Permanent Partial Disability Ratings: One Rating for Multilevel Fusion

In <u>Nadeau v. Institute for Environmental Assessment</u>, slip op. (W.C.C.A. March 29, 2005), the Court addressed the appropriate permanent partial disability rating for multiple fusions. The employee sustained an admitted low back injury which resulted in a two level anterior lumbar fusion. Several months later, after a slip and fall, the employee required a supplementary fusion at the same levels.

The employee claimed entitlement of 30 percent whole body permanency, ten percent for radicular syndrome under Minn. R. 5223.0390, subp. 4C(2), plus an additional ten percent for <u>each</u> of the two fusion procedures performed pursuant to Minn. R. 5223.0390, subp. 5B. Ultimately, the WCCA agreed with the Compensation Judge (subject to a very minor adjustment in the ratings) in determining the employee was entitled to a 20 percent permanent partial disability rating.

Although the employee contended the provision in the rules for surgeries other than fusions provided for additional permanency of a set amount <u>regardless</u> of the number of surgeries performed, whereas the provision for additional permanency for fusions did not provide any such limitation. The employee argued statutory construction indicates the legislature intended to allow ten percent permanency for <u>each</u> fusion surgery performed.

The WCCA disagreed, noting the legislature could have easily added such a provision in the rule for permanency for fusion, but under its plain meaning in conjunction with the general rule of avoiding exaggeration of disability, only ten percent was warranted regardless of the number of fusions. In so doing, the Court agreed with the employer and insurer that the vertebra is either fused or it is not, regardless of the number of surgeries performed to accomplish that result. Thus, an employee is entitled to one rating for a fusion at multiple levels and not a separate rating for each surgical procedure which are required to accomplish the fusion.