

***Graboksy v. ISD 720*, No. WC17-6099 (W.C.C.A. Feb. 9, 2018)**

In this case, an employee slipped on a staircase at work on February 8, 2016 and felt pain in her upper shoulder and upper neck. She also claimed that the incident caused headaches and numbness in her left hand. The employee had a significant history of pre-existing left shoulder, neck, and headache pain dating back many years. Notably, she treated for left shoulder pain two weeks prior to the alleged injury. She filed a Claim Petition, and the employer and insurer denied liability.

An Independent Medical Examination was completed by Dr. Howard Saylor on April 6, 2017. He concluded that the work injury did not significantly aggravate the pre-existing condition or need for treatment. He further concluded that, “in my opinion, the incident of February 8, 2016 caused a temporary aggravation of [the employee’s] pre-existing condition and left thoracic outlet syndrome complaints, which has not yet resolved.” The interpretation of this sentence was disputed between the parties. The matter went to a Hearing where Judge Grant Hartman concluded that the Employee’s work injury was a temporary aggravation of her pre-existing condition that it had resolved by March 1, 2016 (which was less than one month after the injury).

On appeal, the Employee argued that Judge Hartman’s conclusion was not supported by substantial evidence in the record. In its decision, the WCCA took note that the Employee admitted that she experienced the same symptoms both before and after the work injury. Also, the WCCA found that Judge Hartman properly concluded that the medical records did not provide confirmation for the Employee’s increased symptoms. Lastly, and perhaps most notably, the WCCA interpreted Dr. Saylor’s wording in his IME Report of “which has not yet resolved” to be referring to the Employee’s pre-existing condition rather than a temporary aggravation. The WCCA affirmed Judge Hartman’s findings. This decision goes to show how important it is for IME doctors to clearly articulate their expert opinions.

Summary by: Parker T. Olson

***Wilson v. Twin Town Logistics*, No. WC17-6022 (W.C.C.A. Feb. 9, 2018)**

This case involves the issue of *Roraff* attorney fees. Here, an employee suffered a work injury and benefits were paid by Freestone Insurance. The employee eventually filed a Claim Petition seeking attorney fees, however Freestone was subsequently declared insolvent, so the employee’s claims were submitted to Minnesota Insurance Guaranty Association (MIGA). The employee’s claim for attorney fees was for \$30,572.00 as excess fees under *Irwin*. The employer and insurer contended that the claim was excessive and that some of the itemized time had already been paid.

A Hearing was held before Judge Stacy Bouman, who concluded that the employee’s attorney was entitled to \$3,000 “as and for a combination of *Roraff/Heaton* fees and excess fees.” The employee’s attorney appealed the decision.

The WCCA affirmed the award. They concluded that Judge Bouman properly concluded that the issues presented were not complex or technically difficult despite the arguments that the employee’s attorney presented. Further, the WCCA held that Judge Bouman properly analyzed the

itemization of fees and concluded that some of the time was excessive and duplicative. The WCCA gave deference to Judge Bouman's decision and upheld the award of \$3,000 in attorney fees.

Judge Milun wrote a dissent contending that Judge Bouman did not provide adequate rationale to support her decision, and that the employee's attorney should be entitled to additional fees. She noted that it took the employee's attorney two and a half years to obtain benefits for the employee, which. She also wrote that the WCCA's decision in this case would have a chilling effect on petitioner attorneys in the area of workers' compensation.

Summary by: Parker T. Olson

***Azuz v. Vescio's*, No. WC17-6086 (W.C.C.A. Feb. 1, 2018)**

In this case, the employee slipped and fell causing low back pain while at work. Liability was admitted, and benefits were paid. Years prior to the injury, the employee underwent medical treatment for her lower back pain. A prior x-ray revealed that the employee had degenerative disc disease at the L3-5 levels. There were numerous medical records referencing lower back pain and treatment pre-dating the alleged work injury.

The employee eventually underwent surgery. She was then examined by Dr. Robert Wengler, who assigned a 37% permanent disability rating based on the findings in the medical records. The employee was also examined by Dr. William Simonet on behalf of the employer and insurer. Dr. Simonet found that the Employee had reached MMI and required no restrictions. He also found that the employee had a 10% PPD rating unrelated to the injury. The case proceeded to a Hearing where the compensation judge denied the employee's claim for wage loss benefits and a 37% PPD. The employee appealed.

The WCCA affirmed the compensation judge's decision. They noted that the compensation judge properly weighed the opinions of the experts and that Dr. Simonet's report was supported by adequate foundation. While the WCCA did vacate two findings in the compensation judge's decision for misstating a medical record entry, this did not affect the overall affirmation of the underlying decision.

Summary by: Parker T. Olson

***Ahmed v. Loop Parking Co.*, No. WC17-6074 (W.C.C.A. Feb. 13, 2018):**

Pro se employee appeals denial of the claim for right knee MRI and payment of medical expenses. The employee had suffered a right knee injury while working as a parking lot attendant in 2012. He underwent surgery in October 2012. His orthopedic surgeon opined that he had exhausted all treatment options and reached MMI in January 2014. He was released without restrictions. In 2015, the claims were settled on full, final, complete basis except for reasonable, necessary, and causally related medical for the right knee.

In 2016, he treated for pain in his right knee for the first time in 18 months and denied any new injury. A February 2016 MRI showed an oblique tear and a parameniscal cysts. An IME was done, and the IME doctor opined that the current symptoms were caused by the mass and meniscus tear on the 2016 MRI and were unrelated to the 2012 injury. He opined that the 2012 surgery had repaired the tear, and no tear was present on a 2013 MRI.

WCCA affirmed the decision as the compensation judge's findings were supported by the opinions of the IME doctor.

Summary by: Bryan M. Wachter

***Guyton v. Hennepin County Medical Center, No. WC17-6103 (W.C.C.A. Feb. 13, 2018):***

The Employee in this case sustained an admitted low back injury on August 16, 2016. She worked as a dietary aid at HCMC, which is a .9 full time equivalent position, and she frequently works overtime. The Employer paid wage loss benefits based on an AWW calculated by the human resources staff (\$627.87). A QRC prepared an R-2 Rehabilitation Form with the AWW listed as "704.70 (est.)". The Employee contacted the Department of Labor and Industry, which indicated that the AWW calculation using a regular schedule method was \$56.00 and irregular earnings method was \$639.76. The Employee filed a claim petition. Following hearing, the compensation judge found the AWW was \$627.87 and rejected proposed alternative calculations by the Employee as unsupported or exceeding the 26-week period set out in Minn. Stat. §176.011. The compensation judge also rejected late submission by the Employee following the hearing. The Employee appeals.

WCCA affirmed the wage calculation as being supported by substantial evidence in the record. The 26-week averaging method was appropriate as it was a fair approximation of her earning capacity.

WCCA also found that there was no abuse in discretion by the compensation judge by excluding exhibits filed post-hearing.

Summary by: Bryan M. Wachter

***Dahl v. Rice County, No. WC17-6093 (W.C.C.A. March 5, 2018):***

The Employee was a deputy sheriff in Rice County. He suffered four admitted work injuries that resulted in a permanent low back condition. His employment with Rice County ended because his work restrictions could not be accommodated. He was given permanent restrictions following a 2013 functional capacity evaluation. He began working with a QRC in 2006. He held multiple different jobs for varying periods of employment. The QRC developed a retraining proposal in 2016 that he obtain a 3-year teaching degree at University of Mankato with a goal of becoming a high school teacher. Employer and Insurer objected to this proposal. The plan was revised to obtain a master's degree in law enforcement and later revised to become post-secondary criminal justice

and law enforcement teacher. The initial proposal of bachelor's degree in education was ultimately considered by the compensation judge. The QRC testified regarding the job search efforts by the employee throughout the eleven year period. Employer and Insurer retained an independent vocational examiner who opined that the plan was not viable because there were not an adequate number of positions open, was concerned that the employee expected to teach a law enforcement related subject, and it would not necessarily restore the employee's economic status. She also opined that the employee's job search was not diligent and did not fully cooperate with rehab. The compensation judge concluded he was a candidate for retraining as a high school teacher and approved the proposed retraining plan. Employer and Insurer appealed.

The Employer and Insurer argue that the employee's eleven-year job search was deficient, and it cannot be said that retraining was preferable to continued job search as there were no job logs. WCCA held that there was substantial evidence based upon the testimony of the QRC that he had conducted a diligent job search.

The Employer and Insurer argue that the employee failed to establish a likelihood that he would succeed in the program. WCCA held that there was substantial evidence in the record that supported the finding that he had the ability to succeed based upon vocational testing, opinions of QRC, and testimony of the employee.

The Employer and Insurer argue that the employee did not establish that the proposed plan was likely to restore his economic status. WCCA held that there was substantial evidence to support the judge's finding, given that the judge explicitly rejected arguments of proposed alternatives as unreasonable and irrelevant to analysis of whether proposed retraining will place the employee in an economic status as close as possible to what he would have enjoyed if not for his work injuries.

Employer and Insurer also contended that the judge committed procedural errors by admitting records of the QRC that were first disclosed at the hearing and consideration of the employer and insurer's expert witness by deposition rather than life testimony. WCCA held that these evidentiary rulings were not an abuse of discretion.

Summary by: Bryan M. Wachter

***Miller v. Valley Paving Inc., No. WC17-6098 (W.C.C.A. Mar. 6, 2018)***

The primary dispute in this case was whether the employee's work injury was a temporary aggravation of a pre-existing knee condition or a permanent injury substantially contributing to the Employee's ongoing disability.

The parties agreed the employee, a construction worker, sustained a personal injury to his right knee after stepping backwards into a hole on August 31, 2015, arising out of and in the course of his employment.

Medical records revealed the employee had right knee treatment in April and May of 2014 after an injury playing basketball. Among the treating providers was Dr. Joseph Nemanich at Twin Cities Orthopedics. Following an MRI, the employee was diagnosed with a medial meniscus tear

and ACL laxity. He was recommended for a meniscectomy but did not pursue any treatment thereafter until the work injury.

Following the work injury, he was diagnosed with a tear of the medial meniscus and underwent an arthroscopy by Dr. Nemanich in October 2015. The Employee was eventually laid off by the Employer in July 2016.

Dr. Nemanich prepared a report attributing the right knee problems to the August 31, 2015 work injury and gave a 2% PPD rating. Dr. Thomas Nelson performed an independent medical examination and opined the torn meniscus was present before the August 31, 2015, work injury, the work injury was a temporary aggravation of the employee's pre-existing condition and no permanency was related to the work injury.

The compensation judge found the work injury to be permanent in nature and awarded benefits to the Employee. The employer and insurer, who raised issues with both the credibility of the employee and the adoption of Dr. Nemanich's report, appealed the matter.

As to the credibility determination, the WCCA noted the compensation judge had made a specific finding that he "found the hearing testimony of the employee to be credible." The court reasoned that it has previously held that a compensation judge is in the best position to consider the credibility of witnesses and while different conclusions can be drawn from conflicting evidence, there was no basis to reverse the credibility determination of the compensation judge.

With respect to the adoption of Dr. Nemanich's medical opinion, the court stated one of the central functions of a compensation judge is to weigh competing medical opinions and the WCCA will uphold the compensation judge's choice of medical opinion where there was adequate foundation for the opinion. In support of the compensation judge's adoption of Dr. Nemanich's opinion, the court noted, "We think it is significant that Dr. Nemanich, who concluded that the work injury was a permanent injury, had treated the employee for his knee problems in 2014 and was undeniably qualified to provide an opinion on this question."

Summary by: Emily L. Johnson

***Karkanen v. Univ. of Minn., No. WC17-6117 (W.C.C.A. Mar. 14, 2018)***

The employee in this matter submitted a petition to vacate an award based on a substantial and unanticipated change in medical condition under Minn. Stat. § 176.461.

The employee worked as a veterinary technician for the University of Minnesota. She had a claimed back injury on April 17, 2010, when she was assisting in surgery being performed on a horse and was pulling and lifting large bags of fluid. The employee had a significant history of prior back injuries and treatment. In June 2010, she underwent a posterior lumbar interbody fusion at L5-S1.

The employer and insurer denied the claimed injury and the parties eventually settled the matter in April 2012, pursuant to a stipulation for settlement wherein the employee accepted a sum in

exchange for a full, final and complete settlement of all claims with the exception of future medical expenses and permanent total disability benefits after 15 years.

Prior to settlement, the employee was working full-time under restrictions. She continued to have pain, which she rated at a 7/10 in records just prior to her settlement and was on several pain medications.

Following the issuance of an Award on April 19, 2012, the employee continued to treat for the back, including multiple additional surgeries, injections, pain medication and physical therapy.

In its analysis, the court outlined the multiple factors set out in *Fodness v. Standard Café*, 41 W.C.D. 1054 (W.C.C.A. 1989) for evaluation of whether there has been a substantial and unanticipated change in medical condition: a change in diagnosis; change in the employee's ability to work; additional permanent partial disability; necessity for more costly and extensive medical care than originally anticipated, a causal relationship between the covered work injury and the worsened conditions and the contemplation of the parties at the time of settlement.

The WCCA held the employee failed to provide evidence to demonstrate the work injury was causally related to her present condition. Therefore, the court did not go into an analysis of any other *Fodness* factors and denied the employee's appeal for a vacation of the award. The court rejected the employee's argument that whether a causal relationship exists is a factual determination that should be made by a compensation judge at a hearing after the WCCA vacates the award.

Summary by: Emily L. Johnson

***Weiss v. St. Mary's Med. Ctr.*, No. WC17-6097 (W.C.C.A. Mar. 15, 2018)**

In this matter, the WCCA affirmed the compensation judge's determination that the employee had sustained *Gillette* injuries to her cervical spine and right shoulder where substantial evidence supported the finding. The WCCA also affirmed the compensation judge's ruling that the employee's average weekly wage could be preserved for future determination.

The employee worked for Essentia Health St. Mary's Medical Center cleaning and sterilizing IV poles and associated pumps and equipment. The work involved her pushing around a supply cart throughout the hospital, which she did for over 13 years. At the time of the alleged injuries, the employee had been working a second, part-time job for Walmart as a cashier. The employee claimed *Gillette* injuries to her cervical spine, right shoulder and left knee, with a culmination date of August 8, 2016.

Medical records showed sporadic treatment for her shoulders, hands and cervical spine, including a 1991 cervical strain which she attributed to pulling a heavy cart and a 2007 right shoulder sprain after trying to pull IV poles into an elevator. Her treatment ramped up in 2016 and she reported having neck, upper back pain and bilateral arm tingling for years and that her jobs aggravated her pain.

One of the employee's treating physicians provided an opinion letter diagnosing right shoulder rotator cuff impingement and tearing and multilevel degenerative changes to the cervical spine and concluded the findings were significantly aggravated by her work for Essentia.

Independent Medical Examiner Dr. Loren Vorlicky agreed with the diagnoses of a right shoulder rotator cuff tear and acromioclavicular joint arthritis as well as multilevel degenerative disc disease of the cervical spine. He opined all of these were chronic degenerative conditions and the employee's work activities at Essentia did not constitute a substantial cause of their development, aggravation, or acceleration.

The WCCA held that substantial evidence supported the judge's finding that the employee sustained *Gillette* injuries to her cervical spine and right shoulder culminating on or about August 8, 2016.

As to the average weekly wage issue, the employee's wages from her second job at Walmart being included in her weekly wage was not raised at the hearing and the compensation judge ruled that any claim for those was preserved for future determination.

The employer and insurer argued that the compensation judge erred as a matter of law by leaving the question of the weekly wage open with respect to the wages from Walmart because they were included at the hearing. The WCCA held they could not conclude the compensation judge abused his discretion by failing to make a final determination on an issue which even the appellant agrees was not actually raised.

Summary by: Emily L. Johnson

***Mellgren v. Minn. Dep't of Corr., State of Minn., No. WC17-6110 (W.C.C.A. Mar. 21, 2018)***

Employee Lynn M. Mellgren sustained a non-work-related injury in February of 2000. A tear of the ACL, a medial meniscus tear, and degenerative changes of the medial compartment in the right knee was indicated in an MRI scan. She underwent arthroscopic surgery, then returned to work without restriction. After having a pain in the right knee in 2006 that was treated with a cortisone injection, she experienced no symptoms and was given no restrictions or treatment for her right knee from 2006 until 2016.

In 2016, the Employee was involved in an inmate altercation. Following this incident, she experienced soreness and then severe pain in her right knee. A work-related injury was admitted and wage loss and medical expenses were paid.

A March 2016 x-ray showed significant arthritis in the right knee, and the symptoms were opined to be a flare-up of either arthritis or a minor knee sprain. Conservative care and a cortisone injection were recommended. A second opinion was that the pain was from a torn ACL graft. A third opinion given in a July 2016 IME was that the Employee had suffered a temporary aggravation of a pre-existing condition. The same IME found the Employee to be at MMI with no PPD, need for further medical treatment, or restrictions.

In February 2017 the Employee sought treatment, claiming that her symptoms had gradually returned. A Synvisc injection was recommended, but denied by work comp based on the findings of the IME report. In June 2017, the IME doctor added to his initial report that the Employee's condition was likely due to "chronic failure of a non-healing previous graft," and that any further treatment would be to treat the underlying condition, not a condition brought about by the work injury.

The compensation judge agreed with the Employer that the work injury was not a substantial contributing factor for the Employee's condition or need for treatment. On appeal, the Employee argued that the aggravation of a pre-existing condition had never resolved, that the need for the Synvisc injection was therefore related to her work injury, and that as she only required treatment because of the work injury, the compensation judge erred. She pointed out six factors the court had used to assess aggravations of pre-existing conditions: "1) the nature and severity of the preexisting condition and the extent of restrictions and disability resulting therefrom; 2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; 3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; 4) the nature of the symptoms and extent of medical treatment following the aggravating incident; 5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and 6) medical opinions on the issue." *Lynn M. Mellgren v. Minn. Dep't of Corr., State of Minn.*, No. WC17-6110 (W.C.C.A. Mar. 21, 2018), see *Wold v. Olinger Trucking, Inc.* slip op. at 4 (W.C.C.A. Aug. 29, 1994).

The Employer argued that the compensation judge's ruling was supported by the IME opinion that the Employee's condition was a temporary aggravation of a pre-existing osteoarthritic condition. A judicial opinion that favors one of multiple differing medical opinions should be upheld unless it was found to lack adequate foundation. *Nord. V. City of Cook*, 360 N.W.2d 337, 342-43, W.C.D. 364, 372-73 (Minn. 1985). The Court found that the compensation judge did not error by relying on the IME doctor's opinion, as the doctor's opinion was "not based on speculation or conjecture..." Additionally, no medical opinions found the work injury to be a substantial contributing factor to the right knee condition or need for the Synvisc injection, and the Employee failed to prove this connection.

Although the Court also noted that the Employee's arguments were supported by evidence, it was not the Court's role to determine whether such substantial evidence exists. Rather, the Court was to determine only if the compensation judge's findings were supported by substantial evidence. As they found such evidence to exist, they affirmed.

Summary by: Megan M. Oliver

### ***Colton v. Bloomington Plating, No WC17-6090 (W.C.C.A. Mar. 26, 2018)***

Employee Thomas Colton sustained an admitted work-related injury in his work with Federated Mutual Group ("Federated") and entered into a stipulation for settlement that closed out everything but future medical expenses. He was subsequently hired by the State of Minnesota, Department of

Corrections (“DOC”), sustained another admitted work-related injury, and entered into a second stipulation for settlement in which everything but future medical was closed out. The stipulation specified that DOC would pay future medical expenses, and that Federated would reimburse DOC for 44% of them. The Special Compensation Fund (“Fund”) would then reimburse Federated for their expenses.

State agencies, including DOC (collectively, the “State”), have a system for handling WC claims. Specifically, the State has a contract with CorVel in which CorVel provides services to manage care and bill payment, and keeps a network of medical providers for injured employees as well as “pharmacy benefit management services.” The State paid for medical expenses of the Employee for an approximately 2-year period of time, and submitted a request to Federated for 44% of the amount. Federated paid, and submitted a request for reimbursement to the Fund.

The Fund refused to pay the full amount claimed, claiming that the total paid for some prescriptions exceeded the maximum amount allowed and citing Minn. R. 5221.4070 subp. 4. The matter was eventually before a compensation judge.

At the hearing, the Fund additionally claimed that the amount requested for reimbursement included management fees that were not medical expenses and, as such, that it was not responsible for and contribution for them. Federation maintained its claim that the Fund should reimburse it or, if the Fund was correct in its position, that Federation should not have paid the amount to the State and should itself be refunded. Federated additionally sought .191 fees and penalties. The State argued that the relationship it had with CorVel altered how Minn. R. 5221.4070 applied. Specifically, that it was bound by subp. 5, and that subps. 3 and 4 did not apply. As the maximum fee in dispute fell under subp. 4, it was not relevant to this matter.

The compensation judge found that: 1) the payments that had been made by the State to CorVel were for medical expenses; 2) that subp. 5 controlled the services provided by CorVel and its relationship with the State; 3 and 4) Federated was not entitled to .191 fees or penalties.

On appeal, the Court affirmed that CorVel met the definition that bound it to Minn. R. 5221.4070 subp 5. The Court also found that “administrative costs were ‘woven into the prescription drug costs’” (Finding 4 of the compensation judge). As such, the lower court was again affirmed.

Federated filed a notice of cross-appeal on this matter. However, as the filing was one day late, the Court lacked subject matter jurisdiction and dismissed the cross-appeal.

Summary by: Megan M. Oliver

***Perez v. Swift Pork, Co./JBS USA LLC and Sedgwick Claims Mgmt. Servs., Inc. and Minn. Dep’t of Human Servs./BRS, Avera Med. Group Worthington, and Avera McKennan Hosp., No. WC17-6106 (W.C.C.A. Mar. 26, 2018)***

The Employee in this case was a Spanish speaker. She had a small stature and need to reach up often in her line of work with the Insured. In so doing, she developed right shoulder pain. She saw the on-site nurse a dozen times in less than a month with complaints of right arm pain. At each

examination, she was found to have full range of motion. She eventually saw a doctor for her right shoulder pain and shortly thereafter underwent an IME. Both physicians noted that the Employee had full range of motion of her right shoulder. Additionally, the IME physician found that the Employee had only sustained a temporary strain of a pre-existing condition, was at MMI, and required no restrictions.

The Employee sought benefits, and the matter came before a compensation judge. Following the hearing, the Employee told her attorney that she was concerned about the English and Spanish translations, that she had trouble understanding and hearing the interpreter, and that she believed that not everything had been interpreted. While the Employee's attorney did mention this to the Employer's attorney, he failed to bring this to the attention of the compensation judge.

After the compensation judge denied the Employee's claim for benefits, she appealed on the basis that the "the services of the court-appointed interpreter were inadequate, insufficient, and resulted in incorrectly interpreted material testimony." She claimed that the interpreter had discouraged her from asking for clarification, and that the misunderstanding of her testimony led to her claims being affected in a material way.

The Employee failed to raise any concern at the hearing. The Court has previously held that an issue not raised in the hearing cannot later be raised upon appeal. *Troester v. Drapery Servs. Of Austin*. 49 W.C.D. 74, 78 (W.C.C.A. 1993). However, the Court also noted that it was important for testimony to be correctly interpreted. The Court noted by review of the record that Employee was able to describe and demonstrate the gestures and positions involved in her work for the judge. Further, the Court found that the compensation judge's opinion appeared to be based upon the finding of the medical examinations and other medical evidence, not on the mechanism of the injury. Finally, the Court found that the record and substantial evidence supported that the Employee had sustained merely a temporary injury that had resolved. As such, it affirmed the compensation judge's denial of benefits.

Summary by: Megan M. Oliver

### ***Cornelius v. Woods Landscaping*, WC17-6109 (W.C.C.A. March 28, 2018)**

The Employee was injured while working as a landscaper. He underwent surgical repair of his knee on December 22, 2015 and received 15 weeks of temporary total disability (TTD). He was subsequently released to work without restrictions starting February 11, 2016 and was incarcerated for about one month ending April 10, 2016. The Employer hired a replacement while the Employee was incarcerated, and the Employee's job ended. He received unemployment benefits from April until August 2016 when he began working at a new employer. He subsequently left the second employer and found a new job a few months later. He did not restrict his job search during these times due to any physical restrictions related to his knee.

The Claim Petition alleged intermittent TTD and temporary partial disability (TPD) benefits, which the compensation judge denied at hearing, noting that the Employee reached maximum medical improvement (MMI) on April 18, 2016, failed to prove the alleged wage loss in the periods

of TPD was due to the left lower extremity injury, failed to conduct a diligent job search, and was not under work restrictions during the periods he was unemployed.

The Employee appealed, contending the compensation judge erred in not awarding TPD by not presuming a loss of earning capacity based on the actual earnings in post injury employments. The Workers' Compensation Court of Appeals affirmed the denial of TPD based on the fact that the Employee was not under any work restrictions and failed to prove the wage loss was causally related to the original injury as required by Minn. Stat. § 176.101, subd. 2(b).

He also appealed the denial of TTD benefits, but failed to address the first period of TTD and the date of MMI in his brief, thus waiving the issue on appeal under Minn. R. 9800.0900, subps. 1 and 2. The denial of the second period of TTD was affirmed as the Employee was released to work without restrictions and failed to show that he performed a diligent job search

Summary by: Scott G. Ferriss

***Manning v. Flynn Dalco Roofing, WC17-6102 (W.C.C.A. March 28, 2018)***

The Employer and Insurer appealed the compensation judge's finding that the Employee sustained a *Gillette* injury to his cervical spine and award of benefits. The Employer and Insurer objected to the doctor's report obtained by the Employee as lacking foundation, in part due to the doctor not reviewing prior imaging, lack of explanation of his opinion regarding causation, and a lack of understanding of the Employee's work activities.

The W.C.C.A affirmed the compensation judge, reaffirming that a compensation judge has discretion to assess the weight and sufficiency of medical expert opinions. In this case, the Court found the opinion of the Employee's doctor more persuasive than the report obtained by the Employer and Insurer.

Summary by: Scott G. Ferriss

***Loos v. White Bear Lake Superstore, WC17-6108 (W.C.C.A. March 28, 2018)***

The Employer and Insurer appealed the compensation judge's determination that the Employee was unable to maintain suitable gainful employment. The Employee, working in car sales, sustained two injuries to his ankle that required him to be placed into sedentary work. The Employer offered him a position that complied with his restrictions but changed his compensation from commission based to an hourly wage that would be taken out of any commission earned. The Employee asked the Department of Labor and Industry staff about the job offer due to his concerns with the compensation change. DOLI staff told him the job offer was not viable and the Employee's QRC was told by DOLI that there was a question as to whether the job offer was "meaningful work." He refused the job offer.

The Employer and Insurer appealed, arguing that the job offer was gainful employment that the Employee could perform. Because a R-2 Rehabilitation Plan was not filed, the standard for discontinuance of benefits is whether the employee refuses an offer of gainful employment that he would be able to do within his restrictions. In this case, the WCCA affirmed the compensation

judge's finding that the job offer was not gainful employment as he was unable to engage in traditional sales activities necessary for selling cars. The Court also noted that "meaningful" and "gainful" have been used in identical context in their previous opinions, and thus the wrong legal standard was not applied, as argued by the Employer and Insurer.

Summary by: Scott G. Ferriss