CASE SUMMARY SERIES

Cousineau McGuire | August 2012

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LAW FIRM NEWS

2012 Minneesota Super Lawyers Recognition

Cousineau McGuire is proud to announce that seven of its attorneys have been named in the Minnesota Super Lawyers® list. Lawyers included represent our civil litigation, personal injury, appellate, general litigation, workers' compensation and transportation practices.

The following attorneys from the firm's office were selected for inclusion in the 2012 Minnesota Super Lawyers list in the categories indicated below:

James L. Haigh for Civil Litigation Defense

Thomas P. Kieselbach for Workers' Compensation Defense

Michael W. McNee for Transportation/Maritime

Andrea E. Reisbord for Insurance Coverage

Susan D. Thurmer for Personal Injury Defense: General

Peter G. Van Bergen for General Litigation

James R. Waldhauser for Workers' Compensation

The Minnesota Super Lawyers selection process involves a statewide nomination process with peer review by practice area and independent research. Only five percent of the attorneys in Minnesota are named to the list.

2012 Minnesota Rising Stars Recognition

Cousineau McGuire is proud to announce that four of its attorneys have been named in the Minnesota Rising Stars® list.

The following attorneys from the firm's office were selected for inclusion in the 2012 Minnesota Rising Stars list in the categories indicated below:

Jennifer M. Fitzgerald for Workers' Compensation

Christopher P. Malone for Personal Injury Defense: General

Tamara L. Novotny for Civil Litigation Defense

Whitney L. Teel for Workers' Compensation

This is Whitney Teel's first inclusion on this prestigious list.

The selection process for Rising Stars is the same as the Super Lawyers selection process except that: 1) to be eligible for inclusion in Rising Stars, a candidate must be either 40 years old or younger or 2) in practice for ten years or less. While up to five percent of the lawyers in the state are named to Super Lawyers, **no more than 2.5 percent are named to the Rising Stars list.**

Attorneys
Peter G. Van Bergen ‡
James R. Waldhauser
Thomas P. Kieselbach *
James L. Haigh
Michael W. McNee *
John T. Thul *
Mark A. Kleinschmidt *
Thomas F. Coleman
Richard W. Schmidt *
Susan D. Thurmer *+
Lisa F. Kinney *†
Michael D. Barrett *
Andrea E. Reisbord
Dawn L. Gagne *
Christopher P. Malone * ◊
Jennifer M. Fitzgerald
William F. Davern *
Craig A. Larsen *
Tamara L. Novotny *•
Jessica J. Theisen
Whitney L. Teel
Mark L. Pfister ‡ ◊
David A. Wikoff
Robyn K. Johnson
Kimberly Fleming
Daniel R. Mitchell
Matthew J. Weissenborn
Stephanie N. Swanson
Meaghan C. Bryan
Rachel E. Bendtsen
Natalie K. Lund
Nicole A. Kampa
Jennifer R. Augustin
Joseph D. Amos
Jonathan R. Woolsey

* Also admitted in Wisconsin
† Also admitted in Michigan
+ Also admitted in Florida
• Also admitted in North Dakota
‡ Civil Trial Specialist certified by MSBA
◊ Qualified Neutral Mediator and Arbitrator under Rule 114 of the Minnesota General Rules of Practice

2013 Best Lawyers

Cousineau McGuire is proud to announce that six of its attorneys have been named in the 2013 Best Lawyers in America® list. Lawyers included represent our personal injury, product liability and workers' compensation practices. The following attorneys from the firm's office were selected for inclusion in the categories indicated below:

Peter G. Van Bergen: Product Liability and Personal Injury Defense

Thomas F. Coleman: Workers' Compensation, Employers

Thomas P. Kieselbach: Workers' Compensation, Employers

Mark A. Kleinschmidt: Workers' Compensation, Employers

Richard W. Schmidt: Workers' Compensation, Employers

James R. Waldhauser: Workers' Compensation, Employers

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LEGAL NEWS

These cases are posted in full on our website, and are available for download.

Farmers Insurance Exchange, Plaintiff, vs. Jessica Anne Letellier, et al., Defendants; Jessica Anne Letellier, et al., third party plaintiffs, Appellants, vs. Illinois Farmers Insurance Company, third party defendant, Respondent.
Minnesota Court of Appeals, filed September 4, 2012

Court's syllabus: A provision in an automobile-insurance policy that provides coverage for damages that an insured person is legally liable to pay because of bodily injury arising out of the ownership, maintenance, or use of a vehicle, does not provide coverage for damages that an insured person is legally liable to pay under the social-host-liability statute because of bodily injury caused by an intoxicated driver under 21 years of age who was not insured under the policy and who was driving a vehicle that was not insured under the policy.

Affirmed. Judge Randolph W. Peterson.

▬

Johnson v. Allstate Property & Casualty Ins. Co.
U.S. District Court, District of Minnesota, August 17, 2012

Court's introduction: "Plaintiff Holly JoAnn Johnson was injured in a car crash on February 12, 2007. Johnson seeks benefits under either her adoptive father's [Joseph's] or foster mother's [Shepard's] insurance policies. Defendant Allstate Property and Casualty Insurance Company ('Allstate') issued both of these policies but claims that Johnson was not covered by either. Allstate now moves for summary judgment, seeking dismissal with prejudice of Johnson's claims. The Court will grant the motion for summary judgment because Johnson is not eligible for benefits as a 'resident relative' under either policy."

Johnson's testimony does not indicate she was temporarily away from Joseph's house - she had left four months earlier. Nor does it indicate that she intended to live with Joseph again; she stated unequivocally that she planned to live with Shepard until she graduated from high school and did not intend to return to Joseph's house. . . . The Court concludes that Johnson was not a 'resident' of Joseph's home at the time of the accident. . . .

In order to be an 'insured' under Shepard's Allstate policy, Johnson must be a 'resident relative' as defined by the policy. The Minnesota courts have held that a former foster child is not a relative. . . . Neither party identified a Minnesota case that address whether a current foster child is a relative for the purposes of auto insurance policies. . . . Other states that have addressed the issue have held that a foster child is not a relative for insurance purposes. . . . This Court concludes the same."

▬

Remodeling Dimensions, Inc., Appellant, vs. Integrity Mutual Insurance Company, Respondent.
Minnesota Supreme Court, filed August 22, 2012

Court's syllabus:

1. Homeowners' claim for moisture damage caused by the contractor to preexisting walls and structure located adjacent to work performed by the contractor satisfies the definition of an "occurrence," and is not excluded under the business-risk exclusion of the applicable commercial general liability insurance policy.

2. When an insurer notifies its insured that it accepts defense of an arbitration claim under a reservation of rights that includes covered and noncovered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each.

Reversed and remanded. Justice Christopher J. Dietzen.

▬

Gage v. Stanley Convergent Security Solutions, Inc.
U.S. District Court, District of Minnesota. Filed August 13, 2012

Court's introduction: "Under Minnesota law, an exculpatory clause in a contract can prevent an injured party from suing a tortfeasor for negligent acts, but, as a matter of public policy, an exculpatory clause in a contract cannot prevent an injured party from suing a tortfeasor for intentional, willful, or wanton acts. The question in this case -- apparently a question of first impression under Minnesota law -- is whether an anti-subrogation clause in a contract can prevent the injured party's insurer from bringing a subrogation action against the tortfeasor for intentional, willful, or wanton acts."

Excerpts: "Gage's insurer (through Gage) argues that, for the same reasons that an exculpatory clause is invalid under Minnesota law as it applies to claims of intentional, willful, or wanton conduct, an anti-subrogation clause should be found invalid under Minnesota law as it applies to similar claims. The Court agrees. . . . [T]he Court holds that the anti-subrogation clause in the Gage-Stanley contract is unenforceable under Minnesota law insofar as it applies to Gage's claim against Stanley for willful and wanton negligence. That claim will have to be tried."

▬

James R. Williams, Respondent, vs. Orlando Henry "Tubby" Smith, et al., Appellants.

Minnesota Supreme Court, filed August 8, 2012.

Court's syllabus:

1. Generally, the exclusive method for a prospective employee to obtain judicial review of the University of Minnesota's decision not to hire the person, on the ground that the decision is based on an error of law, is arbitrary and capricious, or unconstitutional, is by certiorari under Minn. Stat. ch. 606 (2010). Consequently, the failure of a prospective employee to timely seek judicial review by certiorari deprives the court of subject-matter jurisdiction over that claim. When, however, a prospective employee's claim against the University of Minnesota alleges tortious conduct such as fraud or negligent misrepresentation that is separate and distinct from the University's decision not to hire, the district court has subject-matter jurisdiction to address that claim.

2. When a prospective government employment relationship is negotiated at arm's length between sophisticated business persons and does not involve a professional, fiduciary, or other special legal relationship between the parties, the prospective employee is not entitled to protection against negligent misrepresentations by the representative for the prospective government employer.

Reversed. Justice Christopher J. Dietzen. Concurring in part, dissenting in part, Justice Helen M. Meyer and Acting Justice Waldemar Senyk. Took no part, Chief Justice Lorie S. Gildea, Justices Alan C. Page, Paul H. Anderson and David R. Stras. Esther Tomljanovich and Waldemar Senyk, Acting Justices.

Northeast Bank v. Wells Fargo Bank, N.A.

U.S. District Court, District of Minnesota, file July 9, 2012.

Court's introduction: "In response to a loss claim, The Hanover Insurance Group (Hanover) issued checks made payable to Grand Rios Investment, LLC, Northeast Bank, and Alex N. Sill Company, the insured, the loss payee, and the public adjuster, respectively. Without Northeast Bank's endorsement, knowledge, or consent, Wells Fargo Bank, N.A., paid the full amount of the checks to Grand Rios Investment. After Wells Fargo Bank refused Northeast Bank's payment demands, Northeast Bank brought this action. In its Second Amended Complaint, Northeast Bank asserted a claim against Wells Fargo Bank for conversion under Minn. Stat. § 336.3-420 (2010). Northeast Bank also asserted claims against Hanover for breach of contract as a third-party beneficiary and for enforcement of a lost, destroyed, or stolen instrument under Minn. Stat. §§ 336.3-309 to -310 (2010). The case is before the Court on Hanover's motion to dismiss for failure to state a claim. For the reasons set forth below, the Court grants the motion."

▬

Oluf Johnson vs. Paynesville Farmers Union Cooperative Oil Co.

Minnesota Supreme Court, filed August 1, 2012.

Court's Syllabus:

1. Because Minnesota does not recognize claims for trespass by particulate matter, the district court did not err in dismissing respondents' trespass claim as a matter of law.

2. Under 7 C.F.R. § 205.202(b) (2012), a producer's intentional placement of pesticides onto fields from which crops are intended to be harvested and sold as organic is prohibited, but section 205.202(b) does not regulate the drift of pesticides onto those fields. The district court therefore did not err in dismissing respondents' nuisance and negligence per se claims based on section 205.202(b). But to the extent that respondents' nuisance and negligence per se claims are not grounded on section 205.202(b), the court erred when it dismissed those claims.

3. Because respondents' proposed amended nuisance and negligence per se claims that are not grounded on 7 C.F.R. § 205.202(b), are not futile, the district court abused its discretion in denying respondents' motion to amend their complaint to include those claims.

Affirmed in part, reversed in part, and remanded. Chief Justice Lorie S. Gildea. Dissenting, Justice Alan C. Page.

Kari Renswick, Respondent, vs. Jason Wenzel, Appellant.

Minnesota Court of Appeals, filed July 30, 2012.

Court Syllabus:

1. An invitee's entering a house that has an unlit entryway and stairway in close proximity to each other is not an act to which the doctrine of primary assumption of the risk applies to exempt the homeowner from liability for negligent failure to warn about the potentially dangerous condition.

2. An injured tort plaintiff's Medicare benefits in the form of payments for medical care or Medicare-negotiated discounts to reduce her medical bill are collateral sources that are excepted from the collateral-source offset provision of Minnesota Statutes section 548.251, subdivision 1, and, as such, they do not provide a basis to reduce her damages award.

▬

Builders Association of Minnesota, Appellant, vs. City of St. Paul, Respondent.

Minnesota Court of Appeals, filed July 23, 2012.

Court's syllabus: A city may not circumvent the preemption provisions of the state building code by indirectly adopting its own building regulation through a "policy" rather than an ordinance or formal enactment. The state building code preempts such municipal policies to the same extent that it preempts municipalities' ordinances or formal enactments that differ from the uniform state code. Reversed and remanded. Judge Lawrence T. Collins.

▬

John Doe 76C, Respondent, vs. Archdiocese of Saint Paul and Minneapolis; Diocese of Winona, Appellant.

Minnesota Supreme Court, filed July 25, 2012.

Court's syllabus:

1. The district court did not abuse its discretion by excluding, on foundational reliability grounds, expert testimony on the theory of repressed and recovered memory offered to prove a disability delaying the accrual of a cause of action.

2. The district court did not err when it granted appellants summary judgment.

Reversed. Justice G. Barry Anderson. Dissenting, Justices Paul H. Anderson and Helen M. Meyer.

Rick Glorvigen, as Trustee for the next of kin of decedent James Kosak, Appellant; Thomas M. Gartland, as Trustee for the next of kin of decedent Gary R. Prokop, Appellant, vs. Cirrus Design Corporation, Respondent; Estate of Gary Prokop, by and through Katherine Prokop as Personal Representative, Appellant; University of North Dakota Aerospace Foundation, Respondent.

Minnesota Supreme Court, filed July 18, 2012.

Court's syllabus: An airplane manufacturer's duty to warn does not include a duty to provide training to pilots who purchase an airplane from the manufacturer. A pilot may not recover in tort against an airplane manufacturer when the duty owed to the pilot by the manufacturer was imposed only by contract.

Affirmed. Justice G. Barry Anderson. Dissenting, Justices Paul H. Anderson and Alan C. Page. Took no part, Justice David R. Stras.

▬

Gordon Helmer Anderson, Respondent; Maxine Anderson, Plaintiff, vs. Neil Raymond Christopherson, Respondent; Dennis Christopherson, Appellant

Minnesota Supreme Court, filed July 18, 2012.

Court's syllabus:

1. The question of whether defendants' dog directly and immediately produced injury under the dog owner's liability statute, Minn. Stat. § 347.22 (2010), is a question of fact.

2. The question of whether defendant harbored a dog under Minn. Stat. § 347.22 is a question of fact for the jury.

Affirmed. Justice Alan C. Page.

▬

Auto Club Insurance Assoc. v. Sentry Insurance

U.S. Court of Appeals, 8th Circuit, filed July 2, 2012.

Civil case - Insurance. District court did not err in interpreting the provisions of the policy in issue to determine that the employee driver was an insured who received excess coverage and not a named insured who would receive primary coverage.

Quade vs. Secura Insurance

Minnesota Supreme Court, filed June 13, 2013.

Reversing the Minnesota Court of Appeals, the Minnesota Supreme Court has ruled in the insurance context, an appraiser's assessment of the "amount of loss" necessarily includes a determination of the cause of the loss and the amount it would cost to repair that loss.

Andrea Reisbord and Dawn Gagne of our office represented the insurer securing reversal of the Court of Appeals. For more information about this case, contact Dawn at 952.546.8400.

▬

Meskill v. GGNSC Stillwater Greeley LLC

U.S. District Court, District of Minnesota, filed May 25, 2012.

Plaintiff Bruce Meskill, as trustee of the estate of Howard Meskill (his father), commenced this action against Defendant GGNSC Stillwater Greeley LLC d/b/a Golden Living Center - Greeley ('GLC'), a skilled-nursing facility in Stillwater, Minnesota, where the elder Meskill had lived, asserting that it was negligent in the care it had provided. Relying on an arbitration agreement in the documents Meskill signed when he arrived at the facility, GLC now moves to compel arbitration. For the reasons set forth below, its Motion will be granted."

▬

Tammy Pepper, Respondent, vs. State Farm Mutual Automobile Insurance Company a/k/a State Farm Fire and Casualty Company a/k/a State Farm Insurance Companies, Appellant.

Minnesota Supreme Court, filed May 30, 2012.

Court's syllabus: An insurer may enforce an insurance policy exclusion that prevents coverage conversion without violating the No-Fault Act, Minn. Stat. §§ 65B.41-71 (2010).

Coverage conversion arises when an insured recovers liability benefits and underinsured motorist benefits under separate policies issued by the same insurer to one tortfeasor. Reversed. Justice Paul H. Anderson.

CASE SUMMARIES
Edited by Andrea E. Reisbord

Minnesota Court of Appeals

Insurance Policy Exclusions

***Koskovich v. American Family Mutual Insurance,* Minnesota Court of Appeals, A11-2206 ~ Reviewed by Rachel Bendtsen**

In this unpublished case, the Minnesota Court of Appeals held that a plain-language insurance policy exclusion for damage resulting from "mold and rot" cannot be overcome by arguing that the claim was actually for water intrusion. Appellant's insurance policy contained an express exclusions that the insurance company did not cover loss "resulting directly or indirectly from or caused by [mold or rot]." The policy stated that the exclusion applied "regardless of any other cause or event contributing concurrently or in any sequence to the loss". The Court held that this plain language excluded all recovery for the damage caused by mold or rot, regardless of whether the water intrusion that led to the mold and rot was an arguably covered event. Likewise, the court found that an ensuing loss clause could not counteract the plain language exclusion for mold and rot. In addition, the court found that although American Family had drafted the policy, the exclusion was not ambiguous. Therefore, the court was obligated to interpret the policy according to its plain language and could not construe it in Appellants' favor. Finally, the court found that the insurance policy's supplemental coverage for collapse was not applicable because Appellants' home was not in imminent danger of collapse.

On remand, if Appellants do have snow and ice immunity, the conflict between that statute and the No-Fault Act will have to be resolved prior to any arbitration award on the indemnity matter.

Employment - Leave of Absence

Donald Morris Fernow (Respondent), Country Mutual Insurance Company, (Intervenor/Respondent), vs. Michael Donald Gould and the City of Alexandria (Appellants)
Minnesota Court of Appeals, Filed June 11, 2012, A11-1904 ~ Reviewed by Stephanie N. Swanson

The Court of Appeals reversed an arbitration award to Country Mutual for indemnification of basic economic loss benefits paid under the Minnesota No-Fault Automobile Insurance Act because the arbitrator exceeded her authority by determining an issue of law.

Gould, driving a snow plow for the City of Alexandria, collided with Fernow causing injury. The snowplow was a commercial vehicle. The district court found that a genuine issue of material fact precluded summary judgment of appellants' claim that governmental snow and ice immunity applied. In the meantime, Country Mutual, Fernow's insurer, submitted an indemnification claim against Appellants to arbitration and objected to waiting for the district court to make a final determination of the legal issue of immunity. The arbitration proceeded and the arbitrator found that "the defense of governmental statutory immunity does not apply to this matter," ordering the City of Alexandria to indemnify Country Mutual for basic economic loss amounts paid. The district court confirmed the arbitration award and the City appealed.

The Court of Appeals found "consistency mandates the courts interpret the no-fault statutes, not various panels of arbitrators" and that "in the area of automobile reparation arbitrators are limited to deciding issues of fact, leaving interpretation of law to the courts." The application of immunity is a question of law. In this matter, if the Appellants have snow and ice immunity under Minn. Stat. §466.03, then Country Mutuals statutory right to indemnification under §65B.53 will directly conflict requiring interpretation of both statutes and legislative intent. Interpretation of statutes is a question of law, and for consistent application of the No-Fault Act it is required that the courts interpret statutes affecting application of the Act.

Unemployment Benefits

Jane Kay Dukowitz (Appellant) vs. Hannon Security Services (Respondent)
Minnesota Court of Appeals, Filed July 9, 2012 ~ Reviewed by Stephanie N. Swanson

Appellant was employed by Hannon Security as a security officer from 2005 to March 13, 2009. In July 2008 Appellant accepted a seasonal position within Hannon for daytime hours and she signed a document reflecting that she would "take the chance of it (the position) staying open." In December 2008 Appellant was informed her position would be ending. She informed Hannon that she would be seeking unemployment benefits and there was discussion at that time whether Appellant should be terminated; however, she asked to continue to work shifts that became available and her supervisor agreed. Appellant worked one shift after applying for unemployment benefits in December 2008. On March 13, 2009, she was terminated from Hannon. The parties disagreed about the reasons for termination. Hannon claimed poor work with one client, her expressed unwillingness to work weekends or nights and a lack of opportunities in the area. Appellant Plaintiff argued that she was terminated in retaliation for seeking unemployment benefits and in violation of public policy.

On appeal, the court addressed two issues: (1) Whether the common law recognizes a claim of retaliatory discharge based on an employee's stated intention to apply for unemployment benefits; (2) Whether the Minnesota Unemployment Insurance Law creates an implied private right of action for retaliatory discharge.

Minnesota is an at-will employment state and the only narrow exception to the at-will employment rule allowing for a potential wrongful discharge claim is when an employee is terminated based on a refusal to violate the law or contrary to public policy. Appellant did not fall within this exception. The court of appeals declined to recognize a new or broader exception to at-will employment and provided that determining public policy is better performed by the legislature. Appellant's claim of an implied private right of action pursuant to Minn. Stat. §268, also failed because, although Appellant wa a member of the class for whose benefit the statute was enacted, the statute does not proscribe retaliation against an employee who applies for benefits. The statute also creates an express, criminal remedy for conduct that is proscribed, negating any argument that the legislature intended to provide a civil right of action.

Employement - Overtime

In the Matter of the Order to Comply: Labor Law Violation of Daley Farm of Lewiston
Minnesota Court of Appeals, Filed July 9, 2012 ~ Reviewed by Stephanie N. Swanson

The Court of Appeals affirmed the Department of Labor and Industry's (DLI) Order concluding that employees paid on an hourly basis do not come within the agricultural exemption to the overtime requirements of the Minnesota Fair Labor Standards Act (MFLSA). Daley Farms challenged the order arguing that its hourly employees fit within a statutory exemption within the MFSLA that excludes "any individual employed in agriculture on a farming unit or operation who is paid a salary greater than the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1-1/2 times the state minimum wage per week." This decision revolves around the definition of "salary."

The Department of Labor and Industry (DLI) ruled that "a salary is not an hourly rate" but rather a predetermined wage for each workweek. Because a salary is defined as a predetermined wage for each workweek, Daley Farm's argument that its employees paid on an hourly basis fall within the overtime exemption for salaried agricultural employees fails.

Daley Farms also argued that the federal FSLA pre-empts the narrower MFLSA agricultural exemption. However, if employment issues fall within jurisdiction of both state and federal law, the employer must comply with the law asserting the higher standard. Accordingly, this argument was rejected as well.

Indemnification – Settlement Agreement

Lasica v. Savers Group of Minnesota
Minnesota Court of Appeals, August 20, 2012
Reviewed by Rachel Bendtsen

In this unpublished decision, the Minnesota Court of Appeals affirmed the district court's interpretation and enforcement of a settlement agreement.

After Appellant sued his business partners and other for misappropriation of funds, the parties reached a settlement agreement. The agreement provided that Respondent would pay Appellant $75,000.00 and transfer all rights,

title, and interest in the parties' companies and related real property to appellant. The parties agreed to a mutual release of all claims "with the exception to any right of defense, indemnification, or advancement, whether under contract, common law or statute, including rights under the Minnesota Limited Liability Act."
Respondent later moved the Court to enforce the settlement agreement asserting that he was entitled to indemnification with regard to various loans which he guaranteed while a part of the business, and which the business had now defaulted upon. The Court found that the substance of the settlement agreement was to transfer all rights in the business and, likewise, all responsibilities for the business debts, to Appellant. Therefore, the Court determined that Respondent was entitled to indemnification for these guarantees. Separately, the Court reversed the district court's requirement that Appellant deposit various amounts as surety for the indemnification claim because, at this point, there was no evidence that indemnification had been requested by Respondent and denied by Appellant.

WORKERS' COMPENSATION

Edited by Craig A. Larsen

Requirement to Provide Notice to Employer

Anderson v. Frontier Communications
Minnesota Supreme Court, filed September 5, 2012 ~ Reviewed by Jonathan R. Woolsey

The Minnesota Supreme Court reversed the WCCA and affirmed the Compensation Judge's findings, holding that the failure of the employee to give timely notice of his work related injury to the employer, as well as the employer's lack of actual knowledge regarding the work related nature of the employee's injury, precludes recovery of benefits under the Minnesota Workers Compensation Act.

The Employee worked from 1987 to 2007 as a lineman for a communications company, which was a physical job that required frequent heavy lifting and bending over to mark underground cables. Pursuant to his testimony given to the Compensation Judge, following the gradual onset and progressive worsening of his low back pain symptoms from 2004 to 2005, and following his consultation with a surgeon in May 2007, the Employee knew that his work activities at the Employer were causing or aggravating his low back problems. However, it was not until May 2009 that the Employee, through his attorney, gave notice to the Employer of the claimed work related nature of his low back condition.

As the Anderson court held, pursuant to Minn. Stat. § 176.141 and Issacson v. Minnetonka (Minn. 1987), in order to recover workers compensation benefits, an employee must either: (1) give notice of injury no more than 180 days after "it becomes reasonably apparent to the employee that the injury has resulted in, or is likely to cause, a compensable disability," or (2) must show that the employer had actual knowledge of the injury, or in other words, that the employer had "some information connecting work activity with an injury."

Here, where the Employee knew in May 2007 that his work activities were contributing to his low back problems, but failed to provide notice to the Employer of this fact until May 2009, and also failed to show that the Employer had actual knowledge of the injury, he was barred from recovering benefits under the Minnesota Workers Compensation Act.
Justices Paul Anderson, Alan Page, and Helen Meyer all dissented. In his dissent, Justice Paul Anderson noted the stoic attitude of the Employee with respect to his own pain symptoms, and provided an interesting and somewhat animated discussion on the point at which the Employee, as a reasonable person, may have realized the compensable nature of the disability he sustained from his work injury.

Causation

Preston vs. Hitchin Rail
W.C.C.A., June 4, 2012 ~ Reviewed by Natalie K. Lund

The Employee sustained a work-related injury to her back on September 28, 2004. After subsequent settlement and return to work, the Employee alleged a second specific injury to her back and neck on December 22, 2006. She continued to work with the pre-injury employer, and ultimately alleged her work duties aggravated her back and neck conditions. A Claim Petition was filed asserting injury dates of September 28, 2004, December 22, 2006 and a Gillette injury culminating in July of 2006. Dr. Wengler testified on behalf of the employee, concluding the Employee's work activities after April 2005 and/or her fall on December 22, 2006 were a substantial contributing cause of her lumbar and cervical spine conditions. The compensation judge found the employee sustained a

Gillette injury to her cervical and lumbar spine arising out of and in the course of her employment in 2005 and 2006, which culminated on March 5, 2007, when the employee was taken off work, and that the December 22, 2006 injury further aggravated the employee's conditions. Both injuries caused the employee's need for medical treatment and disability. The employer and insurer appealed.

The WCCA affirmed in part and vacated in part. The employer and insurer's contention that the employee's expert, Dr. Wengler, lacked foundation was denied. The fact that Dr. Wengler did not mention prior chiropractic records in his report was not sufficient to show he assumed there were no prior low back complaints where he acknowledged having read such records in his deposition. The determination of the compensation judge on the credibility of the employee was also affirmed despite the employee's inconsistent recollection of her medical history. The WCCA vacated the finding of the compensation judge that the Gillette injury culminated on March 5, 2007, as the date was irrelevant given the finding as to a specific injury on December 22, 2006. The award was affirmed.

▬

Causation/Evidence

Myhre vs. Public Storage, Inc.
W.C.C.A. file June 5, 2012 ~ Reviewed by Natalie K. Lund

The WCCA affirmed the findings of the compensation judge that the employee was not exposed to mold in her employer-furnished apartment and that she was not disabled as a result of that exposure. From June 2008 through August 2010, the employee lived in an employer-furnished apartment. She reported a foul odor from the basement of the apartment and water damage on the wall of the basement to her district manager. A February 8, 2009 x-ray indicated a one centimeter ovoid nodular density in the right lung. In late 2009 and 2010, the employee treated with symptoms including heavy feeling in her chest and coughing. She reported there was black mold in her basement. However, her medical history included heavy smoking and she had treated in the past for respiratory infection, cough and shortness of breath. On August 5, 2010, the employee's residence was inspected for mold exposure by EFI Global, Inc. The inspection found that there was evidence of water and moisture damage in the basement, but there were no visible signs of fungal growth in the living or basement area of the residence. At hearing, the employee made a claim for temporary total disability benefits and medical expenses based, in part, on two exhibits of medical journal articles. The employer and insurer objected, which the compensation judge sustained. The judge found the employee failed to prove she was exposed to mold in the employer-furnished apartment or that she was temporarily and totally disabled. Within her memorandum, the judge discussed the articles submitted by the employee's attorney. The employee appealed the decision and the employer and insurer cross-appealed the judge's consideration of the employee's exhibits.

The WCCA found substantial evidence supported the compensation judge's finding that the employee was not exposed to mold. The employee was not disabled as a result of mold exposure. Finally, where there was no indication the judge's consideration of the article exhibits formed the basis for her decision, any error by the judge in discussing the exhibits not admitted into evidence was harmless.

▬

Notice

Dahlen vs. Hiway Amoco, Inc.
W.C.C.A., June 7, 2012 ~ Reviewed by Natalie K. Lund

The WCCA affirmed the findings of the compensation judge that the employee failed to prove she sustained a personal injury on March 9, 2009 and that she failed to provide notice of an injury as required by Minn. Stat. 176.141. The employee alleged that on March 9, 2009, her foot became stuck between two pallets. As she pulled her foot out, she experienced an onset of pain and her foot began to swell. The employee testified she told her supervisor about the injury the following day. The supervisor testified she was not told about the injury at work. She was only told the employee had injured her foot. This was supported by a medical records stating the injury had not been reported to workers' compensation. Further, another employer witness testified there was no way the employee could have fit her foot in between the two pallets. The compensation judge accepted the testimony of the employer witnesses, as well as the report of the employer's IME doctor, Dr. Segal. The WCCA found there was substantial evidence to support the compensation judge's denial of a compensable claim.

▬

Jurisdiction

Stevens-Stevenson vs. Greater Lake Country Food
W.C.C.A., May 18, 2012 ~ Reviewed by Natalie K. Lund
The employee sustained three work-related injuries in the course and scope of her employment with Greater Lake Country Food: a 1996 right shoulder injury, a 1997 right ankle injury, and a 1998 cervical injury. In May 2011, the employee filed a medical request for payment or approval of recommended cervical and lumbar MRI scans. The attached medical records included an MRI order form, which indicated the employee had right hand pain and numbness "shooting down legs". Physical therapy records noted chronic neck pain, bilateral hip pain and decreased lumbar and hip range of motion. In a Decision and Order, the mediator/arbitrator denied the medical request based on his conclusion that inadequate documentation had been established to support the request. A request for formal hearing was filed. Counsel for the employer and insurer argued at hearing that the compensation judge lacked jurisdiction to determine the employee's entitlement to the claimed treatment where the employer and insurer had never admitted liability for lumbar spine or hip injuries. The compensation judge awarded the lumbar MRI. The employer and insurer appealed.

The WCCA vacated the decision of the compensation judge on separate grounds. The Court found that a claim that a work injury has produced or contributed to a condition in a different body part than the original injury – what is commonly referred to as a consequential injury – raises the issue of causation, not primary liability. A consequential injury is not a separate injury that must be pleaded by claim petition. Jurisdiction was appropriate. However, the employee had produced a medical report two months prior to the hearing, which formed the support for her claim. The employer and insurer had not received sufficient notice of that report, and had been unable to perform responsive discovery. On that basis, the judge's decision was vacated and remanded for additional proceedings.

Reprinted from Arrowood's ***Indemnity*** newsletter

'Easy Riding' Attorney Makes 2,400-Mile Motorcycle Trek to Claims Medical/Legal Summit from Ironwood, Michigan, to Charlotte

Lisa Kinney, one of Arrowpoint's workers compensation defense counsel, made a unique entrance at the recent Claims Medical/Legal Summit – straight from a multi-state motorcycle trek from her home in Ironwood, Michigan to Charlotte.

Her trip included a stop on the way at the Claims and Litigation Management Alliance Workers Compensation Conference in Columbus, Ohio. That's 18 hours to Columbus and an additional 4 hours to Charlotte – 2,400 miles round-trip.

"It was a terrific trip," said Lisa, who is with the Cousineau McGuire Law Firm and has been a motorcycle enthusiast almost her entire life. "I was very fortunate with the weather. In 41 hours of riding, I had only 10 minutes of rain."

Lisa also pointed out that she's glad the meeting took place before the recent heat wave. "You guys planned my trip perfectly for me," she laughed.

Lisa has been with Cousinau McGuire for 20 years and has worked with Arrowpoint since 2008. "The summit was very informative and a lot of fun," she noted. "It was great to have the opportunity to meet all the folks at Arrowpoint with whom I've worked the past few years. It's always good to put names with faces."

When asked about how she first became interested in motorcycles, Lisa said, "I have five brothers, and we rode every kind of road bike, six-wheel vehicle, snowmobile, etc. all my years growing up. Several of my brothers were riders before me, and I rode to high school as a passenger with my brother many times each spring. It seemed to be a natural next step for me."

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