

WORKERS' COMPENSATION

RORAFF FEES: Certification and 'Genuine Dispute'

In *Michele Alden v. Mills Fleet Farm and Hartford Specialty Risk Services*, No. WC10-5081 (W.C.C.A. July 29, 2010), the employee sustained an admitted low back injury and various wage loss and medical benefits were paid accordingly. On April 8, 2009, the employee's physician requested that the insurer authorize surgery. Within seven working days, the claims adjuster faxed a note to the doctor, stating, "surgery is denied pending a second surgical opinion per Minnesota Statute § 176.135(1)(a)." The claims adjuster also spoke directly with the employee and told her an independent medical examination would be set to determine whether the surgery was reasonable and necessary and causally related to her work injury. That same day, an independent medical examination was scheduled for May 2, 2009, with Dr. Terry Hood.

On April 24, 2009, the employee hired an attorney. Two days prior to the scheduled independent medical examination, the employee's attorney served a Claim Petition requesting approval for the surgery. No request had been made by the employee's attorney that the matter be certified for dispute.

Following the employee's independent medical examination, Dr. Hood agreed with the treating physician's recommendation for surgery and the insurer approved the procedure, which the employee underwent on June 3, 2009. Following surgery, the employee's attorney served and filed a claim for *Roraff* fees totalling \$6,007.61. The employer and insurer contested the fees on the grounds that the employee had neither requested nor received certification of a dispute, as required by statute, and that there had been no genuine dispute over the employee's entitlement to surgery.

A compensation judge found that the failure by the employee's attorney to request certification of the dispute did not preclude his claim for fees and that there had been a genuine dispute over the proposed surgery. The judge awarded the *Roraff* fees claimed, as well as attorney fees pursuant to Minnesota Statute § 176.081, subd. 7.

The W.C.C.A. found that the compensation judge erred by ruling that the certification process is inapplicable to *Roraff* fees when an employee chooses to file a Claim Petition rather than a Medical Request. The W.C.C.A. noted that the intent of the dispute certification process is to facilitate "the prompt and economical resolution of medical and rehabilitation disputes without the need for attorney involvement." *Jorgenson v. Nova-Fleck, Inc.*, 638 N.W.2d 760, 763 (Minn. 2002). According to the W.C.C.A., "requiring employees and their counsel to take this first, informal step is hardly an onerous burden...the process is not a mere technicality that may be ignored."

The W.C.C.A. then continued its analysis under the *Jorgenson* case. According to the W.C.C.A., even if certification is unnecessary, fees should not be awarded when there is not a "genuine dispute." An employer and insurer have a right to an independent medical exam under both the statute and the rules, and this right, standing alone is not enough to establish the existence of a genuine dispute. The W.C.C.A. found that the insurer followed the medical treatment parameter timelines in obtaining a second opinion and making its decision to approve or deny authorization for surgery. According to the W.C.C.A., there was "little justification for imposing liability for fees on an insurer that handles and ultimately approves a request for surgery in precisely the manner envisioned by the rules governing compensable treatment." Consequently, the W.C.C.A. found that the record did not support the conclusion that a "genuine dispute" existed and reversed the compensation judge's award of *Roraff* fees.



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HDBOB Receives Top Ranking by U.S. News and World Report

HDBOB was recently listed as a top ranking law firm by *U.S. News and World Report* in their ranking of the Best Law Firms. HDBOB was ranked in the top tier out of three in the areas of personal injury and workers' compensation.

U.S. News and World Report compiled their rankings by following a multi-step process. First, thousands of law firm clients, leading lawyers and law firm managers, partners and associates, marketing officers and recruiting officers were surveyed regarding what factors they considered vital for clients hiring law firms, for lawyers choosing a firm to refer a legal matter to, and for lawyers seeking employment. Based on information from that initial survey, *U.S. News and World Reports* then sent out a second set of surveys to clients (including every Fortune 100 company and 587 of the Fortune 1000 companies) and lawyers. Using a scale of 1 (weakest) to 5 (strongest), clients voted on expertise, responsiveness, understanding of a business and its needs, cost-effectiveness, civility, and whether they would refer another client to a firm. Lawyers voted on expertise, responsiveness, integrity, cost-effectiveness, and whether they would refer a matter to a firm and whether they consider a firm a worthy competitor.

Additional surveys were also conducted regarding demographic data regarding accomplishments achieved by individual lawyers at a particular firm as well as pro-bono commitment and diversity, among others. A firm's ranking also took into account the number of attorneys at the firm who had achieved the status of Best Lawyer. HDBOB partners Dave Odlag, Bill Bradt, Mark Catron, and Craig Nichols have all received this honor.

ESTATE PLANNING & PROBATE

Safeguarding Your Estate Part Three: Powers of Attorney

A power of attorney is an estate planning document created by an individual during his or her lifetime. It is an important and powerful estate-planning tool. A power of attorney authorizes one person to act for another. The individual giving the power under the power of attorney is the "principal" and the person receiving the power is the "attorney-in-fact." The attorney-in-fact is usually provided with the authority to make a wide variety of financial decisions for the principal.

The law treats an attorney-in-fact as the principal's agent. Thus, if an attorney-in-fact takes action on the principal's behalf, the law treats the action as having been taken by the principal. Even though the principal may not intend that the attorney-in-fact will exercise any power until the principal is unable to make his or her own decisions, the attorney-in-fact has legal authority to act as soon as the power of attorney is signed. Incapacity of the principal is not a factor. Therefore, careful consideration must be given prior to creating a power of attorney.

A power of attorney is normally drafted to be "durable." When a power of attorney is made durable, it remains valid even if the principal becomes incapacitated during his or her lifetime. A power of attorney that is not durable expires upon the principal's incapacity or incompetence.

Regardless of whether a principal chooses a durable or nondurable power of attorney, a power of attorney expires upon the death of the principal.

It may also be revoked during the principal's lifetime by signing a revocation of powers of attorney form and providing notice of the revocation to the attorney-in-fact. It is typically advised that the revocation also be provided to anyone who received the power of attorney document. Finally, a power of attorney is automatically terminated if the attorney-in-fact named is a spouse and proceedings are commenced for dissolution, legal separation, or annulment of the principal and attorney-in-fact's marriage.

Some common situations where a power of attorney may be useful include the following:

- When a person needs someone else to pay his or her bills.
- When a person needs to sign documents but is traveling outside of the state or country.
- When a property manager needs to commence unlawful detainer proceedings to evict tenants.
- When a person needs to sign a purchase agreement for real property and he or she is residing in a different state during the winter months.

Up Next: Health Care Directives



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WORKERS' COMPENSATION

HDBOB Attorneys Address Critical Workers' Compensation Issues

HDBOB attorneys recently addressed before the Minnesota Workers' Compensation Court of Appeals two contentiously debated workers' compensation issues.

In *Mewhorter v. Morrell Services, et. al.* (W.C.C.A. June 1, 2010), the employee argued in favor of stacking temporary total disability (TTD) benefits over three separate injury dates. The employee sustained cervical spine injuries during his employment in 1997, 2000 and 2007, all of which contributed to his total disability following the 2007 date of injury. The employee was paid fewer than the 104 weeks of TTD benefits available to him following the 1997 and 2000 injuries.

After the employee was injured in 2007 with a new employer and received 104 weeks of TTD benefits, he then claimed he was entitled to additional TTD benefits from the 1997 and 2000 injuries. Craig Nichols represented the 2000 injury employer and insurer and successfully argued to a workers' compensation judge, in a motion to dismiss, that the employee's claims were limited to the benefits payable for the 2007 injury.

The compensation judge determined that since the employee's disability was

the result of the combined effects of all dates of injury, the employee's TTD claim was limited to the last injury. The W.C.C.A. affirmed the compensation judge's decision. Since the employee's disability was due to the combined effects of the injuries, it was improper to impose consecutive liability on all three injuries. The fact that the earlier injuries may have been substantial contributing factors to the employee's disability was a matter of contribution, not an issue of additional compensation owed to the employee.

In *Bauer v. Heppner's Auto Body, et. al.*, (W.C.C.A. January 5, 2011), the W.C.C.A. accepted Joe Twomey's argument that the employee's testimony alone should not establish his work restrictions. For years employees have argued, and the W.C.C.A. has accepted, that work restrictions do not have to be established by a physician. Case law supports the position that an employee's testimony alone is sometimes sufficient to establish work restrictions.

The prior case law, however, was distinguishable from the facts in *Bauer*. For example, the other cases involved situations where the employee's treating

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EMPLOYMENT LAW

Rein in Abuse of FMLA Leave

Employees are becoming well-versed in the FMLA game, and employers are often paying the price. Unscheduled intermittent leaves now account for a huge portion of all FMLA leaves of absence. While the law does allow employees to take FMLA leave in small increments for a doctor's visit or to care for a sick relative, it does not give them unfettered rights to random work breaks or to arrive late without a good excuse.

Employers can, and should, demand medical certifications for all FMLA leaves and challenge intermittent leave requests to create a less disruptive schedule. As a new court ruling shows, the FMLA was not intended to cover random breaks that damage an organization's productivity. In *Mauder v. Metropolitan Transit Authority of Harris County*, 446 F.3d 574 (5th Cir. 2006), an employee with diabetes was frequently arriving late to work. His diabetes medicine caused temporary uncontrollable bowel movements. The employee demanded unfettered permission to take lengthy restroom breaks. The company denied his request because the breaks hurt the call center's responsiveness.

After the company fired the employee for performance reasons, he sued, alleging he was entitled to FMLA leave for those restroom breaks. The court disagreed, saying that such breaks were not FMLA protected unless the employee was too incapacitated to come to work at all. NOTE: Keep in mind, however, not to terminate quickly when an employee has a physical problem. The ADA could apply and it may require periodic breaks as an accommodation. Strongly consider legal consultation if there is a potential medical issue. Remember, employers that pull the termination trigger quickly on employees with medical issues will not get sympathy from juries.

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4 Tips to Reduce Workers' Compensation Costs

1. Establish an accident-prevention program. Many states offer free consultations with safety specialists. Find details at www.osha.gov/dcsp.
2. Investigate all accidents, not just ones resulting in claims.
3. Report accidents promptly. Delays lead employees to contact lawyers.
4. Stay in touch with injured employees and their doctors. That will help you design an appropriate return-to-work plan.



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WORKERS' COMPENSATION ISSUES

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doctor had a pattern of previously giving the employee restrictions for a condition that remained unchanged from the date of the last restriction. In *Bauer*, the W.C.C.A. was not convinced that the facts of the case or the employee's testimony warranted ongoing restrictions. The W.C.C.A. stated that, while prior cases allows a compensation judge to rely on an employee's testimony to establish restrictions, the prior cases did not hold that a judge must rely on such testimony. The W.C.C.A. found that the record as a whole, which included an opinion by an independent medical examiner that the employee could work without restrictions, supported the compensation judge's decision that the employee did not have work restrictions.



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SPOTLIGHT ON: HDBOB'S Paralegals



Pictured left to right: Lori Cich, Caryl Ghimenti, Sheila Moe and Karen Parsons.

The paralegals at HDBOB are an integral part of the litigation team. Whether assisting in hearing preparation or tracking down a potential witness, they provide invaluable support to the attorneys and clients with whom they work.

Caryl Ghimenti assists HDBOB attorneys with workers' compensation, civil litigation, and probate cases. Caryl began her career at HDBOB in 1995, left to pursue other interests for a couple of years, and then returned in 1997. Caryl also serves as the HDBOB's office administrator. Caryl has an Associate's Degree in paralegal studies from Inver Hill Community College and has studied social work at St. Catherine's University.

Lori Cich got her foot in the door at HDBOB in 1997 on the recommendation of partner Tim Eiden. Her work focuses exclusively in the area of workers' compensation. Lori has a B.A. in history and political science from Augsburg College and an Associates Degree in paralegal studies from Inver Hills Community College.

Sheila Moe joined HDBOB in 1997 and assists with workers' compensation, employment law and personal injury cases. She has an Associate's Degree in paralegal studies from Inver Hills Community College.

Karen Parsons came to HDBOB in 2008 with a B.S. degree in speech and hearing science from the University of Minnesota. She is certified through the Minnesota Paralegal Institute. Karen's work focuses on workers' compensation, employment law, medical malpractice, and personal injury cases.