Workers' Compensation
Court of Appeals

July through September 2005

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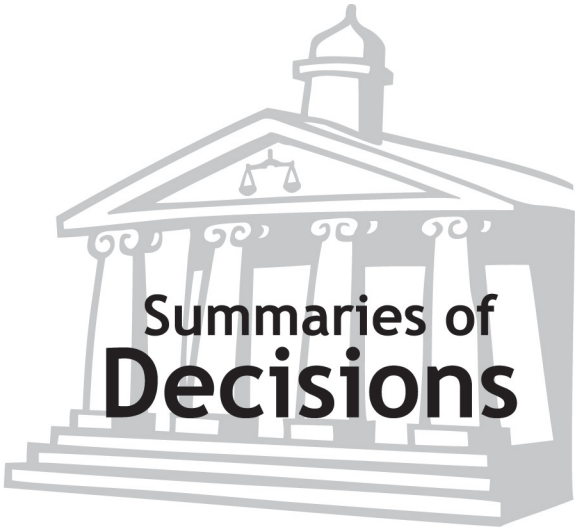

***Grove v. United Hospital*, 7/5/05**
DOI: 2/26/01

Jurisdiction – Justiciable Controversy

Because the record was inadequate to establish whether tangible benefits were in dispute at the hearing, the matter was remanded for further proceedings.

Attorney Fees – Roraff

In the absence of an actual petition for fees or agreement of the parties, compensation judges should avoid issuing orders awarding unspecified "reasonable" attorney fees, as such orders have no practical effect other than to prompt otherwise unnecessary appeals.

Modified in part, vacated in part, and remanded.

Branch, III v. Strout Plastics*, 7/14/05
DOI: 9/6/02

Job Search
Temporary Total Disability

Where the employee contacted only about 25 employers over claimed benefits periods totaling about 14 months, where entries in the employee's job search logs were not corroborated by the audit of a business investigator, where the employee's follow-up on leads with a temporary employment agency was not diligent, and where the employee had rejected rehabilitation assistance, the compensation judge's conclusion that the employee did not conduct a reasonable and diligent job search during the benefits periods at issues was not clearly erroneous and unsupported by substantial evidence, and the judge's denial of temporary total disability benefits on that basis was affirmed.

* This case is on appeal to the Minnesota Supreme Court.

Temporary Benefits – Fully Recovered
Temporary Partial Disability

Where the employee had a long history of pre-existing neck and low back injury, where there was expert medical opinion that the employee no longer had any objective abnormal physical findings and had sustained no new injury to his neck on the date alleged, where there was other expert medical opinion that the employee had essentially fully range of motion in both his neck and low back and demonstrated no significant abnormalities on MRI scans, the compensation judge's conclusion that the employee's neck and low back injuries were temporary and had fully resolved by the date of a third medical expert's finding that the employee had full range of motion in all planes of his lumbar and cervical spine was not clearly erroneous and unsupported by substantial evidence.

Practice and Procedure – Matters at Issue
Remand
Temporary Partial Disability
Earning Capacity

Where the only definitive evidence of earnings by the employee as a result of self-employment selling Avon products during the two-month post-injury period at issue reflected earnings of $22.80 in commissions on the sale of four items, where the court had affirmed a finding that the employee was not involved in a reasonable and diligent search for work during that period, and where the employee's purported claim for temporary partial disability benefits alternative to this claim for temporary total benefits during the period was not formally pled and was not asserted until late in the hearing, the compensation judge's failure to address the purported claim was not error warranting remand of the issue.

Permanent Partial Disability

Where it was supported by expert medical opinion and not otherwise unreasonable in light of the evidence, the compensation judge's denial of permanent partial disability benefits related to the employee's temporary work injury was not clearly erroneous and unsupported by substantial evidence.

Medical Treatment and Expense

Where none of the employee's arguments with regard to certain subsidiary medical and rehabilitation benefits fully contemplated the judge's affirmed conclusion, in reliance on medical evidence, that the employee's condition was fully resolved, the compensation judge's denial of subsidiary benefits subsequent to the date of resolution was not clearly erroneous and unsupported by substantial evidence, pursuant to Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987), and derivative cases.

Affirmed.

***Ly v. Laidlaw, Inc.*, 7/14/05**
DOI: 3/14/02

Permanent Partial Disability

It was error for the compensation judge to award permanent partial disability based on the opinion of the IME doctor where the doctor improperly applied the rule in a case of multiple surgeries.

Affirmed in part, vacated in part, and remand.

***Smith v. Becklund Home Health Care*, 7/18/05**
DOI: 5/4/93, 12/8/92

Medical Treatment and Expense – Reasonable and Necessary
Settlements

The record as a whole, including expert opinion, supported the compensation judge's denial of claimed antidepressant medication expenses, both on grounds that the medication was not reasonable and necessary to treat chronic pain and on grounds that the medication expense claim was barred by a closeout of claims for psychological and psychiatric treatment.

Affirmed.

Werneke (minor) by Werneke v. Lakeside Lawn and Landscape, Inc.*, 7/21/05
DOI: 6/16/03

Employment Relationship – Authority to Hire

Where the employer had in fact made his son foreman of the lawn mowing division of the employer's landscaping business, where the son's foreman role was known and evident to the 15-year-old injured purported employee, and where the foreman/son's statements and actions would reasonably lead the injured purported employee and his parents to believe that the foreman/son had intention and authority to hire the purported employee for his mowing crew, the compensation judge's conclusion that the owner's conduct was sufficient to clothe his son in apparent authority to hire for his crew was not clearly erroneous and unsupported by substantial evidence.

Employment Relationship – Deemed Employer

Where acknowledged employees on the employer's lawn-mowing crew were also, like the claimant, social friends as well as working associates of the crew's foreman, where the claimant was expressly called and invited to work and directed to report at the employer's usual 7:30 a.m. starting time on the date of his injury, where the claimant was given by the foreman a time sheet to complete at the end of the pay period, where the claimant was clearly needed by the employer to fill out the crew on which he worked, where the claimant performed the same tasks that other members of the crew performed, and where the claimant's work was an obvious benefit to the employer, the compensation judge's conclusion that the claimant was working under an implied contract for hire at the time of his injury was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

* This case is on appeal to the Minnesota Supreme Court.

***Tuttle v. Society of St. Vincent De Paul*, 7/22/05**
DOI: 12/16/00

Causation
Credibility

The employee's testimony about the manner in which he was injured was not clearly "contrary to the laws of physics" and the compensation judge did not err in accepting the employee's testimony as credible.

Maximum Medical Improvement

Where the evidence as to an earlier date for attainment of maximum medical improvement (MMI) was equivocal, the compensation judge did not err in reaching a finding that MMI had been reached no later than the date of the employer's independent medical examination.

Arising Out Of and In the Course Of

Substantial evidence supports the compensation judge's finding that the employee's injury arose out of and in the course of his employment where he was performing his usual job duties as a thrift store manager and where, although he had reported his time on the date of injury as "volunteer hours," this merely reflected the employer's timekeeping practices and refusal to pay overtime hours for work performed in excess of 40 hours per week.

Injury – Permanent

Substantial evidence, including medical records, lay testimony and expert medical opinion, supported the compensation judge's finding that the employee's low back injury was permanent rather than temporary.

Earning Capacity
Job Search

Substantial evidence supported the compensation judge's findings that the employee had performed a reasonably diligent job search and that his post-injury employment reasonably reflected his impaired earning capacity, so that the awards of temporary total and temporary partial disability compensation was appropriate.

Affirmed.

***Churchill v. Japs Olson Company*, 7/25/05**
DOI: 8/29/92

Evidence – Burden of Proof

Where the compensation judge's stated basis for rejecting an medical unopposed opinion on causation is directly contrary to the record, and where the compensation judge, in her memorandum,

indicates that the absence of a well-founded medical opinion supporting causation was the sole basis for the denial of the employee's claim, the denial of causation is reversed.

Reversed.

Leidenfrost v. Wal-Mart Stores, Inc.*, 7/26/05
DOI: 3/23/00

Medical Treatment and Expense – Treatment Parameters

Where the parties have stipulated that the surgery performed was casually related and reasonable and necessary, the failure of the health care provider to provide prior notification of the procedure to the employer and insurer did not bar the provider from receiving payment for the surgery.

Affirmed.

***Sether v. Wherley Motors*, 7/27/05**
DOI: 9/17/94

Temporary Total Disability

Substantial evidence, including the adequately founded opinion of the employee's treating physician, supports the compensation judge's finding that the employee's 1994 work injury remained a substantial contributing factor of the employee's current disability.

Intervenors

An intervenor makes an appearance in the case separate from that of the employee by filing a motion to intervene and has a right to present evidence and argument in support of its claim at the hearing. Attached documentation to the motion to intervene, however, may be sufficient to establish an intervention interest and right to reimbursement for the claimed amount without the intervenor being present at the hearing.

Affirmed in part, vacated in part, and remanded in part.

***Cunningham v. Minnesota Motor Company*, 8/1/05**
DOI: 12/31/01, 7/28/99

Rehabilitation – Retraining

Where the judge's decision was based on the expert opinion of a qualified rehabilitation consultant, that, in keeping with the factors articulated in Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (W.C.C.A. 1989), the employee (1) reasonably needed retraining rather than further job search, (2) was likely to succeed at the proposed retraining, (3) was likely to obtain related employment following the proposed retraining, and (4) was likely to recoup lost earning capacity consequent to that employment, the compensation judge's award of retraining was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

* This case is on appeal to the Minnesota Supreme Court.

***Gustafson v. Hennepin County Medical Center*, 8/1/05**
DOI: 1/29/04

Vacation of Award – Voidable Award

Where the employee rescinded a separate settlement agreement that was a material and integral part of the workers' compensation settlement agreement between the parties, the Award on Stipulation is voidable, and is vacated and set aside.

Petition to vacate granted.

***Hershkovitz v. Lakeville Motor Express*, 8/1/05**
DOI: 11/14/02

Causation

Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee sustained an injury to his cervical spine as a result of his work-related injury on Nov. 14, 2002.

Notice of Injury
Minnesota Statutes §176.141

The compensation judge reasonably concluded that, although the employee initially experienced low back symptoms but later developed neck symptoms, the employee's eventual medical treatment and surgery to his cervical spine arose out of the employee's work injury for which there was notice to the employer and insurer as required by Minnesota Statutes §176.141.

Affirmed.

***Thorsten v. Construction and General Laborers*, 8/1/05**
DOI: 12/9/96

Medical Treatment and Expense – Treatment Parameters
Minnesota Rules Part 5221.6500, subp. 2C(1)(d)

Where the compensation judge found that the employee had a valid discogram showing positive results at one or two levels, and had experienced incapacitating pain for at least three months, which are two of the conditions in the applicable permanent medical treatment parameter that must be satisfied to indicate that surgery is reasonably required, and where those findings are supported by substantial evidence of record, we affirm the compensation judge's award of the employee's claim for the proposed fusion surgery.

Medical Treatment and Expense

Where the compensation judge found that the employee had a valid discogram showing positive results at one or two levels, and had experienced incapacitating pain for at least three months, which are two of the conditions in the applicable permanent medical treatment parameter, Minnesota Rules

Part 5221.6500, subp. 2C(1)(d), that must be satisfied to indicate that surgery is reasonably required, and where those findings are supported by substantial evidence of record, we affirm the compensation judge's award of the employee's claim for a fusion surgery.

Affirmed.

Wheelock v. Trilite Stone, et al*, 8/1/05
DOI: 3/7/00

Job Offer – Refusal

Rehabilitation and medical records reasonably support the conclusion that the employee refused an offer of suitable employment.

Earning Capacity

The compensation judge reasonably concluded that four extremely short-term jobs held by the employee post-injury were casual and sporadic employment not representative of the employee's earning capacity for temporary partial disability benefit purposes.

Affirmed as modified.

***Hayden v. Scott County*, 8/2/05**
DOI: 10/29/99, 11/18/97

Apportionment – Permanent Partial Disability
Minnesota Statutes §176.101, subd. 4a

Where there was no expert medical opinion or other evidence that the employee had any traumatically caused or congenital condition in her low back pre-existing the first of her two work injuries with the employer, the compensation judge's apportionment of the employee's permanent partial disability to a pre-existing traumatic injury or congenital condition, pursuant to Minnesota Statutes §176.101, subd. 4a, was clearly erroneous and unsupported by substantial evidence.

Penalties

Where, although it was reversing the judge's decision to apportion 12 percent of the employee's total 26 percent permanent partial disability, the court did not find unreasonable the judge's implicit finding that the employer's defense on the 12 percent was reasonable, but where the employer had no legal basis for delaying for over a year in making full payment of compensation for the remaining 14 percent, the compensation judge's denial of penalties for vexatious delay in payment was reversed in part, to provide for an award of a penalty for the employer's delay in paying compensation for the uncontested 14 percent impairment.

Affirmed in part, reversed in part.

* This case is on appeal to the Minnesota Supreme Court.

***Carter v. Alliant Technologies*, 8/3/05**
DOI: 3/7/03

Causation

The employee's testimony together with the medical records and opinions of Dr. Brutlag support the compensation judge's finding the employee sustained a permanent injury to his right shoulder on March 7, 2003.

Temporary Total Disability

Substantial evidence supports the finding the employee had restrictions on his work activities after March 7, 2003, and the injury was a substantial contributing cause of the employee's wage loss. Where the evidence supports the conclusion that the employee had a reasonable expectation of returning to work for the employer following layoffs on March 20 and Nov. 10, 2003, the compensation judge properly awarded temporary total disability benefits.

Temporary Partial Disability

The medical evidence and the employee's testimony supports the conclusion that the employee's work-related injury caused a physical disability impairing the employee's ability to work and the judge's award of temporary partial disability benefits.

Permanent Partial Disability – Shoulder
Minnesota Rules Part 5223.0450, subp. 3.A.(1)

The award of a two percent permanent partial disability for a partial thickness rotator cuff tear is affirmed as Minnesota Rules Part 5223.0450, subp. 3.A.(1), provides for the rating "with or without surgical repair." The award of permanent partial disability for loss of motion of the shoulder is premature as a surgical repair may change the amount of permanency to which the employee may be entitled, and that award is vacated.

Maximum Medical Improvement

Where the compensation judge found the employee sustained a permanent injury and awarded a surgical consultation, the compensation judge's determination the employee had reached maximum medical improvement on Jan. 20, 2004, must be reversed.

Affirmed in part, vacated in part, and reversed in part.

***Cosgrove v. Healtheast Corporate Services*, 8/9/05**
DOI: 9/21/01

Causation

Substantial evidence in the form of well-founded medical opinions supports the compensation judge's determination that the employee's admitted work injury was not a substantial contributing factor in the employee's condition.

Affirmed.

***Nelson v. Austin Medical Center*, 8/12/05**
DOI: 3/19/03, 2/12/02

Causation – Substantial Contributing Cause

Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee did not develop complex regional pain syndrome as a consequence of her work injury.

Permanent Partial Disability – Schedule

Where the record reasonably supported the conclusion that the employee's work-related condition was expressly covered by the permanent partial disability rules, the compensation judge did not err in denying the employee's request for a rating pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

Affirmed.

***Kuehn v. Vickerman Construction, Inc., et al*, 8/16/05**
DOI: 2/20/03, 7/16/97, 7/8/86, 9/15/79

Gillette Injury

Substantial evidence, including expert medical opinion and the employee's testimony, supports the compensation judge's finding that the employee sustained a Gillette injury in February 2003.

Notice

The compensation judge did not err by finding the employee had given adequate notice of a Gillette injury where the employee gave notice after his initial consultation with his attorney, within 180 days of stopping work, before a medical opinion had been obtained identifying the employee's injury as a Gillette injury, and the employer does not allege any prejudice due to delay in notice.

Apportionment

Substantial evidence, including expert medical opinion and the employee's testimony, supports the compensation judge's finding apportioning liability among his various work injuries.

Weekly Wage

The compensation judge did not err by calculating the employee's weekly wage to include overtime where the employee was working 12-hour shifts, seven days a week for the entire time he worked for the employer.

Affirmed.

***Long v. Wal-Mart Stores, Inc.*, 8/16/05**
DOI: 11/2/02

Causation – Temporary Aggravation

Substantial evidence, including the report of the independent medical examiner and other medical evidence, supports the compensation judge's finding that the employee's work-related injury had fully resolved by June 2004.

Medical Treatment and Expense – Change of Physicians

Where the employee filed a medical request seeking approval and payment for chiropractic services provided from Jan. 30 through March 17, 2003, the compensation judge erred in denying treatment solely on the basis of lack of prior approval for a change of physicians under Minnesota Rules 5221.0430, subp. 3, and the matter is remanded for further consideration. See Henschel v. Interfaith Social Services, slip op. (W.C.C.A. Oct. 2, 1995).

Medical Treatment and Expense

Where substantial evidence supported the compensation judge's finding the employee's work injury had resolved by June 2004, the judge reasonably found emergency room treatment provided on June 23, 2004, was unrelated to the effects of the employee's Nov. 2, 2002, work injury.

Affirmed in part and remanded in part.

***Metters v. Northwest Airlines*, 8/17/05**
DOI: 9/19/03

Notice of Injury

Substantial evidence supports the finding that the employee had sufficient knowledge of the probable compensable character of her personal injury more than 180 days prior to the notice given in this case, and the finding that the employee failed to provide timely notice of injury to employer is affirmed.

Affirmed.

***Hanson-Haukoos v. Hormel Foods Corporation*, 8/18/05**
DOI: 1/8/03, 11/25/02, 5/9/01, 1/4/00, 1/21/99, 12/12/97

Gillette Injury

Substantial evidence of record, including an adequately founded expert medical opinion, supports the compensation judge's finding that on Jan. 8, 2003, the employee sustained a Gillette injury in the nature of bilateral carpal tunnel syndrome, as a result of her work activities, and that the employee provided the employer with timely notice of that injury.

Maximum Medical Improvement – Service of MMI Report

Where no physician had yet issued a report advising that the employee had reached maximum medical improvement (MMI) from all work-related injuries, the compensation judge's finding that the employee had not yet reached MMI from all injuries, nor had she been served with a MMI report, was supported by substantial evidence of record.

Temporary Total Disability Benefits – Causation

Substantial evidence of record supported the compensation judge's award of temporary total disability benefits while the employee was disabled during her post-surgery recovery.

Temporary Total Disability Benefits – Causation – Job Search

Where the employee's employment was terminated due to attendance issues, and where the employee remained subject to work restrictions as a result of her work-related injuries and cooperated with rehabilitation assistance by engaging in a diligent job search, the compensation judge reasonably concluded that the employee was entitled to temporary total disability benefits after the termination of her position.

Temporary Partial Disability Benefits – Causation

Where the employee was restricted to part-time work once she returned to work post-surgery, the evidence of record supported the compensation judge's award of temporary partial disability benefits.

Temporary Partial Disability Benefits – Causation

During the period of time when the employee's time loss was due to illness and medical consultations unrelated to her work injuries, the compensation judge reasonably denied the employee's claim for temporary partial disability benefits.

Temporary Partial Disability Benefits – Earning Capacity

Substantial evidence, including testimony by the employee's QRC, supports the compensation judge's denial of temporary partial disability benefits during the period when the employee earned very limited wages from part-time employment, based on his finding that the wages did not accurately represent the employee's earning capacity.

Permanent Partial Disability Benefits

Substantial evidence, including adequately founded medical opinion, supports the compensation judge's findings concerning various claims for permanent partial disability benefits.

Intervenors

Where the evidence of record did not clearly show that the VA Medical Center, a nonparticipating provider in the employer's managed care plan, was provided with notice regarding the rules of the managed care plan, that provider should not be denied reimbursement for an alleged failure to comply with managed care rules.

Rehabilitation – Eligibility

Substantial evidence of record supports the compensation judge's findings that the employee's work injuries resulted in permanent impairment and ongoing restrictions and that the employee may be reasonably expected to benefit from rehabilitation assistance.

Wages – Irregular Hours
Minnesota Statutes §176.011, subd. 18

Where the employee's hours and wages were different for each of the 26 weeks prior to her injury, and where the record documents the days actually worked by the employee, the compensation judge properly utilized the calculation method for weekly wage rate as outlined in Minnesota Statutes §176.011, subd. 18.

Affirmed, as modified.

***Stromberg f/k/a Kroeten f/k/a Meyer v. Honeywell, Inc.*, 8/18/05**
DOI: 5/28/02

Causation – Substantial Contributing Cause

Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee sustained a Gillette injury as a result of her work activities and that her surgeries were reasonable, necessary, and causally related to the work injury.

Temporary Total Disability

Substantial evidence, including the employee's medical records, supported the compensation judge's award of temporary total disability benefits.

Rehabilitation – Consultation

The issue of whether the employee is permanently precluded from returning to her pre-injury job, due to a work injury, is irrelevant to the question of whether the employee is entitled to a rehabilitation consultation.

Affirmed.

***Miller v. Northwest Airlines Corporation*, 8/19/05**
DOI: 1/12/93

Permanent Total Disability – Applicable Standard

Where it was clear, from the judge's memorandum and from the opinions of the doctors upon whom the judge relied, that the compensation judge reasonably inferred from the doctors' opinions that the doctors deemed the employee's physical disability total and permanent on a solely medical basis, any search for work was in effect a moot issue regardless of the employee's "age, education, training, and experience," and the fact that the doctors' opinions did not expressly reference a standard embracing such nonmedical elements did not render those opinions insubstantial as support for the compensation judge's finding that the employee was permanently and totally disabled.

Appeals – Law of the Case
Withdrawal from the Labor Market
Permanent Total Disability

Where the only wage replacement benefits effectively at issue in the former proceeding, in which the employee was denied benefits for having withdrawn from the labor market, were benefits up through the date of the hearing, where at the time of that proceeding the employee was still reasonably medically capable of performing at least some work, and where, subsequent to that proceeding, the employee's condition deteriorated to the point where two doctors and ultimately the judge could reasonably conclude that the employee was totally incapable of work on a purely medical basis, the compensation judge's award of permanent total disability benefits notwithstanding the absence of any affirmative re-entry into the labor market was neither clearly erroneous nor unsupported by substantial evidence.

Practice and Procedure – Admission of Evidence
Evidence – Credibility

Where the judge indicated that she would give the employer and insurer four weeks in which to conduct and submit a post-hearing cross-examination of the employee, where the employer and insurer waived that option by subsequent letter to the judge, and where the judge's arguably diminished opportunity to assess the credibility of a witness appearing by telephone as opposed to in person might just as well have worked to the benefit of the employer and insurer as to their detriment, the compensation judge did not abuse her discretion in permitting the employee to testify by telephone subsequent to the judge's denial of a motion to compel attendance and arguably without notice that the testimony would even occur.

Affirmed.

Ramos v. Tiehoch Contracting, Inc.*, 8/19/05
DOI: 4/17/02

Employment Relationship
Evidence – Credibility

Where the judge's decision was based almost exclusively on findings as to the credibility of the petitioner and of the purported employer, the compensation judge's conclusion that the petitioner had been personally hired by and was an employee of the purported employer were not clearly erroneous and unsupported by substantial evidence.

Arising Out Of and In the Course Of
Evidence – Credibility

Where the judge accepted the petitioner's account of his injury as credible, and where that account was reasonably supported by the testimony of a witness and consistent with the employee's medical records, the compensation judge's conclusion that the employee's injuries arose out of and in the course of his employment was not clearly erroneous and unsupported by substantial evidence.

Practice and Procedure – Admission of Evidence

Where the witness had now testified post hearing in person, subject to cross-examination, and where the record had been reopened to receive that testimony, whatever might have been the hearsay nature of the prehearing statement of the witness that had originally been received into evidence over the objection of the employer was rendered harmless by the witness's ultimate availability for cross-examination, and admission of that prehearing statement was not basis for reversal.

Practice and Procedure – Reopening of the Record

Where the employer did not argue that the judge had been misled by the allegedly fraudulent affidavit of the petitioner's counsel, where a complete copy of the deposition testimony at issue was attached to that counsel's Motion and Affidavit, where the court was fully apprised of the petitioner's bases for requesting that the record be reopened to receive that testimony, and where the bases for the petitioner's attorney's allegedly fraudulent assertions, together with the witness's explanation as to his failure to attend his earlier-noticed deposition, were fully explored at the reopened hearing, the compensation judge did not abuse her discretion or otherwise err in reopening the record to receive the deposition testimony at issue.

Affirmed.

***Hampton v. Spectro Alloys Corporation*, 8/22/05**
DOI: 7/9/02, 6/26/02

Practice and Procedure – Order for Dismissal
Contribution and Reimbursement

The compensation judge erred in concluding that employer and Zurich American's claim for contribution against employer and Western National was barred by an order for dismissal of the

* This case is on appeal to the Minnesota Supreme Court.

employee's claim against Western National for current medical expenses pursuant to the rational in Wolk v. Allian Tech. Sys., slip op. (W.C.C.A. July 18, 1997).

Settlements – Interpretation

The compensation judge erred in finding the language of the stipulation for settlement barred the employee's claim against Western National where the stipulation left open medical expenses "related to the surgery on the employee's neck," and the employee's current claim is for expenses for a second fusion surgery necessitated by the failure of the first cervical fusion.

Reversed.

Edeogu v. Bauerly Brothers, Inc.*, 8/30/05
DOI: 7/00/97, 7/19/96

Appeals – Notice of Appeal

The employee's appeal must be dismissed where not filed within the 30-day statutory limit for perfecting an appeal.

Vacation of Award
Jurisdiction – Subject Matter
Minnesota Statutes §176.461

Pursuant to Minnesota Statutes §176.461 and DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501, 30 W.C.D. 109 (Minn. 1977), the Workers' Compensation Court of Appeals lack authority to vacate or set aside the October 1999 order dismissing the employee's claim petition.

Appeal dismissed; petition for relief denied.

***Balega v. Hennepin County Medical Center*, 8/31/05**
DOI: 4/1/99, 6/8/89

Applicable Law – Controlling Event

Where substantial evidence supports the compensation judge's finding that the employee's 1999 injury was a substantial contributing factor to his permanent total disability, the compensation judge correctly concluded that the 1999 injury was a controlling event for purposes of determining applicable law.

Affirmed.

***Cici v. Methodist Hospital*, 8/31/05**
DOI: 6/18/90

Temporary Partial Disability Benefits – Earning Capacity

Where the employee remained subject to restrictions, and worked at various temporary contract positions for intermittent periods of time between 2002 and 2004, substantial evidence supports the

* This case is on appeal to the Minnesota Supreme Court.

compensation judge's determination that the employee's work injury was a substantial contributing cause of her loss of earnings for those periods of time.

Affirmed.

***Hinrichs v. Chili's/Host Marriott Services*, 9/2/05**
DOI: 1/13/03

Medical Treatment and Expense – Treatment Parameters
Minnesota Rules Part 5221.6200, subp. 3

Treatment modalities addressed under subparts 3C and 3H of Minnesota Rules Part 5221.6200 are separate modalities entitled each to its own nonaggregated frequency limit. Where it was not unreasonable for the judge to conclude that the employee's deep tissue and trigger point therapy with a massage therapist was manual therapy governed by provisions of Minnesota Rules Part 5221.6200, subpart 3H, and not chiropractic adjustment governed by provision of subpart 3C of that rule, the compensation judge's award of payment for the massage therapy concurrent with already paid chiropractic treatment was neither clearly erroneous nor unsupported by substantial evidence.

Medical Treatment and Expense – Fee Schedule
Minnesota Rules Part 5221.0700, subp. 3C

It is not the job of a compensation judge or the Workers' Compensation Court of Appeals to assign a service to one of the provider group designations in Minnesota Rules Part 5221.0700, subp. 3C, based on equitable concerns of educational level or professional expertise, and, although the services at issue were not a perfect fit into any of the designations, there was no clear legal error in the compensation judge's conclusion that the trigger point massage therapy at issue fit the physical medicine and rehabilitation services provider group designation at Minnesota Rules Part 5221.0700, subpart 3C(4), better than it fit the chiropractic services designation at subpart 3C(5) of that rule.

Affirmed.

***Stromley v. McQuay International*, 9/2/05**
DOI: 10/8/03

Medical Treatment and Expense – Surgery

Substantial evidence supports the compensation judge's denial of proposed fusion surgery for the employee.

Affirmed.

***Kottke v. Virginia Regional Medical Center*, 9/6/05**
DOI: 6/2/94, 6/25/91, 12/12/89, 10/23/87, 11/21/85

Causation – Substantial Contributing Cause

Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee's work-related injuries did not substantially contribute to the employee's need for surgery and resulting permanent total disability.

Affirmed.

***Magariner v. General Cleaning, et al*, 9/6/05**
DOI: 1996, 6/6/88

Causation – Substantial Contributing Cause

Substantial evidence, including the employee's testimony, supported the compensation judge's decision that the employee did not sustain a work-related injury while employed by a garbage and recycling firm.

Credits Offset
Apportionment

The compensation judge erred in concluding that the employer and insurer were equitably estopped from asserting that the employee was an uninsured independent contractor at the time of an alleged second work injury, and remand was required for further consideration and findings regarding the employer and insurer's credit claim pursuant to Narog v. Tony's Ceramics, 36 W.C.D. 357 (W.C.C.A. 1983).

Affirmed in part, reversed in part, and remanded.

***Martinez v. Thomas Storage Systems*, 9/9/05**
DOI: 11/10/03

Wages Calculation
Minnesota Statutes §176.011, subd. 18

Where there was no evidence to indicate that the employee worked an irregular schedule, the compensation judge's finding to that effect is clearly erroneous. The evidence established that the employee was hired to work 40 hours per week, and that she was working on that basis until her work injury intervened to prevent her from continuing. Pursuant to the calculation of weekly wage set forth in Minnesota Statutes §176.011, subd. 18, the employee's weekly wage has been based on her daily wage multiplied by the anticipated five days of work per week.

Reversed.

***Bellow v. Antonio Holliday d/b/a Tony Mogul Enterprises, LLC*, 9/12/05**
DOI: 1/14/04

Employment Relationship
Minnesota Statutes §176.183, subd. 1

Where the only issue before the judge was whether either the corporate owner or his corporation was the employee's employer, where there was evidence that the corporate owner had personally hired the employee but had paid for all of his corporation's materials and labor from a corporate account, and where the parties did not litigate whether or not the owner directed and controlled the activities of employees within the meaning of Minnesota Statutes §176.183, subd. 1, the compensation judge's decision that the corporation was a liable employer was affirmed but her decision that the owner was also an employer was reversed and her decision that he was jointly and severally liable for benefits was vacated.

Affirmed in part, reversed in part, vacated in part, and modified in part.

***Coffing v. Independent School District #194*, 9/13/05**
DOI: 11/1/99

Permanent Partial Disability – Shoulder
Permanent Partial Disability – Weber Rating
Evidence – *Res Judicata*

Where the permanency claim denied at a 2003 proceeding had been for benefits for a cervical condition under a scheduled provision of the Minnesota Rules, and where the permanency claim at the 2004 proceeding had been for benefits for a forearm condition under a rating pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), res judicata did not bar the compensation judge's award of benefits pursuant to the 2004 claim, notwithstanding the fact that the forearm condition was already in existence at the time of the 2003 proceeding.

Temporary Partial Disability
Earning Capacity
Evidence – Collateral Estoppel

An employee's earning capacity is neither static nor amenable to a final determination valid for all future periods; where the employee's wages at her post-injury job were found in an earlier proceeding not to represent her diminished earning capacity during the period at issue, but where her wages at that same job were found in a later proceeding to represent her diminished earning capacity during a later benefits period, the doctrine of collateral estoppel did not apply to bar an award of temporary partial disability benefits in the later proceeding.

Affirmed.

***Peterson v. ADB Construction, et al*, 9/13/05**
DOI: 10/17/03, 8/6/02

Apportionment – Calculation
Calculation of Benefits – Compensation Rate

Where the insurer on the risk for the 2003 injury had focused its appeal on the narrow contention that the judge should have based her Kaisershot calculation on the employee's wage at the time of that 2003 injury rather than on his wage at the time of his 2002 injury, where none of the parties had appealed from the judge's application of the Kaisershot formula rather than a Kirchner analysis, which would have been more proper, where to reverse and apply Kirchner instead of Kaisershot would only have benefitted the non-appealing insurer on the risk for the 2002 injury, and where the employee could not have been fairly compensated if the judge had applied the Kaisershot formula using the 2003 post-injury wage as argued by the 2003 insurer, the court declined to reverse the compensation judge's application of the Kaisershot formula based on the employee's 2002 post-injury wage.

Affirmed.

***Ullery v. Americold Logistics*, 9/14/05**
DOI: 12/10/97

Causation

Substantial evidence, including the expert opinion of the employer and insurer's independent medical examiner, supports the compensation judge's finding that the employee's Dec. 10, 1997, work-related injury had resolved by Feb. 5, 1999, and that the employee's subsequent shoulder condition was not causally related to the temporary work injury.

Affirmed.

***Burks v. Volume Services America, Inc./Centerplate*, 9/15/05**
DOI: 6/13/03

Medical Treatment and Expense – Reasonable and Necessary
Evidence – Credibility
Causation – Medical Expenses

Where the compensation judge denied the employee's claim primarily on grounds that it was supported almost exclusively by the employee's own testimony of persistent symptoms since the date of the injury, where the judge found that testimony unpersuasive, where the substance of that same testimony was critical to the expert medical opinion upon which the employee's claim relied, and where the judge found that opinion less compelling than the contrary opinion of the independent medical expert, the compensation judge's denial of payment of the medical expenses at issue was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

***Matthew F. Johnson v. VCI Asbestos Abatement*, 9/15/05**
DOI: 2/9/02

Attorney Fees – Roraff

The compensation judge's finding that 5.2 hours of attorney and staff time was sufficient to resolve the employee's medical claim was clearly erroneous, and the compensation judge's award of attorney fees is reversed, and an award of $2,500.00 in attorneys fees is substituted.

Costs and Disbursements

On the record before us, this court cannot conclude that the compensation judge abused her discretion by refusing to tax the cost of obtaining medical records from other medical providers on the basis that these particular records were not necessary to resolve the issues on which the employee prevailed.

Reversed in part and affirmed in part.

***Renee D. Johnson v. Ricci's of Hugo, Inc.*, 9/15/05**
DOI: 11/6/03

Arising Out Of and In the Course Of

Where the employee had stopped working and had begun socializing, drinking, and playing pool, her injury upon leaving the employer's premises was not "in the course of" employment since the employee was no longer engaged in activity reasonably incidental to her employment.

Affirmed.

***Pratt v. Minn Tex Investments*, 9/19/05**
DOI: 7/17/03

Arising Out Of and In the Course Of – Special Hazard

Where the judge reasonably concluded that the quarter- to half-inch rubber floor mat from which the employee was stepping at work when his knee gave out did not represent a special hazard or increased risk related the employee's work, and where the only connection between the employment and the injury was the fact that the injury occurred on the employer's premises during work hours, the compensation judge's conclusion that the employee's injury, although in the course of his employment, did not arise out of his employment was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

***Pascuzzi v. Jivery Construction*, 9/20/05**
DOI: 9/30/02

Practice and Procedures – Expedited Hearing

Where the employee claimed temporary partial disability in his obligation to discontinuance of temporary total disability and the hearing was held more than four months after OAH received the file, the employer and insurer had sufficient notice to defend the claim and it was not error for the compensation judge to consider the employee's temporary partial disability claim.

Affirmed in part, vacated in part.

***Ahmed v. Budget Car Rental*, 9/22/05**
DOI: 2/29/04

Causation

Substantial evidence supported the compensation judge's decision that the employee did not sustain a work injury as claimed.

Affirmed.

***David A. Johnson v. Laraway Roofing, et al*, 9/22/05**
DOI: 1/22/97, 9/19/85

Causation – Expert Medical Opinion

Substantial evidence of record, including medical evidence and witness testimony, supports the compensation judge's finding that the employee's work injury on Jan. 22, 1997, but not his injury on Sept. 19, 1985, represents a substantial contributing factor in his current low back condition.

Temporary Partial Disability
Earning Capacity

The employee's earnings were too insubstantial to establish entitlement to temporary partial benefits; compensation judge's award of temporary partial benefits is reversed.

Affirmed in part and reversed in part.

***Sigurdson v. Joyce International*, 9/22/05**
DOI: 8/25/88

Permanent Total Disability

Where the employee had been regularly employed at an increasing hourly wage for a considerable period of time, and where it was undisputed that there had been no significant change in his low back condition for 10 years and he had not treated with a doctor for that condition in eight years, the

compensation judge's conclusion that the employee was not unable to secure anything more than sporadic employment resulting in insubstantial income was not clearly erroneous and unsupported by substantial evidence.

Rehabilitation Eligibility

Where no job search or other rehabilitation efforts had been requested by the employer and insurer for nine years prior to their request for rehabilitation assistance, where the restrictions under which the employee had been working during that time were substantial support for the judge's finding that additional rehabilitation services would be futile, and where the judge's decision was supported by expert vocational and medical opinion, the compensation judge's conclusion that renewed rehabilitation assistance would not be appropriate was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

***Ozmun v. Ohio Cart/Omni Cart Services, et al*, 9/26/05**
DOI: 7/1/03

Jurisdiction – Subject Matter

The employee's pre-injury agreement to be bound by Ohio workers' compensation law was not enforceable where the employee was a Minnesota resident, who was hired to perform all of his job duties in Minnesota, and who sustained the alleged work injury in Minnesota.

Employment Relationship – Deemed Employer
Employment Relationship – Joint Employer

Where the entity allegedly liable for benefits as either a general contractor or a joint employer was not a party to the proceedings, no analysis as to the merits of the issue was appropriate or possible.

Affirmed.

***Boyington v. Hirschbach Motor Lines, Inc.*, 9/28/05**
DOI: 4/22/87

Vacation of Award – Substantial Change in Condition

Where permanency and medical expenses remained open, and there was no evidence that the employee was unable to continue working at the job he had held since the settlement, good cause to vacate was not established.

Petition to vacate denied.

Minnesota Supreme Court

July through September 2005

Case summaries published are those prepared by the WCCA

***• Catherine A. Engels v. City of Delano and LMC/Berkley Risk Administrators, and Ingenix Subrogation Services, Allina Hospitals & Clinics, Center for Diagnostic Imaging, Excel Physical Therapy, Noran Neurological Clinic, Twin Cities Spine Center, Park Nicollet Clinic, Methodist Hospital, Consulting Radiologists, LTD, Intervenors*, A05-711, June 29, 2005**

Decision of the Workers' Compensation Court of Appeals filed March 9, 2005, affirmed without opinion.

***• Daryl F. Clark v. Lake Superior Paper/M.J. Electric, and St. Paul Companies, and Special Compensation Fund, Intervenor*, A05-710, July 5, 2005**

Decision of the Workers' Compensation Court of Appeals filed March 11, 2005, affirmed without opinion.

***• Humberto Alarcon v. Coca-Cola Enterprises, Self-Insured, administered by National Loss Control Services, and Capitol Orthopedics, Ingenix/UCare Minnesota, and Minnesota Department of Employment and Economic Development, Intervenors*, A05-783, July 19, 2005**

Decision of the Workers' Compensation Court of Appeals filed March 23, 2005, affirmed without opinion.

***• William F. Serra v. Hanna Mining Company/National Steel Pellet, Self-Insured/Minnesota Self-Insured Security Fund*, A05-915, August 23, 2005**

Decision of the Workers' Compensation Court of Appeals filed April 12, 2005, affirmed without opinion.