee appealed.

The Employee appealed three particular findings: (1) that the employee failed to prove that there was a substance on the floor which made the floor sticky; (2) the examination and opinion of Dr. Strand; and (3) that even accepting the employee's description of the event, no increased risk was established. The WCCA affirmed the findings for the following reasons: (1) there is no clear evidence that a substance existed on the floor; (2) the examination and opinion of Dr. Strand appeared to be a recitation of the evidence presented. As such, the only issue is whether the judge applied the correct legal standard regarding whether the employee's injury arose out of his employment.

The WCCA concluded the compensation judge did not apply the correct legal standard and reversed on this basis. The WCCA held that while there is no evidence that there was a sticky substance on the floor, he encountered a set of circumstances as part of the working environment, which when combined, created a hazard. The set of circumstances (tight confined space, focus on the patient, rolling of the chair, planting his foot to twist toward computer) increased the risk of injury and provided the necessary causal connection between the injury and employment.

Summary by: Bryan M. Wachter