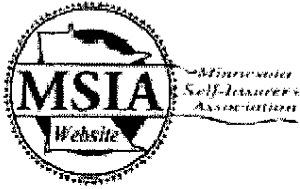




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CASE LAW UPDATE MSIA Quarterly Membership Meeting

Kirk C. Thompson

September 16, 2011

Grand View Lodge, Nisswa, Minnesota

2011 Amendments to Minnesota Workers' Compensation Act

Changes in the Law

- The judge who conducts a medical, rehabilitation or discontinuance conference must not be the same judge who conducts a *de novo* hearing following the conference. Minn. Stat. 176.106, subd.4.
- Settlement conferences are now mandatory. The OAH must hold a conference within 180 days of the filing of a claim petition and within 45 days of a petition to discontinue, objection to discontinuance, or a request for formal hearing. Minn. Stat. 176.305, subd. 1a.
- A pretrial statement must be filed at least 5 days before a settlement conference. Minn. Stat. 176.305, subd. 1a.
- If settlement is not reached, a hearing must be held within 90 days of the settlement conference and the hearing must be conducted by a compensation judge other than the judges who conducted the administrative conference and settlement conference. Minn. Stat. 176.305, subd. 1a.
- An appropriation of \$600,000.00 was made for the purpose of implementing a case management system and electronic filing system at the Office of Administrative Hearings (Section 21 of Chapter 89 of Minnesota Session Laws, 2011).
- Remodeling costs have been increased from \$60,000.00 to \$75,000.00. The cost of obtaining architectural certification, if required, is included in this limit. Minn. Stat. 176.137.

These changes are effective August 1, 2011

Minnesota Supreme Court Case Review

August 2011

Martin v. Morrison Trucking, Inc. Minn. Supreme Court August 3, 2011

The Bottom Line: The WCCA is an agency within the executive branch limited to answering specialized questions under the Workers Compensation Act; the WCCA does not have authority to interpret and issue orders affecting the rights of parties under non-workers' compensation laws. Here, the WCCA did not have jurisdiction to interpret a Wisconsin workers' comp insurance policy.

This case involves a great deal of litigation, including at least two Hearings before a compensation judge, two decisions of the Workers' Compensation Court of Appeals and a previous decision of the Minnesota Supreme Court.

The Court's holding is that the Minnesota Workers' Compensation Court of Appeals exceeded its statutory authority when it invalidated a provision in a Travelers' Wisconsin Pool policy excluding coverage for Minnesota injuries.

The employee was hired in Wisconsin to work for Morrison Trucking, but he was injured in Minnesota in 2002. He received Wisconsin benefits, but filed claims for additional Minnesota benefits. Travelers paid the Wisconsin benefits, but denied the Minnesota benefits, claiming that its policy specifically excluded injuries in Minnesota. The Minnesota workers compensation judge awarded the claimed Minnesota benefits to the employee and determined that Morrison Trucking was an uninsured employer under Minnesota law and imposed a 65% penalty due to the uninsured status. Prior to that hearing, the Minnesota Special Compensation Fund (for uninsured employers) had settled with the employee for a lump sum of \$67,500.00. The Special Fund participated in the Minnesota workers' compensation hearing, seeking to obtain a recovery from Travelers, but that recovery was denied, as Travelers' Minnesota exclusion was upheld by the Minnesota workers' compensation judge.

The WCCA reversed in its 10/29/08 decision and ordered Travelers to pay the Minnesota benefits. The Minnesota Supreme Court reversed that decision in its 2009 ruling. The matter was again tried before a compensation judge, who found no Minnesota coverage due to Travelers' exclusion. The WCCA reversed again and ruled that Travelers did have coverage and that it was against public policy for Travelers' Minnesota exclusion to be valid, as the employer, Morrison

Trucking, was a Pool insured and had no choice but to accept the coverage provided by Travelers under Wisconsin law (where workers' compensation coverage is mandatory, as it is in Minnesota). The WCCA reasoned that Morrison had a reasonable belief that their operations were covered by workers' compensation insurance when it purchased the only available workers' compensation insurance to it under Wisconsin law, through the Pool. The employer and its insurance agent admitted they did not read the policy, which expressly excluded coverage in Minnesota.

The Minnesota Supreme Court in its 8/03/11 Decision stated that the Minnesota Workers' Compensation Court of Appeals exceeded its statutory authority when it ruled that a Wisconsin insurance policy provision was invalid and against public policy. The Minnesota Supreme Court pointed out that the WCCA is an independent agency within the executive branch of government "tasked with answering specialized questions arising under the Minnesota Workers' Compensation Act." Minn. Stat. 175A.01, Subd.1. The Minnesota Supreme Court stated that compensation judges and the WCCA can rule on questions of whether a Minnesota employer has workers' compensation coverage, but the compensation judges and WCCA cannot "reach across the border to determine whether Morrison Trucking *should* have been insured for Minnesota liability, given the principles and policy of the Wisconsin Act and the unambiguous exclusion of Minnesota coverage in Travelers' policy."

The Supreme Court noted that the WCCA has, for example, jurisdiction to order a Minnesota workers' compensation insurer to reimburse a no-fault automobile or uninsured liability carrier, however, the WCCA does not have authority to determine liability of the no-fault carrier for no-fault benefits to the insured.

Interestingly, the Minnesota Supreme Court noted that Morrison Trucking may have a valid claim against Travelers in a court of general jurisdiction in Minnesota or Wisconsin for failing to provide coverage in Minnesota. Such a claim, however, may not be addressed by the Minnesota Workers' Compensation Court of Appeals, "an agency of the Minnesota executive branch."

The final verdict concerning the Minnesota compensation claim is that Morrison was an uninsured employer and is liable for reimbursement to the Special Compensation Fund for its \$67,500.00 settlement and, further, is liable for a 65% penalty based on its status as an uninsured employer.

Frandsen v. Ford Motor Company Minn. Supreme Court August 10, 2011

The Bottom Line: An employer does not waive later reliance on the statutory age 67 retirement presumption by failing to specifically reserve that defense in a to-date Stipulation for Settlement; waiver is the intentional relinquishment of a known right and there must be evidence of intent in order for a waiver to be found.

The Minnesota Supreme Court reversed the decision of the Workers' Compensation Court of Appeals which had denied the employer the opportunity to attempt to discontinue the employee's permanent total benefits at age 67 based upon the statutory retirement presumption^{*} found at Minn. Stat. 176.101, subd. 4, which states "permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market. This presumption is rebuttable by the employee."

Ford Motor Company had filed a petition with the WCCA to discontinue the PTD benefit based on the employee turning 67.

The parties had previously stipulated in 2007 that the employee was PTD as a result of his 2004 work injury at Ford. The settlement reached was a to-date settlement, which stipulated that Ford would make ongoing payment of PTD benefits, would be allowed to take the SSDI offset against the weekly PTD, and could recoup some overpayments through further reduction in the weekly PTD and in the event the employee was rated with additional PPD. To-date settlement was entered into when the employee was approximately 64 years of age.

The Stipulation for Settlement stated that the employee's weekly PTD would be adjusted based on cost of living increases and based on changes that may occur concerning his SSDI payments. The Stipulation said nothing about the employer's intent to possibly discontinue the PTD benefit at age 67. In addition, there was no language in the Stipulation indicating that the employer intended to waive the right to discontinue PTD at age 67.

Somewhat surprisingly, the WCCA stated in its decision that Ford would not be allowed to discontinue the PTD benefit because it had not expressly reserved the right to do so in the Stipulation. The WCCA held that the failure to specifically reserve the right to discontinue was effectively a waiver of that right.

^{*} The age 67 retirement presumption of 176.101, subd. 4 is effective for injuries occurring on or after 10/01/1995.

The Minnesota Supreme Court had little trouble in reversing the WCCA. The Supreme Court stated that “waiver is the intentional relinquishment of a known right.” The Court further stated that the retirement presumption of 176.101, subd.4 allows the employer to presume that an employee would have retired at 67 and to simply stop paying PTD benefits without taking any action. The Court stated that because an employer can invoke the presumption of retirement by doing nothing an employee cannot “rely solely on that same inaction to prove an intent to waive the retirement presumption.”

In short, the Supreme Court stated that an employee must prove waiver by “(1) language in a stipulation for settlement between the parties, (2) affirmative conduct on the part of the employer, or (3) circumstances that would ascribe meaning to the employer’s silence.” There was no such evidence in the case and therefore the Supreme Court reversed the decision and remanded the matter to the Workers’ Compensation Court of Appeals. The WCCA will presumably determine whether the employee can prove that the employer knowingly and intentionally waived the right to rely on the retirement presumption in the Stipulation. Additionally, the employer has been paying PTD benefits during the period of time this case has been litigated and the WCCA will also need to address whether the retirement presumption applies to terminate TTD or whether the employee has been able to rebut that presumption.

Interestingly, there were several amicus briefs filed, one from the Minnesota Association for Justice (formerly known as the Minnesota Trial Lawyers Association), the Minnesota Self-Insurers Association and the Minnesota Defense Lawyers Association.

Troyer v. Vertlu Management Company, Minn. Supreme Court, August 17, 2011

The Bottom Line: A hospital is regarded as the supplier of spinal implant hardware, not the manufacturer. A large hospital (100 beds or more) is entitled to receive 85% of its usual and customary charge and a judge is not authorized to award a lower percentage. A judge is authorized to order a lower percentage for spinal implants at smaller hospitals (less than 100 beds). Hospitals can continue to mark up the cost of spinal implant hardware by 200% and 300% or more.

This is a significant case concerning spinal surgery hardware. When spinal fusions are conducted, the hardware or "implants" are expensive, costing tens of thousands of dollars a piece. In Minnesota, the hospital providing these fusion surgeries have apparently marked up the cost of the implants by 200% and 300%. In other states, hospitals are allowed to mark up the implants only 20% or 30%, not 200% or 300%. There has been extensive litigation in the last few years involving large hospitals, with 100 or more beds, concerning the mark-up of spinal implants. The Troyer decision is a decided victory for the hospitals and puts to rest the following defenses which have been asserted by the employers and insurers:

1. That the supplier of the implants/hardware has to bill the workers' compensation insurer directly, with no mark-up and
2. A compensation judge has discretion to award anywhere from 0% to 85% of the charge for the hardware, pursuant to Minn. Stat. 176.136, subd. 1B(b).

The Decision is quite technical, however, in short the Court determined that Rule 5221.0700, subpart 2A shall be interpreted to mean that the hospital is the health care provider to bill for the supply or service when the provider presents that supply or service in its "final, usable form to the injured employee." In short, the hospital is the billing entity for the spinal implant products (made by other companies) and is presumably free to continue to mark up the price 200% or 300%.

Additionally, the Supreme Court ruled that for large hospitals (100 beds or more), Minn. Stat. 176.136, subd. 1B(b) requires that the employer and insurer pay 85% of the providers usual and customary charge. The Court rejected the employer and insurers' argument that the 85% was merely a ceiling and that a compensation judge was free to order a lesser percentage (to take into account

the huge mark-up on the implant products). The Supreme Court noted that another provision of 176.136 does allow compensation judges to use discretion for pricing (for smaller hospitals of less than 100 beds), but that same discretion is not provided for the larger hospitals. As such, the Court has essentially created two classes of hospitals for the purposes of the spinal implant products. A large hospital is permitted to mark up the price and is entitled to 85% of the usual and customary charge, whereas a smaller hospital is free to mark up the price, but Minn. Stat. 176.136, subd.1B(a) allows review and discretionary reduction of charges by a compensation judge. As such, a judge might restrict a small hospital to a much lower mark up, but the judge can't do that in the case of a large hospital.