MINNESOTA WORKERS' COMPENSATION

CASE LAW UPDATE

Minnesota Employers Workers Compensation Alliance

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Issue: Whether the compensation judge's determination that the employee has not reached MMI and had performed an adequate job search was supported by substantial evidence.

The employee began working for the employer in November 2015. There were conflicting facts and testimony presented at hearing as to when and whether the employee reported the injury as work-related or non-work related. The IME doctor, assuming the facts as reported to him by the employee were true, found a compensable work injury, but also found MMI. The employee's doctors indicated he was not at MMI and had ongoing restrictions related to the work injury (cervical disc herniation). The employee eventually found part-time work within his treating doctor's restrictions, although he did not keep any job logs. The matter went before Judge Marshall who found that the employee sustained a compensable injury, had not reached MMI, and was entitled to TTD benefits. The employer and insurer appealed.

The W.C.C.A. determined substantial evidence supported the compensation judge's determination since the judge made credibility determinations based on the evidence submitted. Further, the compensation judge reasonably relied upon the employee's belief about his employment status with the date-of-injury employer thus enabling the employee to not have to conduct a job search when the employee reasonably expected to return to a position with the employer.

***Nelson v. Smurfit Stone Container Corp.*, No. WC17-6053 (W.C.C.A. Oct. 9, 2017)**
Topic: *Gillette* injury – causation and date of injury; TTD – retirement & withdrawal from labor market
Issue: (1) Whether a *Gillette* injury can culminate on the date the employee was laid off when he did not seek medical treatment for the condition until after 3 years he was laid off. (2) Whether the judge erred in awarding TTD benefits when she denied PTD benefits because the employee did not conduct a diligent job search.

The employee sustained a right shoulder injury while working for the employer, had surgery, and was released without restrictions after surgery in 2009. The employee testified he told his supervisor that his shoulders were a problem and his supervisors helped him out with work activities after 2009. In 2011 he was assigned to a job that required more arm movement. In May 2012 he was laid off when the plant closed. The employee testified he had left shoulder problems when he was laid off, but signed a document when he was laid off that indicated he did not have a work related injury at that time. He claimed that before the plant closed, he planned to work until age 66. After the plant closed, he looked for work for a few months but then began receiving social security retirement.

In December 2015, the employee started treatment for his left shoulder and then underwent a left shoulder surgery in 2016. His doctor said his left shoulder injury was due to him overcompensating for his right shoulder caused by his work with the employer. An IVE determined the employee could work as a light machine operator within his restrictions. A different rehabilitation counselor opined he was not capable of any gainful employment give his restrictions, age, and education.

The W.C.C.A. affirmed the *Gillette* injury culmination date as the last date he stopped working. A date an employee is laid off for economic reasons may be an ascertainable event for a *Gillette* injury even when an employee does not seek medical attention until after being laid off because his work activity could have contributed to his injury. Additionally, the employee could have reasonably believed the document he signed did not refer to his shoulder conditions.

The compensation judge found the employee was not at MMI for his left shoulder condition and TTD was due from his left shoulder surgery through the date of the hearing. The judge's decision that the employee failed to

make a diligent job search in denying his PTD benefits is not inconsistent with awarding TTD benefits. The compensation judge was reasonable in accepting the QRC's opinion that the employee was not permanently totally disabled if he conducted a diligent job search, yet still determine after his left shoulder surgery the employee was not able to obtain the jobs the QRC had considered and therefore that work was not appropriate for the employee with his restrictions. Further, for TTD benefits, the compensation judge reasonably concluded the employee did not remove himself from the labor market as he had looked for work after he was laid off and drew social security benefits because of financial need. The judge reasonably concluded the employee originally planned to retire at age 66, but his plans changed because he was laid off. The judge determined he did not retire or withdraw from the labor market upon the closing of the employer's plant.

***Samuda v. Minn. Vikings Football Club*, No. WC17-6068 (W.C.C.A. Oct. 16, 2017)**
Topic: Wages - Calculation
Issue: Did the ALJ err in concluding the employee's AWW should be based on the salary indicated in the contract when the employee had only participated in preseason training camps.

The employee sustained an admitted work injury in April of 2014, while participating in a preseason training camp before the start of his first season playing professional football. He was paid $700 per week during the training season and then was to be paid $318,000 as a yearly salary under his contract with the Vikings. Although the contract required the employee to participate in the training camp, there was no provision in the contract as to the amount of compensation he was to receive during the preseason. The contract only stated that the employer will pay for the employee's traveling expenses to the training camp, reasonable board and expenses during the preseason training and during games, and additional compensation, benefits, and reimbursement as called for in any collective bargaining agreement.

The W.C.C.A. ruled that the $700.00 payment was not meant to be wages, because the contract indicated a yearly salary of $318,000.00 and the contract did not specify that the $700.00 payment constituted his wage. The W.C.C.A. further determined that the employee's AWW would not be accurately reflected if the $700 rate was utilized. The W.C.C.A. modified the A.W.W. determination to reflect the contract's $318,000 salary.

***Burkett v. Randstad and Keystone Auto*, No. WC17-6061 (W.C.C.A. Oct. 16, 2017)**
Topic: *Gillette* injury – causation & date of injury; TTD – withdrawal from labor market
Issue: Whether a compensation judge must make a finding regarding a pre-existing condition's contribution to a *Gillette* injury and whether the employee removed himself from the labor market.

The employee was diagnosed with diabetes in 2007. In June 2014 he complained of numbness and tingling in both hands and fingers. On January 18, 2015, he was admitted into an ER for bilateral hand swelling and pain. On January 20, 2015, he was offered a full-time employment with the employer, where he had been working through a staffing company for over a year. He stopped working for the employer because of his hands in March 2015. He claimed he could not work because his hands were so painful. The employee was diagnosed with CTS before he left work and it was recommended he pursue surgery. He saw a doctor regarding CTS over a year after he left work. During this year he did not seek treatment, was under no restrictions, and did not look for work. The compensation judge ruled the employee sustained a *Gillette* injury, but did not make a specific finding whether or not his diabetes contributed to his hand conditions. No TTD was due because the employee removed himself from the labor market during the year of his inactivity.

The W.C.C.A. affirmed the compensation judge because the judge determined the employee's prior symptoms were not of the nature and magnitude he experienced when he was employed with the employer. Further,

whether diabetes may have contributed was of little consequence since an entire disability is compensable if the employee's usual work tasks substantially aggravate, accelerate, or combine with a pre-existing disease to produce a disability.

***Bromwich v. Massage Envy Roseville*, No. WC17-6065 (W.C.C.A. Oct. 18, 2017)**
Topic: Evidence – expert medical opinion; Job Search; Rehabilitation
Issue: Whether the employee cooperated with the rehabilitation plan when she declined to participate in a functional capacity evaluation.

The employee was injured in April of 2015. The employee was taken off work indefinitely and started receiving rehabilitation services. She reached MMI in early November 2016. She began job placement services mid-December, but did declined to participate in a function capacity evaluation. The employee was not diligent about providing job logs, but after some prompting by the QRC, the employee provided job logs.

The W.C.C.A. rejected the employer and insurer's argument that the employee did not conduct enough job search following the job placement plan because there had been two months between the start of the plan and the hearing on the claim petition, so the judge could properly conclude that the employee cooperated even though there were few job contacts made.

***Rossbach v. Rossbach Constr., Inc.*, No. WC17-6070 (W.C.C.A. Nov. 2, 2017)**
Topic: Vacation of Award – Voidable Award
Issue: Whether an Award on Stipulation is voidable when the compensation judge improperly relied on the presumption of fairness and reasonableness when the parties were not represented by counsel.

The employee was injured his right shoulder at work, and he underwent surgery. He was disabled from returning to his regular job. In October 2014, the QRC who had been working with the employee projected cost of future vocation rehab to be $11,300.00. A month later, the claims adjuster wrote to the employee offering to settle on a full, final and complete basis, but leaving future medicals open. The employee accepted, believing the settlement was for rehabilitation benefits and not future wage loss. The Stipulation outlined a full, final, and complete settlement with medical open, and noted that the employee was unrepresented by counsel. The stipulation also provided a $150.00 fee to allow the employee to seek the advice of counsel before signing it. The employee did not seek counsel, and signed the stipulation. The proposed Award on Stipulation as submitted incorrectly referred to the parties as "each being represented by legal counsel." The employee sought to have the Stipulation vacated on grounds of fraud or mutual mistake of fact.

The W.C.C.A. determined the Award did not meet to the two-step review prescribed by 176.521, Subd. 2. The parties did not establish that the stipulation was reasonable, fair, and in conformity with the Act. Second, the settlement must be "approved" by the compensation judge. Since the stipulation was submitted along with a proposed award which incorrectly recited that both parties were represented by counsel, and then simply stated that "now, therefore, it is hereby ordered payment shall be made in accordance with the terms and provisions set forth in the Stipulation for Settlement" the language in the award did not contain language indicating that the compensation judge had reviewed and approved the stipulation. Absent this language, the statutory requirement for review and approval of the settlement was not met.

***Trujillo v. Pride Constr., Inc.*, No. WC17-6081 (W.C.C.A. Dec. 4, 2017)**
Topic: Job Search; Rehabilitation – Cooperation; Temporary Partial Disability
Issue: Whether substantial evidence supports the compensation judge's determination that the employee is entitled to temporary partial disability benefits.

The employee worked as a laborer doing concrete work for the employer when he injured his right shoulder. Four months later, the employee underwent surgery to repair the injury. Liability was accepted and the employee received wage loss and medical benefits. Shortly after surgery, the employee began working with a QRC. The employee was released to work nine months later on a very light basis but the employer was unable to accommodate the restrictions. A vocational background assessment was taken by the QRC, which provided the employee lived in a town of 800 people, with formal education ending at 10th grade, and previous employment consisted of physical labor experience. The employee engaged in a job search and began working as a custodian 14 hours a week in summer months and 4 to 7 hours a week after Labor Day for County Inn. The rehab plan called for the employee to obtain his GED, which he never did because he had difficulty getting to the classes because of the distance and lack of gas money. The compensation judge found the position at Country Inn to be a permanent position, the available hours varied depending on the season, and the employee has worked all hours available to him, which entitled him to TPD.

The W.C.C.A. affirmed and ruled there is no definition or criteria as to when an employment is sporadic and insubstantial. Instead, it is a question of fact for the compensation judge. Since the employee lives in a rural town, the judge accepted the employee's and QRC's testimony as credible as to job search, despite failure to keep job search logs, and diligent job search is not a legal prerequisite for an award of TPD benefits.

***Hufnagel v. Deer River Health Care Ctr.*, WC17-6057 (W.C.C.A. Dec. 5, 2017)**
Topic: Attorney fees
Issue: Whether the Judge erred by denying EE's request for attorney fees under Minn. Stat. § 176.191.

The employee claimed he had injuries to the same body part on three different dates with two different employers. The compensation judge determined the employee suffered from two dates of injuries that were temporary and had resolved. The judge determined the employee continued to suffer from the effects of the earliest claimed injury. The employee's attorney sought attorney's fees under .191 and *Roraff/Irwin* for approximately $31,000. The compensation judge denied the .191 fees as the judge found the attorney's fees excessive.

Under Minn. Stat. 176.191, attorney fees are authorized where the primary issue is apportionment of benefits. The compensation judge was in error in denying these fees as the two employers sought to place on each other the sole responsibility for payment of the employee's benefits, which rendered apportionment a significant issue in this case. This dispute greatly increased the burden on the employee's counsel to provide effective representation. Without .191 fees, the employee's counsel was not awarded adequate compensation.

The W.C.C.A. vacated and remanded because it concluded that the analysis must consider whether the totality of fees awarded was adequate to compensate the employee's attorney for the representation provide. Simply because the employee's attorney requested fees for time spent on theories that may have not been successful does not mean the time spent must be considered unreasonable as the preparation will, without the aid of hindsight, include various theories of the case, some of which may be unsuccessful.

***Lein v. Eventide*, WC17-6101 (W.C.C.A. Dec. 29, 2017)** ("*Lein 2*"), appealed
Topic: Arising out of & In the Course of
Issue: On remand and with consideration of *Kubis* and *Holt*, whether the employee's injury on a stairway arose out of and in the course of her employment.

The employee fell down a stairway because her right foot slipped from underneath her while at work. This case was previously found not compensable by Judge Marshall as he ruled her injury did not arise out of her employment as the employee was not exposed to an increased risk of injury. On the first appeal, the W.C.C.A. ruled that her injury did arise out of employment because the employer's stairway lacked an anti-slip treads. It was appealed to the MN Supreme Court, which initially stayed the case and then remanded it without a decision to the W.C.C.A. for reconsideration given its *Holt* and *Kubis* decisions.

In *Kubis* the Supreme Court determined the W.C.C.A. exceeded its scope of review because it made a factual inquiry that the employee was hurrying because of work, which was contrary to the compensation judge's findings. In this case, the W.C.C.A. opined that, arguably, it engaged in a factual inquiry when it previously considered a lack of anti-slip treads caused the employee's injury. In this case on remand, the W.C.C.A. declined to engage in a factually inquiry to determine whether there was something wrong with the stairway. Instead, the W.C.C.A.'s decision rested solely upon the compensation judge's factual determination that the employee's injury occurred on a stairway at work. Secondly, *Holt* decided an icy sidewalk presented an increased risk of injury and the proper question in that case was whether the condition encountered by the employee was on the employer's premise and a result of the employment. Similar to *Hohlt*, the W.C.C.A. created a definitive approach to stairways in *Roller-Dick*. Specifically, in *Roller-Dick*, the W.C.C.A. determined stairways on an employer's premises in of themselves constitute an increased risk and that injury is considered to have arisen out of employment. *Roller-Dick* is controlling. The employee fell and was injured on stairs located on her employer's premises, as a result of her employment, and it was the stairs themselves which presented an increased risk of injury. The employee's injury, therefore, arose out of her employment and her claim is compensable.

***Hinkle v. Ruan Transp., Inc.*, WC17-6083 (W.C.C.A. Jan. 5, 2018)**
Topic: Jurisdiction – Out-of-State Injury; Statute Construed
Issue: Whether the Compensation Judge erred in ruling that the employee's work injury was compensable under Minnesota workers' compensation law

The employee was hired in Georgia in 2008 by the employer as an over-the-road trucker upon employee responding to an ad in a Georgia newspaper. The employee lived in Georgia, had a CDL from Georgia, and was assigned to an account with a home terminal in Georgia. The employee was assigned to another account with a home terminal located in Minnesota in 2014. There was another terminal for this latter account located in Georgia. Route assignments were provided to employee by a supervisor/dispatcher located in Minnesota. The employee also attended mandatory training and safety meetings in Minnesota. In October 2014, the employee resigned from his job in order to accomplish a withdrawal from his retirement account. The employee was rehired by employer, and he was flown by employer to Minnesota to complete re-hire paperwork. The employee attended a safety meeting and picked up a load in Minnesota at the time of re-hire. He picked up or delivered products in 20 states, with 19 pickups or deliveries occurring in Minnesota, which was more than any other state, in approximately 12 months. He suffered an admitted work-related injury in 2015 while adjusting a load in Georgia and was paid TTD benefits under Minnesota law. Approximately one year later, he was paid benefits under Georgia law. He filed a Minnesota claim petition in Minnesota requesting benefits under Minnesota law.

The compensation judge found the injury to be compensable under Minnesota law. The employer and insurer appealed, arguing the employee did not meet the requirements of Minn. Stat. § 176.041, subds 2 & 3.

The W.C.C.A. affirmed the compensation judge as the determination is whether the employee's injury in Georgia is compensable under Minnesota law depends upon whether employee's injury and employment fall within the provisions of Minn. Stat. § 176.041. Minn. Stat. § 176.041, subd. 2 sets forth that if an employee regularly performs primary duties of his employment in this state and receives an injury outside of this state in the employ of the employer, this law applies. It is not the amount of time an employee spends in Minnesota performing job duties that determines compensability (relative to jurisdiction) under Minnesota law, but instead, the question is whether the employee regularly performed his/her primary duties in Minnesota. The W.C.C.A. found the following facts to be sufficient support for application of Minnesota law: (1) employee's home terminal is in Minnesota (2) employee received his routes from a dispatcher in Minnesota (3) employee made 19 trips to and from Minnesota in the 10 months prior to the injury, and (4) employee picked up and delivered in Minnesota several times. The W.C.C.A. found the employer to be a Minnesota employer based upon the nature and degree of its contacts in Minnesota and rejected the argument that the employer is based in Iowa due to it having its home office in Iowa and/or being incorporated in Iowa.

***Devos v. Rhino Contracting and SCF*, WC17-6075 (W.C.C.A. Jan. 8, 2018)**
Topic: Practice and Procedure – Stipulated facts and Motion to Dismiss
Issue: Whether the Compensation Judge improperly dismissed the Employee's Claim Petition based upon Minn. Stat. § 176.041, subd. 5b.

The employee worked for an employer during construction seasons and sustained a work-related injury in Minnesota in 2012. It was undisputed the employee did not work 15 consecutive days in Minnesota in 2012 nor did he work more than 240 hours in Minneola that year. A dispute existed on whether the Employee was rehired or recalled in 2012 and whether that occurred in N.D., where the employer was based, or MN, where the employee lived. The employee filed an Amended Claim petition. The SCF filed a motion to dismiss, which was based upon the employee's claim being barred by Minn. Stat. § 176.041, subd. 5b, because the EE was hired in N.D. by a N.D. employer, and his injury arose out of his temporary work in MN. The employee voluntarily struck his Claim Petition from the calendar for two years. The judge held a Special Term Conference via telephone on the motion to dismiss and granted the Judge granted the Motion to Dismiss.

The W.C.C.A. vacated the decision as the Compensation Judge made detailed factual findings during a conference that was only supposed to make legal conclusions based upon undisputed facts. The Judge made legal conclusions based upon facts; however, pursuant to Minn. Stat. § 176.322 legal issues may only be decided without an evidentiary hearing if the parties agree to stipulated set of facts, which was not the case here.

***Beguhl v. Supportive Living Solutions/Whittier PL.*, WC17-6078 (W.C.C.A. Jan. 11, 2018)**
Topic: Evidence - credibility; Substantial evidence; Evidence - expert medical opinion; Rehabilitation - fees & expenses; Rehabilitation - fees & expenses.
Issue: Whether medical management provided by a QRC to a qualified employee is compensable when related to non-work related conditions

The employee worked as an independent living skills counselor which required her to assist her clients with their daily living skills. In this role, she sustained two work injuries, one to her left foot and ankle, and one to her right shoulder with a temporary strain to her neck. Prior to these work injuries, she sustained non work-related and work-related injuries affecting the same body parts.

The compensation judge found that the work injury of November 5, 2015, remained a substantial contributing factor in the employee's left foot and ankle condition, and the work injury of April 5, 2016, remained a substantial contributing factor in the employee's right shoulder condition. She awarded TTD through the date of the hearing and payment of outstanding rehabilitation bills, ongoing rehabilitation benefits, and payment of intervention claims. She also ruled the injury was no longer a substantial contributing factor to the employee's low back and neck conditions. The employer and insurer appealed the award of rehabilitation benefits on five grounds:

1. The QRC's frequent use of a standard billing amount (0.2 of an hour) did not actually identify the reasonable time spent for rehabilitation services.
2. The QRC's description of the service provided was inadequate to determine if the service provided was in furtherance of the rehabilitation plan.
3. The billed time was not reasonable due to the particular service provided.
4. The billed time was an administrative task not in furtherance of the rehabilitation plan.
5. The QRC failed to reduce the charged hourly fee as required by Minn. R. 5220.1900, subp. 1f.

The W.C.C.A. provided that "this court has expressly held that adoption of a minimum time increment for timekeeping of QRC services, very close to the objected time in this matter, is in most cases reasonable." The frequent use of .2 billing amount was found reasonable. The W.C.C.A. did reduce the QRC's bills by .8 for the administrative tasks related to QRC billing.

Importantly, the W.C.C.A. rejected the argument that the award of QRC bills improperly included medical management services provided to the employee related to care for her neck and low back, as those conditions were found to be not compensable. The W.C.C.A. adopted the employee's argument that the definition of "qualified employee" includes prior disabilities. Minn. Rule 5220.0100 subp. 22. Since the employee's ability to work is affected by her medical condition regardless of the cause or origin, a qualified employee is entitled to reasonable medical management of her whole condition, not merely the portion identifiable as treating a compensable work injury.

***Armstrong v. Clyde Machines, Inc.*, WC17-6044 (W.C.C.A. Jan. 30, 2018)**
Topic: Settlements- Interpretation
Issue: Whether the employee's requested treatment at the Center for Pain Management was foreclosed based upon the employee's previous Stipulation for Settlement.

The employee sustained an injury while lifting a 95 pound block of steel in 2007. In 2009, the employee and employer entered into a stipulation for settlement on a full, final and complete basis, with the exception of claims for future medical treatment. According to the language of the agreement, claims for future medical treatment "are limited by foreclosure of claims for … formal in or out patient pain programs, as defined by the treatment parameters, including MAPS…." The employee sought approval of this pain clinic consultation, and a hearing on the matter, the compensation judge found the recommended treatment at Center for Pain management was reasonable, necessary, and casually related to the employee's work injury and rejected the claim that the treatment was bared by the employee's 2009 settlement.

The W.C.C.A. affirmed the compensation judge's ruling. The 2009 settlement left open claims for future medical care, with a list of exceptions. Among those exceptions was "formal in or out patient pain programs, as defined by the treatment parameters, including MAPS… ." The treating doctor's referral did not specify what the treatment would be and therefore the consultation could not be said to meet the requirements for a pain

program under the treatment parameters, and was therefore not closed out by the agreement. Additionally, the stipulation for settlement does not foreclose a referral to a specialized pain center for all aspects of assessment, diagnosis, treatment recommendation, pharmacotherapy management, and pain management treatment.

***Azuz v. Vescio's and Amitrust*, WC17-6086 (W.C.C.A. Feb. 1, 2018)**
Topic: Causation – Substantial Evidence; Permanent Partial Disability
Issue: Whether the compensation judge erred as a matter of law by relying upon Dr. Simonet's opinion and denying medical treatment.

The employee was diagnosed with degenerative disc disease as early as 2002. She had low back pain symptoms with numbness in the right thing in 2008. In 2013, while working for the employer as a server, the employee slipped on water in the kitchen and fell causing low back pain. The employer/insurer admitted liability and paid benefits. The employee underwent physical therapy, MRI scan, a MedX program, injections, and two doctors had determined she was not a surgical candidate. The treating doctor had released the employee in July 2014 as the employee reported she was pain free, and the doctor found she had no functional or mobility issues. The treating doctor provided a 10% PPD rating. The employee moved to Chicago and then claimed she wanted treatment for her back during this time, but did not have health insurance and thus did not receive treatment. She eventually received lumbar surgery, a fusion, in 2016 and was given a 37% PPD rating by Dr. Wengler. The employer received an IME opinion from Dr. Simonet on three separate occasions. Dr. Simonet had concluded the employee reached MMI in his August 2014 IME report and assigned a 10% PPD rating as unrelated to the claimed injury. The compensation judge found the claimed injury was a temporary aggravation of the employee's pre-existing condition which resolved without the need for restrictions and no permanent partial disability was due.

The W.C.C.A. affirmed the compensation judge's decision that the employee's injury was a temporary aggravation of a pre-existing condition. The compensation judge's choice of relying upon the treating doctor's and the employer's IME doctor's opinions must be upheld unless the opinion lacked adequate foundation. Dr. Simonet had adequate foundation.

The compensation judge did error when he determined the treating doctor assigned a zero-percent PPD rating for the employee's injury. The treating doctor assigned a 10% PPD rating. Give the compensation judge's error, the W.C.C.A. did vacate that portion of the judge's Order; however, this did not affect the overall finding that the employee's injury was not compensable. Since the employee's injury was temporary, a denial of PPD benefits was appropriate.

***Weber v. Jake Bauerly*, WC17-6096 (W.C.C.A. Feb. 8, 2018)**
Topic: Permanent Partial Disability – Substantial evidence
Issue: Whether the compensation judge erred when determining the employee's entitlement to a permanent partial disability rating.

The employee was injured when farm equipment fell onto him, and he sustained injuries to his spine and lower abdomen. The parties presented the opinions of three physicians who considered the employee's permanent partial disability ratings for the conditions: Dr. Kelly Collins, a physical medicine and rehabilitation specialist who had treated the employee for his injury; Dr. Robert Wengler, an orthopedist who evaluated the employee at the request of his attorney; and Dr. Mark Friedland, an orthopedist who evaluated the employee at the request of the employer and insurer. Seven different permanency ratings were claimed by the employee. The employee claimed a PPD rating of 45.5% pursuant to Dr. Wengler's opinions. The compensation judge awarded a 38.66%

PPD rating as the judge found Dr. Wengler's assignment of PPD for the employee's claimed sensory loss of the genitofemoral nerve not appropriate given the employee did not have total or complete sensory loss.

Of the seven permanent partial ratings claimed, the employer's expert agreed with one of the ratings and the compensation judge's denial of the sensory loss rating was not appealed. Thus, the W.C.C.A. analyzed the substantial evidence that supported each of the five different permanency ratings. The W.C.C.A. affirmed the compensation judge's five PPD ratings based upon substantial evidence. The compensation judge considered whether there was objective evidence for the ratings, which was demonstrated by the 31 findings in a 12-page Order with memorandum. The judge carefully reviewed the medical evidence in this complicated case.

***Wilson v. Twin Town Logistics*, WC17-6072 (W.C.C.A. Feb. 9, 2018)**
Topic: Attorney Fees- *Roraff* fees/excess fees
Issue: Whether the compensation judge's award of employee's attorney fees of $3,000 in excess of his contingent fees was unreasonable, not supported by the record, and constituted an abuse of discretion.

The employee suffered a work injury and eventually, the insurer was declared insolvent by the State of Delaware. The employee's claims were removed from the OAH docket, but then placed back on the docket after it was determined the employer was liable for the worker's compensation benefits. The employee went to hearing on the claims for worker's compensation benefits and prevailed.

Later, the employee's attorney, Jerry Sisk, filed a Statement of Attorney Fees and Costs, and sought $4,493.78 in contingent fees from the penalties and the employee's benefits awarded, $2,368.22 as *Roraff* fees, and $30,572.00 as *Irwin* excess fees based upon 186.1 hours of time at a rate of $330.00 per hour. Reimbursement of fees under Minn. Stat. § 176.081, subd. 7, in the amount of $11,230.20 were claimed, as well as $3,808.08 in taxable costs. The employer filed an objection to these fees.

A hearing on the claimed Attorney's fees was held. The compensation judge found that there were genuine disputes over benefits amounting to $27,164.34. The judge found that the employee's attorney had previously been paid $3,638.00 for fees in 2014, was paid *Roraff* fees of $2,500.00 after the October 2016 hearing by agreement of the employer, and had been paid an additional $5,071.01 for contingent fees as a result of the July 2016 hearing. The total amount of attorney fees previously paid to the employee's attorney was $11,209.11. The compensation judge awarded employee's counsel "$3,000.00 as and for a combination of Roraff/Heaton fees and excess fees."

The W.C.C.A. upheld the compensation judge's decision as it must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." In this matter, the compensation judge determined that contingent fees did not adequately compensate the employee's attorney and that excess fees in the amount of $3,000.00 were appropriate. The nature of the claims and the proof required was not particularly complex or unusual. The compensation judge found some of the itemized time was excessive, duplicative, and included "secretarial-type services." The compensation judge did not have to make a detailed finding on each entry, as the statement of attorney fees was a 17 page document with hundreds of entries. An attorney is not automatically entitled to payment of all time set out in a fee statement. This court generally gives deference to a compensation judge's decision as to what constitutes a reasonable fee under the circumstances.

Dissent: The question here is how much deference the W.C.C.A. will extend to the award of attorney fees when the deficiencies of the compensation judge's analysis are so great. The employee's attorney spent considerable

time and effort to ensure the employee received compensation, and his hourly rate was found reasonably by the compensation judge. As one example, the time spent by employee's counsel solely for preparation and attendance at the underlying hearing actually conducted in this matter, multiplied by the hourly rate found reasonable by the compensation judge, comes to over $6,000.00. This amount is double the entire amount of excess fees awarded by the compensation judge. The compensation judge awarded $3,000.00 without an adequate and reasonable rationale as required under *Irwin*.

***Guyton v. Hennepin Cnty. Med. Ctr.*, WC17-6103 (W.C.C.A. Feb. 13, 2018)**
Topic: Evidence – Admission; Wages-Calculation of AWW
Issue: Whether the compensation judge improperly excluded exhibits filed after the hearing, and whether the compensation judge improperly determined the employee's AWW.

The pro-se employee was employed as a .9 full time equivalent and frequently worked overtime. She sustained an admitted low back injury. The employer paid indemnity benefits based upon an AWW of $627.87, which its human resources department determined. The employee contacted DOLI, which determined the employee's AWW to be either $562 using the regular schedule method or $639.76 using the irregular earnings method. The matter was taken to a final hearing, and the judge left the record open following the hearing to receive arguments by the parties. The employee sought to submit additional information with her argument, and the employer objected to this additional information. The compensation judge refused to receive the additional documents. The compensation judge ruled the employee's AWW was $627.87.

The W.C.C.A. affirmed the exclusion of the employee's exhibits submitted after the hearing because evidentiary rulings are generally within the sound discretion of the compensation judge. The compensation judge is given considerable latitude in conducting a worker's compensation hearing.

The W.C.C.A. affirmed the compensation judge's AWW finding because the purpose of a wage determination is to establish a 'fair approximation' of the employee's earning capacity that has been reduced as a result of the work injury. Since the employee had a .9 FTE position and consistently worked overtime hours, the use of the 26-week averaging method was appropriate.

***Ahmed v. Loop Parking Co.*, WC17-6074 (W.C.C.A. Feb. 13, 2018)**
Topic: Causation – Substantial Evidence
Issue: Whether the compensation judge erred in denying the employee's claim for medical expenses.

The employee sustained an injury in 2012 to his right knee. The employee underwent a MRI in 2012 to his right knee and underwent a right knee surgery that year. He underwent physical therapy and had an additional MRI in 2013. By January 2014, the employee was released by the surgeon and placed at MMI. The employer/insurer received an IME report by Dr. Nelson and received an addendum report from him in 2016. Three months later the employee presented to HCMC for ongoing right knee pain; however, he did not seek additional treatment for his right knee until 2016. The employee's claims were settled on a full, final, and complete basis with the exception of reasonable, necessary, and causally related medical treatment for the right knee. An Award on Stipulation was issued. The employee received an evaluation for his right knee from Dr. Becker who recommended another MRI scan in January 2017. The compensation judge denied the claims for payment of medical expenses related to right knee treatment rendered in 2016 and 2017.

The W.C.C.A. affirmed because the compensation judge adopted the opinions of the Employer/Insurer's IME report in that the treatment at issue was not causally related to the work injury, which was supported by substantial evidence in the record.