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XI. WORKERS’ COMPENSATION

A. Arising out of and in the Course of Employment

1. Acts of Third Persons

In *McGowan v. Our Savior’s Lutheran Church*, the Minnesota Supreme Court dismissed a tort action (using the exclusive remedy clause of the Workers’ Compensation Act) commenced by the director of a homeless shelter who was raped by a shelter client. On April 4, 1989, while working in her office at the church’s homeless shelter, Diane McGowan was raped by shelter client, Eulalio Hernandez-Perez. McGowan had come into contact with her assailant on two occasions before the rape. After the second incident, McGowan informed all of the staff that she did not want to be left alone with Hernandez-Perez.

On April 4, 1989, a church custodian told McGowan that the pastor was having trouble with a disruptive man (Hernandez-Perez) in the assembly hall. McGowan escorted Hernandez-Perez to her office to talk to him. Hernandez-Perez became upset, pulled the phone cord out of the wall, closed the office door and raped McGowan.

McGowan argued that Hernandez-Perez raped her for purely personal reasons unrelated to her work. She maintained that Hernandez-Perez knew her prior to the assault; he developed a personal interest in her and made advances toward her.

The supreme court rejected McGowan’s claim. The court held that the assault occurred in the course and scope of the employee’s employment, concluding that the assault arose “solely

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1. 527 N.W.2d 830 (Minn. 1995).
2. *Id.* at 834.
3. *Id.* at 832.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 833.
9. *Id.*
out of McGowan's activities as an employee." The court relied on the fact that McGowan never had any contact with her assailant outside the workplace and that the assault occurred during work hours while McGowan was directly engaged in the performance of her work duties. In reaching this result, the court rejected the notion that the controlling consideration in deciding the issue is the motive or intent of the employee.

2. Recreational Activities and Employer Sponsored Social Events

An injury sustained during travel from an employee's home and workplace is ordinarily not compensable pursuant to the Workers' Compensation Act, unless the employee is on the employer's premises. However, in McConville v. City of St. Paul, the Minnesota Supreme Court held that injuries incurred by an employee in a motor vehicle accident while being transported from a park where employees participated in the employer's wellness program to the place of employment were not excluded from coverage under the Workers' Compensation Act.

Audrey A. McConville was employed as the office manager of the records division of the police department of the City of St. Paul. Her employer permitted her to take lunch breaks during working hours, but the employee was required to keep the department informed of her whereabouts if she was on call.

To encourage its employees to exercise, the employer sponsored a "Walk in the Park" program. This voluntary activity usually occurred three days per week from 11:00 a.m. to

10. Id. at 834.
11. Id.
12. See id.
15. 528 N.W.2d 230 (Minn. 1995).
16. Id. at 232.
17. Id. at 230.
18. Id. at 230-31.
19. Id. at 231.
noon. The employer provided transportation to and from the park in a police car. On August 29, 1989, McConville was returning to work in a police paddy wagon when the car was involved in an accident. McConville sustained a low back injury.

The Minnesota Supreme Court has excluded coverage under the Workers' Compensation Act for injuries the employee sustained returning home from either an employer-sponsored social gathering or an athletic event. However, when the employer regularly transports the employee to and from the workplace, injuries sustained by the employee while a passenger in the vehicle furnished by and under the control of the employer are personal injuries arising out of and in the course of employment. They are subject to the Workers' Compensation Act.

The court treated the employer-provided vehicle as an extension of the workplace. "[T]he employee who rides in the vehicle at the employer's direction is in the employer's service even if the employer regards the transportation as a courtesy to the employee . . . ." The Workers' Compensation Act thus covers the employee. The supreme court also maintained that the application of the Workers' Compensation Act to injuries sustained while being "transported" by the employer does not depend on the point of origin of the journey.

20. Id.
21. Id.
22. Id.
23. Id.
25. McConville, 528 N.W.2d at 291.
26. Id.; see also MINN. STAT. § 176.011, subd. 16 (1994).
Injuries incurred while participating in voluntary recreational programs sponsored by the employer, including health promotion programs, athletic events, parties, and picnics, do not arise out of and in the course of the employment even though the employer pays some or all of the cost of the program. This exclusion does not apply in the event that the injured employee was ordered or assigned by the employer to participate in the program.

MINN. STAT. § 176.021, subd. 9 (1994).
27. McConville, 528 N.W.2d at 292.
28. Id.
29. Id.
30. Id.
3. Workers' Compensation Act Applies to Transitory Employees

In *Vaughn v. Nelson Brothers Construction*,\(^{31}\) Justice Gardebring, writing for the Minnesota Supreme Court, held that the Minnesota Workers' Compensation Act applied to a knee injury suffered by a worker while in Wisconsin, even though the worker was a transitory or traveling employee.\(^{32}\)

Jesse H. Vaughn was hired in Minnesota by Nelson Brothers Construction, a Minnesota employer, as a permanent, full-time, traveling fixture superintendent in January 1990.\(^{33}\) Vaughn coordinated and supervised the installation of fixtures at Target stores located in many states.\(^{34}\) Installation projects at each store were structured according to time schedules. When one project was completed, the traveling fixture superintendent would move on to the next project.\(^{35}\)

On June 4, 1992, Vaughn was working on an eight- or nine-week project in Wisconsin when he sustained a knee injury.\(^{36}\) He filed a claim for benefits under the Minnesota Workers' Compensation Act.\(^{37}\) The compensation judge determined Vaughn was entitled to various benefits under the Act.\(^{38}\) The compensation judge based jurisdiction on Minnesota Statutes section 176.041, subdivision 3 (1992), which provides, "If an employee hired in this state by a Minnesota employer, receives an injury while temporarily employed outside of this state, such injury shall be subject to the provisions of this chapter."\(^{39}\) On appeal, the Workers' Compensation Court of Appeals (WCCA) reversed, deciding Minnesota did not have jurisdiction.\(^{40}\)

The supreme court adopted the "employment relation test" to cover employees like Mr. Vaughn who are always at a temporary location.\(^{41}\) The court noted that Minnesota’s provision

\(^{31}\) 520 N.W.2d 395 (Minn. 1994).
\(^{32}\) *Id.* at 397.
\(^{33}\) *Id.* at 395.
\(^{34}\) *Id.* at 395-96.
\(^{35}\) *Id.* at 396.
\(^{36}\) *Id.*
\(^{37}\) *Id.*
\(^{38}\) *Id.*
\(^{39}\) MINN. STAT. § 176.041, subd. 3 (1994); *see also Vaughn*, 520 N.W.2d at 396.
\(^{40}\) *Vaughn*, 520 N.W.2d at 396.
\(^{41}\) *Id.* at 397.
concerning temporary out-of-state employment does not precisely fit the circumstance posed by transient or traveling employees. However, the court maintained that too narrow a coverage would pose the danger of no coverage by a state.

The fact that a worker may spend a significant amount of time in one state does not detract from the essentially transitory nature of the activity in which they engage. The amount of time one spends in a given locale should be a factor to consider, but should not be controlling. The facility that controlled Vaughn and his assignments was in Minnesota. The source of his renumeration was in Minnesota. Further, Vaughn traveled to Minnesota for administrative and centralized tasks and his employment was not "centralized and fixed" clearly in another state. Thus, the Minnesota Supreme Court concluded that Vaughn was reasonably within the scope of the statutory objective.

B. Wage Loss Benefits—Retirement Defense

A longstanding issue in Minnesota workers' compensation law was the extent to which a retirement defense could be used to limit the duration of a permanent total disability claim. The issue appears to have been resolved by the Minnesota Supreme Court. In Behrens v. City of Fairmont, the court held as follows:

Inasmuch as subsequent efforts to end permanent total benefits "at retirement" have been unsuccessful . . . we think it is reasonably clear that under the law in effect on the date of injury in this case [1973 and 1988], although permanent total benefits may be reduced by the federal social security disability benefits paid after the $25,000 threshold is met, permanent total benefits do not cease altogether when the social security benefits are converted to old age benefits or when the employee attains the age at which he had hoped to

42. Id. at 396.
43. Id. at 397.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. (citing 4 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 87.42(b) (1994)).
49. Id.
50. 533 N.W.2d 854 (Minn. 1995).
In Behrens a self-insured employer filed a petition to vacate an award of permanent total benefits based on worker’s attainment of age sixty-five. The Minnesota Supreme Court held that although permanent total benefits may be reduced by the federal social security disability benefits paid after the $25,000 threshold is met, permanent total benefits do not cease altogether when social security benefits are converted to old age benefits or when the employee attains the age at which he hoped to retire if he was not injured.

James H. Behrens sustained compensable back injuries in 1973 and 1988 while employed by the City of Fairmont. On January 19, 1989, at age sixty, Behrens stopped working because of his work injuries and sought permanent total compensation. Prior to his injury, Behrens indicated he intended to work until age sixty-five.

On April 1, 1993, the city filed a notice of intention to discontinue benefits as of April 26, 1993, Behrens’ sixty-fifth birthday based on Behrens’ intention to retire on his birthday as well as his entitlement to social security benefits. The workers’ compensation judge dismissed the matter, concluding that because Behrens had been declared permanently disabled in 1992 and no petition to vacate the earlier order had been filed, principles of res judicata precluded relitigating the issue. The city’s remedy was to request reopening for modification of the prior declaration of permanent total disability pursuant to Minnesota Statutes section 174.461.

In 1983 the Minnesota Legislature enacted sweeping changes that restructured the delivery of permanent partial benefits and set durational limits on temporary total benefits on retirement. This legislation, however, was not directed at the permanently-disabled worker whose weekly permanent total

51. *Id.* at 856-57.
52. *Id.* at 855.
53. *Id.* at 857.
54. *Id.* at 855.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 856.
benefits were unchanged by the 1983 reform.\textsuperscript{61}

The Behrens case, at least for injuries occurring before October 1, 1995 (when substantial limits on permanent total disability benefits were included in the Act), can be reasonably interpreted as prohibiting the assertion of “retirement” as a means of limiting the temporal duration of permanent total.\textsuperscript{62} The Minnesota Supreme Court clarified the application of the retirement defense and specifically held the presumption inapplicable to cases of permanent total disability benefits.\textsuperscript{63}

\section*{C. Permanent Partial Disability}

Ordinarily, permanent partial disability benefits should be apportioned pursuant to Minnesota Statutes section 176.101, subdivision 4(a) (1994). In Stone v. Lakehead Constructors,\textsuperscript{64} the Minnesota Supreme Court applied equitable principles to apportion liability for benefits equally among four employers.\textsuperscript{65} The court reasoned that where the claimant’s injuries followed so closely on the heels of the prior injuries that the employee’s condition never stabilized sufficiently to justify contemporaneous rating of permanent disability, and where the difference between the highest and lowest hourly wages on the four jobs was thirty-seven cents, equitable principles should apply.\textsuperscript{66}

During a nineteen-month period, thirty-four-year-old construction carpenter Mark Stone sustained a series of low back injuries arising out of and in the course of his employment.\textsuperscript{67} Each injury occurred during the course and scope of Stone’s employment for a different employer.\textsuperscript{68} Stone first developed low back pain on May 24, 1990, while moving water-soaked wood for Lakehead Constructors.\textsuperscript{69} He did not seek medical treatment.\textsuperscript{70}

Stone then worked for Oxford Construction.\textsuperscript{71} While

\begin{footnotes}
\item[61.] \textit{Id.}
\item[62.] \textit{Id.} at 854.
\item[63.] \textit{Id.} at 856-57.
\item[64.] Stone v. Lakehead Constructors, 583 N.W.2d 36 (Minn. 1995).
\item[65.] \textit{Id.} at 39.
\item[66.] \textit{Id.}
\item[67.] \textit{Id.} at 37.
\item[68.] \textit{Id.}
\item[69.] \textit{Id.}
\item[70.] \textit{Id.}
\item[71.] \textit{Id.} at 38.
\end{footnotes}
picking up a fifty to one-hundred-pound toolbox, he felt a pop in his back in the same area that he injured a couple of weeks earlier. Stone received treatment from a chiropractor.

Stone next went to work for Max Gray Construction. In September 1990, he was fitted for a back brace, which he wore until he was laid off in the fall of 1990. In August 1991, after returning to work for Max Gray, Stone suffered a third low back injury but again lost no time from work.

In November or early December 1991, Stone began working for Ray Riihiluoma on a construction project at Hibbing-Chisholm Airport. He again encountered low back pain while working on a hangar construction project.

Finally, in late January and in February 1992, Stone worked sporadically delivering fuel oil for Mancuso Oil. After working a total of 10.65 hours, Stone had to quit because of low back pain.

Six physicians offered testimony on Stone's claim. All agreed that his work at Mancuso Oil was not a factor in his present condition. Several doctors found that the four work-related injuries were substantial contributing factors to Stone's condition of spondylolisthesis. Stone's impairment was diagnosed at 10.5%.

Because the difference between Stone's highest and lowest hourly wage rate was no more than thirty-seven cents, the court determined that it was not necessary nor advantageous to require assignment of a permanency rating applicable to each of the four injuries.

The court maintained that the diversity of medical opinions concerning allocation of permanent partial disability demonstrat-
ed not only the difficulty of allocation, but that such allocation will be open to the same complaints of arbitrariness or insufficiency of the evidence that will have been made with equitable apportionment. 86 Therefore the court held that there was no reason to recalculate the compensation for permanent partial disability when the more complicated statutory format should produce the same amount of compensation to the employee. 87

D. Medical Benefits

Pursuant to Minnesota Rules 5221.6010, treatment parameters were established on an emergency basis effective May 18, 1993. 88 These emergency treatment parameters had a duration of one year. As of May 13, 1994, these emergency rules lapsed. 89 On January 4, 1995, permanent workers' compensation treatment parameter rules were adopted by the Department of Labor and Industry. 90

In Hirsch v. Bartley-Lindsay Co., 91 the Minnesota Supreme Court determined the validity of the treatment parameters. Hirsch challenged the treatment parameters on the grounds that they exceeded the authority that had been delegated to the Commissioner by the enabling legislation, that they were in conflict with other relevant aspects of the Workers' Compensation Act, and that they infringed on the decisional independence of compensation judges. 92

The supreme court determined that the enabling legislation granted to the Commissioner the power to adopt emergency and permanent rules establishing standards and procedures for health care provider treatment. 93 The rules were used to determine whether a health care provider was performing procedures or services at a frequency that was excessive, unnecessary, or inappropriate based upon the accepted standards of medical care. 94 The enabling legislation also allowed

86. Id.
87. Id.
89. Id.
90. Id.
91. 537 N.W.2d 480 (Minn. 1995).
92. Id. at 485.
93. Id. at 485-86 (citing MINN. STAT. § 176.83, subd. 5 (1994)).
94. Id. at 486 (citing MINN. STAT. § 176.83, subd. 5 (1994)).
for a denial of payment for medical services that were in fact excessive, unnecessary, or inappropriate based upon the standards established by the rules.\textsuperscript{95}

The court went on to examine the language found in Minnesota Statutes section 176.135(1), which states that medical care is to be provided "at the time of injury and any time thereafter ...."\textsuperscript{96} The court recognized that this language in the statute does not imply any durational residency limit on medical treatment.\textsuperscript{97} The court determined that any durational limits on medical care established by the treatment parameters were in conflict with the statute.\textsuperscript{98} The statute prevails in such a conflict.\textsuperscript{99}

The second issue addressed by the supreme court was the exclusive list of reasons for departing from the medical treatment parameters.\textsuperscript{100} The court was concerned with the judicial model of decision making. Minnesota Statutes section 176.135, subdivision 1(e), places the question of the necessity for medical treatment within the discretionary power of a compensation judge.\textsuperscript{101} The court decided that an exclusive list of departure rules unduly infringed on the discretionary power of the judge, and thus exceeded the authority granted to him by the legislature.\textsuperscript{102}

As a result, the court held that the rules purported to be binding regulations.\textsuperscript{103} As such, they exceeded legislative authorization and were declared invalid.\textsuperscript{104}

**E. Third Party Practice**

1. **Payments Made Pursuant to Mistake**

In *Kubiszewski v. St. John*,\textsuperscript{105} an injured firefighter sustained a mild lumbar strain when he was hit by truck in a work-related

\begin{itemize}
\item[95.] Id. (citing MINN. STAT. § 176.88, subd. 5 (1994)).
\item[96.] MINN. STAT. § 176.135, subd. 1 (1994).
\item[97.] Hirsch, 537 N.W.2d at 486.
\item[98.] Id.
\item[99.] Id.
\item[100.] Id.
\item[101.] Id.
\item[102.] Id. at 487.
\item[103.] Id.
\item[104.] Id.
\item[105.] 518 N.W.2d 4 (Minn. 1994).
\end{itemize}
accident. The city accepted liability and began paying workers’ compensation benefits including wage loss compensation and medical expenses.

Less than one month later the employee suffered injuries in a non-work related automobile accident. The employee did not inform the city of the non-work related accident and continued to receive benefits. The employer assumed the employee’s disability continued from the first accident.

The employee made a third party recovery arising out of the first injury, and the employer received partial reimbursement of its payments. After settling with the Suburban Hennepin Regional Park District, the employee sued the driver of the car in the non-work related accident. The employer attempted to assert a subrogation claim against the proceeds of that action.

The supreme court reversed the trial court and the court of appeals, by holding that the employer’s right of indemnification does not apply with respect to benefits mistakenly paid for a non-work related injury. The court stated that the employer could have investigated the claim and denied liability if the injury was “determined not to be within the scope and course of employment” or could have terminated benefits “upon filing of a notice of denial of liability within thirty days of notice or knowledge.” None of the benefits the city paid for injuries relating to the second accident were paid pursuant to the Workers’ Compensation Act. Therefore the provisions of the Workers’ Compensation Act, including those giving an employer the right of indemnity, did not apply.

106. Id. at 5.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
112. Id. at 6.
113. Id.
114. Id. at 6-7.
115. Id. at 6 (citing MINN. STAT. § 176.221, subd. 1 (1992)).
116. Id. at 7.
117. Id.
2. Settlement Agreement

In *Karnes v. Quality Pork Processors*, the Minnesota Supreme Court placed into question the enforceability of a provision in a workers' compensation stipulation foreclosing an employee's cause of action under Minnesota Statutes section 176.82. The court reversed a decision of the court of appeals that the Workers' Compensation Act sanctions settlement agreements that conform with the act, are fair and reasonable, are approved by the compensation judge, and do not preclude reopening of an award in order to assure compensation in proportion to disability.

In 1989, while working for Quality Pork Processors (Quality Pork), Bonnie Karnes sustained a compensable injury resulting in bilateral carpal tunnel syndrome. On July 16, 1990, she returned to light duty work. However, three days later, she sustained a work-related right wrist fracture which was surgically reduced in August of 1990.

A year later the parties entered into a settlement agreement. Karnes approved the settlement for all claims. The agreement stated that Karnes had voluntarily terminated her employment with Quality Pork and that she had not retained legal counsel. The agreement was approved by a compensation judge and an award was entered pursuant to the agreement.

Six weeks later, Karnes applied for unemployment compensation, which was denied based upon a determination that she separated from employment due to medical restrictions. Karnes brought an action for retaliatory discharge in violation of

118. 532 N.W.2d 560 (Minn. 1995).
119. See id. at 562.
120. See id. at 563.
121. Id. at 561.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
Minnesota Statutes section 176.82 (1994). Quality Pork claimed the district court lacked jurisdiction over the matter because it was necessary that the settlement agreement be first vacated by the WCCA.\(^{129}\)

The supreme court noted that the WCCA does not have jurisdiction over matters outside the workers' compensation system.\(^{130}\) When a party pleads a release contained in a workers' compensation settlement as an affirmative defense in a subsequent retaliatory discharge action, it is the district court, not the WCCA, that has jurisdiction to resolve the dispute.\(^{132}\)

3. **Employee are not Required to Prove Specific Work Activities Caused Specific Symptoms**

In *Steffen v. Target Stores*,\(^{133}\) the Minnesota Supreme Court held that an employee was not required to prove that specific work activities caused specific symptoms which led cumulatively and ultimately to disability.\(^{134}\) Additionally, the employee was entitled to a remand to determine whether the injury was gradually caused by repetitive work activity.\(^{135}\)

From August 1989 through January 7, 1991, Laurie Steffen worked for Target Stores as a “zoner,” a job that required her to arrange and clean various departments of the employer’s retail stores.\(^{136}\) The job also involved periodic work stocking shelves with merchandise; and on two occasions, she assisted in unloading semi-trailers.\(^{137}\) After leaving for a period of time, Steffen

\(^{129}\) Id. at 561-62. Minnesota Statutes § 176.82 states as follows:

Any person discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits is liable in a civil action for damages incurred by the employee including any diminution in workers' compensation benefits caused by a violation of this section including costs and reasonable attorney fees, and for punitive damages not to exceed three times the amount of any compensation benefit to which the employee is entitled. Damages awarded under this section shall not be offset by any workers' compensation benefits to which the employee is entitled.

\(^{130}\) Id., 532 N.W.2d at 562.

\(^{131}\) Id. at 563; see also MINN. STAT. § 175A.01, subd. 5 (1994).

\(^{132}\) Id.

\(^{133}\) 517 N.W.2d 579 (Minn. 1994).

\(^{134}\) Id. at 581.

\(^{135}\) Id.

\(^{136}\) Id. at 580.

\(^{137}\) Id.
returned to Target as a “ticketer,” a job that involved opening boxes of merchandise, placing price tags on each item, returning the merchandise to the boxes, placing the boxes on a pallet, and moving the pallet to the department. Steffen described the ticketer job as more difficult because it involved more bending, lifting, and stooping.

In early June of 1991, Steffen began noticing pain and swelling in her leg. After various tests and studies, it was determined that Steffen suffered a herniated L5-S1 disk. Dr. Ahlberg, the examining medical consultant, concluded it was most likely that Steffen sustained a herniated disc as a result of work activities without any specific injury, but secondary disk herniation resulted from an episode of backbending and lifting. The compensation judge denied the employee’s claim, finding the medical evidence insufficient. The WCCA affirmed on appeal.

The Minnesota Supreme Court held that where there is objective medical evidence coupled with the opinion of a medical expert and where the ultimate objective is the attainment of substantial justice according to the purposes of the Workers’ Compensation Act, application of the WCCA standard requiring a causal relationship between the specific work and the specific injury casts an unfair burden on the person injured by the duties of employment. The Supreme Court appropriately remanded the matter for a hearing.

Kevin J. Marquitz

138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id. at 581.
146. Id.