

Minnesota Supreme Court Expands the Two-Year Statute of Limitations for Improvements to Real Property

By: Alexandra A. Meyer

In February of 2021, the Minnesota Supreme Court released a noteworthy decision regarding the applicability of the 2-year statute of limitations to contractors who perform work to improve real property.

In *Moore v. Robinson Environmental*, 954 N.W.2d 277, 284 (Minn. 2021), Appellant, Moore brought suit in 2018 for claims stemming from Respondent Robinson's removal of an asbestos-insulated boiler and pipes in 2013. The issue to be decided by the Supreme Court was whether the 2-year statute of limitations set forth in Minn. Stat. § 541.051, subd. 1(a), applied to claims arising from the removal and replacement of a broken, asbestos-insulated boiler.

The statute in relevant part states: “[n]o action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury ... arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property ... more than two years after discovery

of the injury” Minn. Stat. § 541.051, subd. 1(a)(2016).

The controversy in *Moore* was whether this statute applied to the asbestos removal services rendered by Robinson. In 1997, the Minnesota Court of Appeals unanimously held that “demolition” work does not constitute construction of improvement to real property within the meaning of the statute of limitations. *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396 (Minn. Ct. App. 1997). Following this decision, the governing rule was that the 2-year statute of limitations based on services or construction to improve real property did not apply to demolition contractors.

Based on the *Brandt* decision, Moore argued that “construction” categorically excludes demolition work[.]” Moore also asserted that Robinson's abatement and removal work was not by itself an improvement since the removal work did not create an addition to his home. Finally, Moore claimed that the damages did not arise out of the defective and unsafe condition of an improvement to the real property. Notably, Moore urged the Court to examine Robinson's removal and abatement work in isolation of the installation of a new asbestos-free heating

system, which was performed by another contractor. Under these circumstances, Moore argued that the Court should consider Robinson's work to be demolition in nature and outside the scope of section 541.051.

Robinson on the other hand, asserted that the Court should look to the project as a whole. Since the asbestos-insulated boiler and pipes had to be removed so that a new asbestos free heating system could be installed, Robinson's services should be considered part of the construction. Robinson contends that it makes no difference that two contractors were hired for the project since the project as a whole was an improvement to real property.

The Supreme Court looked to the statute for interpretation as to whether Robinson was covered under section 541.051. Under Moore's interpretation, if Robinson was the sole contractor hired to remove the asbestos insulated boiler and install the new heating system the work in its entirety would be covered. Moore's view draws a distinction between contractors who perform subtractive work and those who perform additive work. The Court reasoned that drawing distinctions between contractors working on the same project based

on whether they add or subtract materials in the process of constructing an improvement is arbitrary and inconsistent with the Legislature's intention to broaden the coverage of section 541.051.

Since the Court found the statutory language of section 541.051 to be ambiguous, using the canons of statutory construction, they concluded the "process" of construction includes actions that are necessary to move a construction project toward completion. In other words, the statute views a contractor's coverage in light of the entire process of the building project.

Since the Court determined Robinson's abatement and removal work was to be viewed as part of the project as a whole, the Court had to analyze whether the installation of a new-asbestos free heating system was an improvement to real property. In making this

determination, the Court applied the three-factor test set forth in *Siewert v. Northern States Power Co.*, 793 N.W.2d 272, 287 (Minn. 2011). The Court concluded all three factors applied to the asbestos removal and installation of the new asbestos free heating system.¹

Finally, the Court addressed Moore's claim that his damages did not arise out of a defective and unsafe condition of an improvement to real property. The Court reasoned that "it makes no difference to [its] analysis that the heating system's defective and unsafe condition was allegedly the result of the negligence of Robinson's workers. Negligence 'can create a defective and unsafe condition,' and that is exactly what Moore's complaint alleges."

The Supreme Court's decision effectively overrules *Brandt* by concluding work that "moves a project towards completion" is

considered part of construction work taken as a whole. Accordingly, a 2-year statute of limitations now applies to removal work if it is part of an improvement to real property. Therefore, when evaluating claims against contractors, it is important to understand the scope of the work as it relates to the project as a whole.

¹ For a complete discussion as to the *Siewert* factors see *Moore*, 954 N.W.2d 277, 285-286.



Coverage Case Law Update

On April 14, 2021, the Minnesota Supreme Court issued an important decision affecting insurance coverage for commercial general liability insurers. In *King's Cove Marina, LLC v. Lambert Commercial Construction, LLC*, 2021 WL 1396596, the Court considered whether a commercial general liability insurance policy covers property damage for the insured's own completed work when the policy includes coverage for "products-completed operations hazard" and has an exclusion for property damage arising out of the insured's own work. The Court also considered whether a *Miller-Shugart* settlement agreement is per se unreasonable and unenforceable when it fails to allocate between claims that are covered and not covered by the insurance policy. In considering the issues before it, the Minnesota Supreme Court held that a commercial general liability insurance policy exclusion applies to the insured's own faulty work and that the products-completed operations hazard was included in the unambiguous language of the policy coverage exclusion. In addition, the Court concluded a *Miller-Shugart* settlement agreement is not per se unreasonable where it does not differentiate between the allocation of covered and uncovered claims; instead, the determination of reasonableness is up to the district court to decide based on a two-step analysis test.

Minnesota Supreme Court Reverses the WCCA & Denies Injection Therapy Based on Worker's Compensation Treatment Parameters

By: Tim S. Crom

The Minnesota Supreme Court reversed the Minnesota Workers' Compensation Court of Appeals (following a Decision from the WCCA) reversing a Compensation Judge's denial of ongoing long term facet injections for chronic neck pain following a work injury. The employee, who was a dishwasher for ISD #912, sustained an injury to her neck which was admitted as a *Gillette* type work injury culminating on or about April 14, 2004. Thereafter, the employee was diagnosed following an MRI with significant narrowing in the spinal canal and severe degenerative stenosis of the C5-C7 levels at the cervical spine with resulting spinal cord deformity. In 2005 she was evaluated by Dr. Robert A. Wengler, who concluded that she had a *Gillette* type injury and was sufficiently symptomatic for consideration of surgical fusion in the form of a fusion, C5-C7. She was evaluated by Dr. Bryan Lynn, M.D. in 2007, who concluded she was not a good surgical candidate. This opinion was also expressed by her subsequent primary care provider, Dr. Steven Sabers, M.D., who provided her with treatment from 2008 through the onset of dispute in the fall of 2017.

Treatment provided by Dr. Sabers up to that timeframe consisted of a medial branch block in 2008, which provided no relief, and then a series of facet injections during the ensuing years which the facts reveal were at least 20 injections to the facets at the cervical spine levels in question. The employee's initial response to the injections was limited, with only a few days of

relief but as time went on, she would get up to three months relief and then receive another set of injections.

The injections were provided on a quarterly basis for a period of eight years. During this timeframe, the patient also continued to use prescription pain medication, the nature of which was not clearly indicated in the Decision.

In September of 2017, the employee was seen by Dr. Joel Gedan for an independent medical examination. He noted in his report that facet injections are not designed for long term repeated use, there is no clear indication of any objective change in the employee's condition from the repeated injections, and the continued use of the injections was not reasonable, necessary, or part of an indicated treatment plan from a medical standpoint. Dr. Gedan noted that if relief is obtained from facet injections, the next medical recommended step would be medial branch blocks. He was not aware of the original set of branch blocks in 2008.

The employer, ISD #912, notified the employee they would no longer approve reimbursement for ongoing facet joint injections based on Dr. Gedan's report. In addition to Dr. Gedan's opinions, they also relied on the three injection limit established in the medical treatment parameters, namely Minn. Rule 5221.6200, subp. 5(A)(3) (2019), which provides that the "maximum treatment" is "three injections to any one site".

The employee continued her care with Dr. Sabers. In February of 2018, the doctor ordered an MRI and a set of medial branch blocks. The MRI was noted to show no significant changes in the employee's condition. The employee again received medial branch blocks and again they were unsuccessful.

Dr. Sabers issued a report indicating that the facet injections were the only treatment that was providing the employee with significant and reproducible pain relief. The employee filed a Medical Request for additional facet joint injections. The Request was heard at the Department of Labor & Industry and denied, in part, based on Dr. Gedan's report. The employee sought a Formal Hearing which was held before Compensation Judge Lund, who concluded that ongoing facet injections do not meet the applicable treatment parameter and the employee had not met her burden of proof to show that a departure from the parameters three injection limit was warranted (See Minn. Rule 5221.6050, subp. 8 (2019)). In reaching her conclusions, the Judge found that the employee testified credibly, and the medical evidence submitted documented little to no reduction in her subjective levels of pain with only limited improvement in the objective clinical findings and no change in her functional status. Finally, the Judge concluded that ongoing injections were neither reasonable nor necessary if the treatment did not provide significant or lasting relief and that evidence showed the employee was

continuing to worsen. The employee appealed the Decision to the WCCA. The employee asserted, for the first time, on appeal, that the Judge should have applied an exception to the treatment parameters relying on the *Jacka* line of Decisions. The WCCA concluded that in light of the record as a whole, the Compensation Judge should have considered whether this was a “rare case” warranting departure from the treatment parameters and further found that the Judge’s failure to address the rare case exception was an error of law when read together with the Findings of the Judge indicating that the employee had testified credibly and that she had relief from the injections that had been provided to date. The WCCA concluded that the Compensation Judge’s Decision was not supported by substantial evidence in the record, relying heavily on foundational questions with respect to the IME of Dr. Gedan, his lack of awareness with her set of medial branch blocks and his lack of opinions with respect to treatment that occurred after the IME with regard to the again, failed medial branch blocks and MRI findings.

The Supreme Court, in review of the WCCA’s Determination, first addressed the factual question presented in the case, namely, are quarterly injections reasonable and necessary to treat pain resulting from the employee’s work-related injury, in consideration of the framework of the relevant treatment parameters. The treatment parameters were those provisions pertaining to therapeutic injection, namely, Minn. Rule 5221.6040, subp. 13 (2019). It was noted that she had these quarterly for a period of upwards of almost 10 years with, at best, variable response, but no improvement of

her condition nor function over time. The Court noted “when subsequent injections … demonstrate diminishing control of symptoms or fail to facilitate objective functional gains, then injections … should be discontinued. *Id.*, subp. 5(A)(2)(b).

The Supreme Court disagreed with the WCCA’s analysis, which largely focused on the independent medical examination of Dr. Gedan. The School District argued that the Judge’s Determination was multi-factorial in origin and should be affirmed. That is to say, there was more to the case than simply focusing on Dr. Gedan’s opinions and whether or not they were sufficient to be relied upon by the Compensation Judge. The Supreme Court, in discussing the rationale for the WCCA decision reversing the compensation Judge, noted that the WCCA concluded that the Judge’s Decision was unsupported by substantial evidence because the Judge found the employee’s testimony to be credible and the fact that the employer’s IME did not address the reasonableness of continuing facet injections.

The School District argued for a broader review of the record in assessing the Compensation Judge’s Findings and whether or not they were supported by the record as a whole. Rather than just focusing on two items, like the WCCA, the Court did take a broader approach, again evaluating the issues in the context of the treatment parameters in question noting that there was no evidence submitted indicating that the treatment being provided was in line with the treatment parameter requirements that there be progressive, objective clinical improvement. The Supreme Court, therefore, reversed the WCCA’s reversal of the Compensation Judge

and reinstated the Compensation Judge’s Findings on the issue of reasonableness and necessity of ongoing facet injections.

With regard to the issue of whether the case presented a “rare exception” to the treatment parameters, under the *Jacka* Decision, the Court noted that in *Jacka* they recognized there may be “rare cases” where a Compensation Judge can deviate from the treatment parameters when “departure is necessary to obtain proper treatment.” See also *Asti v. Northwest Airlines*, 588 N.W.2d 737, 740 (Minn. 1999). The Court interpreted the WCCA’s Determination on this issue as a conclusion by the WCCA that the Judge erred as a matter of law by failing to consider whether *Leuthard*’s case was a rare exception to the treatment parameters. The Court went on to note, however, that the WCCA erred in arriving at this conclusion as the employee never asserted this position at the time of the hearing before the Compensation Judge, and, therefore, the claim was forfeited.

The Court went on to discuss the fact that the WCCA’s scope of review is limited to those issues raised by the parties in the Notice of Appeal and those issues tried before the Judge below. Failure to assert the rare case exception before the Judge at the time of hearing was fatal to this argument and the Supreme Court determined that the WCCA exceeded its authority. The employee attempted to argue that the WCCA did have authority to address the rare case exception rule under *Jacka*, citing various Decisions by the WCCA where this action was undertaken at the WCCA. However, the Supreme Court was not swayed, indicating that Decisions of the WCCA on

legal issues are not binding on the Supreme Court. In addition to not raising the rare case exception at hearing before the Compensation Judge, the Court noted the Employee did not raise the issue in the Employee's Notice of Appeal to the WCCA.

In summary, the Supreme Court concluded, "The WCCA erred as a matter of law in vacating the Compensation Judge's Decision and remanding to address the "rare exception" under Jacka et al." As such, the Court reinstated the underlying Decision of the Compensation Judge.

There are several important items to take away from this decision. First, it stands for the proposition that the Supreme Court will review Decisions of the Workers' Compensation Court of Appeals, carefully, to make sure that they, in fact, have issued a Decision that is based on all of the relevant facts in the context of legal issues presented to them. Second, for cases involving treatment of long-term chronic

pain, it stands as a reminder for the need to carefully evaluate the treatment and the medical records to determine if there is compliance with the medical treatment parameters governing the type of treatment rendered. We often see cases involving treatment of chronic pain with long term use of opioids, injection therapies, both therapeutic and diagnostic, with few results yielding what the treatment parameters are designed to provide, and that there is some sort of accountability for the treatment rendered, i.e., is it doing any good. Third, the decision can be read as an endorsement of the argument that mere temporary pain relief without more is insufficient to justify long term chronic treatments under the treatment parameters. When applied, treatment parameters are designed to allow for cessation of the unsuccessful treatment with substitution of something else, to see if that will provide the expected relief and functional improvement.

One final comment regarding the facts of the case, there is little to no

discussion of a treatment plan from the treating physician. Medical treatment under the parameters is supposed to take place in the context of a treatment plan from the provider. In this case, it is not clear what the treatment plan was, or if there even was a treatment plan in place. It is this writer's opinion that injection therapies given on a long term basis rarely include a coherent treatment plan, because typically, if they did, the doctor would be able to recognize when the goals of the treatment plan were not being met.

Lastly, it should be kept in mind, that the employee in this case did report an element of relief from the injections she received. However, the relief was variable, over time her condition was worsening and there was clearly no indication of improvement, which is an expected outcome of any treatment plan.



Motion for Summary Judgment Granted: Failure to accommodate in violation of the ADA and Retaliatory discharge in violation of the Workers' Compensation Act

Owens v. N. Tier Retail LLC, No. 19-3048(DSD/HB), 2021 WL 1118027 (D. Minn. Mar. 24, 2021) came before the district court upon the motion for summary judgment by defendant Northern Tier Retail LLC, commonly known as Speedway. The plaintiff Owens contended that Speedway violated the Americans with Disabilities Act (ADA) in two ways. First, Owens alleged that Speedway discriminated against her because of her disability by changing the terms and conditions of her employment and later constructively discharging her. Second, the plaintiff alleged that Speedway failed to provide her with reasonable accommodations. To establish a prima facie case under either type of claim, a plaintiff must show that (1) she was disabled; (2) she was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) she suffered an adverse employment action due to his/her disability. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007); *Burchett v. Target Corp.*, 340 F.3d 510, 516 (8th Cir. 2003). The court ruled that Owens failed to meet this standard and granted the defendant's motion for summary judgment.

There was no dispute that Owens had the qualifications and skill to perform her customer service representative (CSR) position. Nor was there a dispute that she was unable to perform the essential functions of her job without reasonable accommodation.

Therefore, the court had to decide whether she could perform the essential functions of her job with reasonable accommodation. The court ruled that the record did not support a finding that Owens could have performed the essential functions of her job with reasonable accommodation. Her work restrictions directly conflicted with the tasks of her position and any accommodation would have required Speedway to reallocate some of her employment tasks to co-workers. It is well settled that “[a]n employer need not reallocate or eliminate the essential functions of a job to accommodate a disabled employee.” Nor is the employer required to “reassign existing workers to assist [the employee] in his essential work duties.” Because Owen’s restrictions were squarely at odds with her job responsibilities, she failed to establish that she could have performed her duties with reasonable accommodation.

Owens argued that Speedway refused to engage in an interactive process to determine whether she could be reasonably accommodated. An employer fails to participate in an interactive process if the employer knew of the employee’s disability; the employee requested a reasonable accommodation; the employer did not make a good faith effort to assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer’s lack of good faith. See *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 902

(8th Cir. 2006). The court concluded that at no point did Owens expressly or impliedly request any accommodation or ask to discuss whether any accommodation would be possible, therefore this argument fails.

Owens also argued that she suffered adverse consequences because her workers’ compensation benefits were less than what she would have earned had she been allowed to work and she was constructively discharged. The court disagreed with both contentions. The record reflected that Owens was paid the maximum allowable benefit under the workers’ compensation statute for her temporary total disability. Further, Speedway honored her medication restrictions, reassured her that she could resume her position when she recovered, paid her workers’ compensation benefits during the entire period of disability, and offered her shifts as soon as she was medically cleared to return to work. Speedway offered three separate times to put Owens back on the schedule, however Owens refused. The court concluded that Owens independently decided to terminate her employment with Speedway, and there is no persuasive evidence to the contrary.

Lastly, Owens contended that Speedway violated the Minnesota’s Workers’ Compensation Act (WCA) by retaliatorily discharging her and refusing to offer her continued employment. However, the court ruled that neither claim

had merit. To establish a prima facie case of retaliatory discharge under the WCA, a plaintiff must show that (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there is a causal connection between the two events.

Ciszewski v. Eng'd Polymers Corp., 179 F. Supp. 2d 1072, 1092 (D. Minn. 2001). Owens failed to establish that she suffered an adverse employment action, let alone one that flowed from that protected activity. Further, Speedway did not terminate Owen's employment nor

would she have needed any accommodation had she accepted one of Speedways' three offers for her to return to work. Under these circumstances, this claim under the WCA fails.

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