EUGENE PETERS, Employee/Cross-Appellant, v. EGAN & SONS and LIBERTY MUT. INS. CO., Employer-Insurer/Appellants, CHERNE CONTR., SELF-INSURED/CRAWFORD & CO., Employer, and MEDICA/HEALTHCARE RECOVERIES and MN DEP'T OF ECON. SEC./RI, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 5, 1996

No. *[redacted to remove social security number]*

HEADNOTES

GILLETTE INJURY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee did not sustain a Gillette injury in May of 1993, where the employee testified that his symptoms following the alleged Gillette injury were essentially the same as those he had experienced following his December 1990 and September 1991 specific work injuries, and there was no medical evidence of any "new" objective medical findings following the alleged Gillette injury.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's denial of TTD benefits where the employee, by his own admission, did not perform any job search during the period for which benefits are claimed.

TEMPORARY PARTIAL DISABILITY - The employee does not forfeit entitlement to TPD benefits by failing to search for higher paying work when he is already employed at a full-time job, and it is an error of law to deny TPD benefits on such a basis.

Affirmed in part and reversed in part.

Determined by Wheeler, C.J., Wilson, J., and Olsen, J.
Compensation Judge: William R. Johnson.

OPINION

STEVEN D. WHEELER, Judge

The employer, Egan & Sons, and its insurer, Liberty Mutual Insurance Company, appeal the compensation judge's finding that the employee did not sustain a Gillette injury on May 31, 1993. The employee cross-appeals, attacking the compensation judge's denial of temporary total disability (TTD) benefits from May 31, 1993, through February 1, 1994, and temporary partial disability (TPD) benefits from February 2, 1994, through October 12, 1994. We reverse the compensation judge's decision with respect to the TPD benefits and affirm all other issues.

BACKGROUND

Eugene Peters, the employee, completed a four-year plumbing apprenticeship through the Dunwoody Institute in March 1991. (T. 10, 11, 12.) During his apprenticeship, the employee worked for several different firms before beginning work with Egan & Sons, the employer, in May 1990. (T. 13.) On December 26, 1990, the employee slipped and fell on ice while at work, striking the back of his head on the ground. (T. 14.) The employee's average weekly wage at the time of this injury was $658.80. (Finding 1.) The next morning, the employee awoke with tightness and pain in his back and neck. (Id. and Pet. Ex. H, 1/4/91 exam. note.) As a result of his condition, the employee missed two days of work. (T. 15.) On January 4, 1991, the employee sought treatment from Dr. Dale Wohlrobe, a chiropractor at the Blake Chiropractic Center. (Pet. Ex. H.) The employee testified, and Dr. Wohlrobe's notes indicate, that the chiropractic treatment improved the employee's condition. (T. 15 and Pet. Ex. H.) The employee testified, however, that he continued to have problems with his neck, which were aggravated by overhead work. (T. 15.)

In September of 1991 the employee sustained a second injury while at work for the employer, when he hit his head on a piece of plywood. (T. 15.) The employee's average weekly wage at the time of this injury was $808.00. (Finding 2.) Following this incident, the employee experienced neck and shoulder pain. (T. 16.) This pain was also accompanied by a "tingling" in the employee's arms, that caused him to seek treatment from Dr. Steven Bolles, a chiropractor at the Chiro Center. (T. 16.)

The employee was first seen by Dr. Bolles on September 9, 1991, at which time he reported a sharp onset of neck symptoms following hitting his head on a piece of wood at work. (Pet. Ex. I, 9/9/91 exam. note.) Upon examination, Dr. Bolles diagnosed the employee as having "[c]ervical sprain/strain injury with brachial neuritis complicated by acquired kyphosis." (Id.) Dr. Bolles indicated that he would treat the employee with "standard osseous adjustments and appropriate physiotherapeutic modalities." (Id.) The employee was subsequently seen by Dr. Bolles on September 10, 11 and 17. Dr. Bolles' notes indicate that by his September 17, 1991 treatment of the employee, the employee's condition had improved. (Pet. Ex. I, 9/17/91 exam. note.) The employee testified that following this injury, he did not miss any work, but that his symptoms never completely resolved. (T. 17.)

At the end of 1991, the employee was laid off from Egan & Sons. (T. 17.) After working briefly at Pioneer Power and Neumec, in November 1992 the employee began working for Cherne Contracting as a plumber. (T. 18.) The employee testified that his position at Cherne, which he characterized as "heavy" in nature, required climbing ladders, heavy lifting and extensive overhead work. (T. 18, 19.) The employee testified that while working at Cherne he began to notice "a lot of tingling in [his] arms." (T. 20.) At first the tingling was less severe than that he had previously experienced, but that it became progressively worse. (T. 20.) Although the employee's previous arm condition had been symptomatic only when he was engaged in overhead work, his symptoms in the spring of 1993 included arm tingling even when

he was relaxing at home. (T. 21.) The employee's average weekly wage at this time was $789.57. (Finding 3.)

Due to his increased arm symptoms, on June 1, 1993, the employee was seen by Dr. Donald Johnson, an occupational medicine specialist, at the Columbia Park Clinic. (Pet. Ex. D, 6/1/93 chart note.) Dr. Johnson's notes indicate that the employee reported nonspecific aching in his left arm during the previous three weeks. (Id.) The employee testified that at the time he was first seen by Dr. Johnson, he was experiencing tingling in his arms and neck pain. (T. 22, 23.) After taking a brief history from the employee and examining his cervical and thoracic spine, it was Dr. Johnson's assessment that the employee had "cervical/thoracic myofascial discomfort." (Id.) Following his June 1, 1993 examination of the employee, it was Dr. Johnson's opinion that the employee was capable of working without restrictions. (Pet. Ex. D, 6/1/93 Fitness for Duty form.)

Dr. Johnson's June 4, 1993 note indicates that the employee called his office stating that he was "doing worse." (Pet. Ex. D, 6/4/93 telephone message.) The employee was seen by Dr. Johnson in his office later that same day, at which time the employee reported that he had been unable to work since his last visit with Dr. Johnson due to his arm symptoms. (Pet. Ex. D, 6/4/93 exam. note.) Following his examination of the employee, Dr. Johnson concluded that the employee had "cervical myofascial discomfort" and "left upper extremity discomfort with subjective dysesthesia [and] a possible radicular component." (Id.) Dr. Johnson ordered a CT scan of the employee's cervical spine to rule out a disc herniation. (Id.) Dr. Johnson also restricted the employee from lifting greater than 20 pounds, and performing overhead and "straight out" reaching. The employee testified that Cherne was unable to accommodate his restrictions and laid him off. (T. 26.) Following his lay-off from Cherne, the employee collected unemployment compensation. (T. 27.)

The CT scan of the employee's cervical spine was performed on June 8, 1993. (Pet. Ex. D, 6/9/93 exam. note.) On June 9, 1993, the employee returned to see Dr. Johnson at which time he complained of tingling in his feet as well as his left arm. (Id.) Dr. Johnson stated that the CT scan was interpreted by CDI as showing "multiple level uncinate spurring and foraminal stenosis at C3-4, C4-5, C5-6, and C6-7." The CT scan also showed evidence of a fracture of the employee's right C7 uncinate process and severe bony lateral stenosis at the C6-7 level on the right side. (Id.) Dr. Johnson opined that the conditions demonstrated by the CT scan were consistent with the employee's prior cervical injury. (Id.) Following his examination of the employee and a review of his recent CT scan, it was Dr. Johnson's opinion that the employee's "cervical changes themselves appear to be related to prior injury and would be consistent in length of time with the history given by the patient of the injury in 1990." (Id.) Dr. Johnson referred the employee to Dr. Richard Johnson, at the Noran Clinic, for a neurological evaluation, and restricted the employee from lifting greater than 25 pounds, performing overhead and straight out reaching, and working above ground level. (Id. and 6/9/93 Fitness for Duty form.)

The employee was first seen by Dr. Richard Johnson on July 5, 1993. (Pet. Ex. C, 7/5/93 letter to Dr. Donald Johnson.) Following his examination of the employee, Dr. Johnson recommended that the employee start on "thoracic outlet exercises," and asked the employee to follow-up in one month. (Id.)

The employee returned for a follow-up examination by Dr. Richard Johnson on August 5, 1993. (Pet. Ex. C, 8/5/93 letter to Dr. Donald Johnson.) Having reviewed the employee's previous CT scans, Dr. Johnson opined that they revealed "mild spurring at several levels [and] moderate stenosis of the right C6-7 neural foramina secondary to uncinate process hypertrophy." (Id.) It was Dr. Johnson's opinion, however, that the conditions shown in the employee's CT scan did not completely explain his subjective complaints. (Id.) Dr. Johnson also stated that the thoracic outlet exercises had not improved the employee's condition. (Id.) Dr. Johnson ordered a myelogram with a follow-up CT scan. (Id.)

Pursuant to a referral by Dr. Richard Johnson, the employee was seen by Dr. Terry Hood, a neurological surgeon, on August 18, 1993. Following his review of the employee's previous CT scan and his examination of the employee, he concluded that he could not find any explanation for the employee's then current symptoms. (Resp. Cherne Ex. 1, 8/18/93 letter to Dr. Richard Johnson.) Dr. Hood recommended that the employee be seen by a vascular surgeon to rule out thoracic outlet syndrome. (Id.)

The employee was again seen by Dr. Richard Johnson on September 9, 1993, at which time Dr. Johnson stated that the myelogram revealed posterior spurring and disc bulging, "marked hypertrophy of the uncinate processes at C6-7 with fairly marked stenosis of the right C6-7 neuroforamin." (Pet. Ex. C, 9/9/93 exam. note.) Dr. Johnson's notes indicate that the employee had not been working and was not experiencing as much numbness. (Id.) After discussing the employee's options with him, Dr. Johnson referred the employee to Dr. Gregg Anderson, a vascular surgeon. (Id.)

The employee was first seen by Dr. Anderson on September 14, 1993, at which time Dr. Anderson diagnosed thoracic outlet syndrome and recommended that the employee participate in a "formal rehabilitation program" before surgery would be undertaken. (Pet. Ex. E, 9/14/93 letter to Dr. Richard Johnson.) The surgical procedure being considered by Dr. Anderson was a "first rib resection with scalenectomy and possible neurolysis of the brachial plexus." (Id.)

The employee underwent several physical therapy sessions at Coplin Physical Therapy between October 18, 1993 and November 24, 1993. (Pet. Ex. F.) The employee's therapy included hot/cold packs, manual therapy, mechanical traction, and exercises. In a November 24, 1993 discharge report, completed by Ralph Throckmorton, a physical therapist, it was noted that the employee "has noticed improved ROM but no change in arm symptoms with sustained overhead activity." Mr. Throckmorton recommended that the employee continue his at-home thoracic outlet syndrome exercises and suggested that he undergo a functional capacities evaluation to determine his work readiness. (Pet. Ex. F. 11/24/93 discharge report.)

The employee returned to see Dr. Richard Johnson on December 23, 1993. (Pet. Ex. C, 12/23/93 letter to Dr. Donald Johnson.) In a report of the same date, Dr. Johnson stated that the employee's condition had not improved with the formal rehabilitation program recommended by Dr. Anderson. Dr. Johnson also stated that the employee's symptoms had increased following an automobile accident he was involved in approximately two weeks previously. He reported that the employee's numbness now occurred even when his arms were relaxed by his sides, and that his symptoms were greater in his right arm than in his left. Dr. Johnson ordered an EMG to rule out several possible sources of the employee's symptoms. He also stated that given the employee's complicated situation, he would not want to "rush right into surgery for thoracic outlet syndrome," as the employee does have "some significant disease in his cervical spine including some narrowing of the C6-7 neural foramen which could be contributing to the symptoms. . . ." (Id.)

The employee was seen by Dr. Stephen Barron, an orthopedic surgeon, on December 27, 1993, for an independent medical evaluation. (Pet. Ex. G, 1/6/94 report.) Upon examination, the employee reported neck pain, and bilateral numbness and tingling in his arms and hands. Following a review of the employee's previous medical records, Dr. Barron diagnosed the employee's condition as "spinal stenosis on the right at C6 and C7." Dr. Barron also noted evidence on the employee's CT scan of degenerative disc disease. Dr. Barron opined that the employee had sustained a 14% permanent partial disability based on his cervical condition. Although he specifically stated in his report that the employee's cervical symptoms were causally related to his December 16, 1990 injury and September 1991 aggravation thereof, he went on to apportion the employee's disability as 20% relating to the December 1990 injury, 30% relating to the September 1991 aggravation, and 50% relating to a May 1993 Gillette injury. (Id.) Furthermore, it was Dr. Barron's opinion that the employee had reached MMI effective December 27, 1993, and was capable of full-time work with restrictions, including no lifting in excess of 30 pounds, no frequent bending at the neck, and no repetitive overhead work. (Id.) Dr. Barron concluded that no further medical or chiropractic treatment was required. (Id.)

The employee returned to see Dr. Richard Johnson on January 13, 1994, at which time he stated that the employee's EMG was normal, showing no signs of denervation or carpal tunnel syndrome. (Pet. Ex. C, 1/13/94 exam. note.) Dr. Johnson stated that "[b]y history, [the employee] certainly does appear to have thoracic outlet syndrome." (Id.) Dr. Johnson restricted the employee from work above the head. (Pet. Ex. C, 1/13/94 report of work ability.)

In February 1994, the employee began full-time work as a cashier at Clark Oil Co. at a wage of approximately $5.50 per hour. (T. 27.) Also beginning at approximately that time, the employee worked part-time performing housework for his father-in-law through Allied Health at a wage of $6.00 per hour. (T. 28 & Resp. Liberty Exh. 1.)

At the request of the self-insured employer, Cherne Contracting, on July 12, 1994 the employee was seen by Dr. David Boxall, an orthopedist, for an independent medical evaluation of his cervical spine condition. (Resp. Cherne Ex. 1, 7/12/94 report.) At the time of that examination, the employee complained of an aching neck, shooting pain in both arms with

overhead reaching and sneezing, and numbness in the fingers of both hands. Following a review of the employee's previous medical records and an examination of the employee, it was Dr. Boxall's opinion that the employee's December 1990 work injury was the sole cause of the employee's neck problems and resulting ongoing neck complaints. It was Dr. Boxall's opinion that the employee's September 1991 work injury represented a temporary flare-up of his pre-existing condition because his ongoing complaints were similar in nature to those prior to the September 1991 injury. Dr. Boxall further concluded that he found no medical evidence to support the occurrence of a Gillette injury in May 1993. As the employee's neck symptoms had remained unchanged for approximately one year, Dr. Boxall opined that the employee had reached maximum medical improvement, and that he was capable of work with restrictions, which included avoiding prolonged fixed positions of the head and neck, no repetitive bending or twisting of his head and neck, and no working with his arms at, or above, shoulder height for an extended period of time. Dr. Boxall also recommended that the employee avoid lifting greater than 40 pounds above shoulder level.

The employee left Clark Oil Co. on October 13, 1994, after which he worked for Award Temporary Services and Interim Temporary Services. (T. 27-29.) Through Interim, the employee worked as a forklift operator at Tool Products Co. at a wage of $7.00 per hour. Tool Products subsequently hired the employee as a full-time forklift operator at a wage of $8.34 per hour. (T. 29.)

The employee returned to see Dr. Richard Johnson on November 11, 1994, requesting that his lifting restrictions be removed. (Pet. Ex. C, 11/11/94 exam. note.) At that time, the employee reported that his arms were "fairly good if he did not use them above his head." Dr. Johnson opined that the employee had ongoing thoracic outlet syndrome. In a report of work ability of the same date, Dr. Johnson released the employee to work with the sole restriction of "no use of arms above head, especially repetitively." (Pet. Ex. C, 11/11/94 report of work ability.)

On March 7, 1995, the employee met with Jan Lowe, a qualified rehabilitation consultant (QRC), for the performance of an employability evaluation, at the request of Egan & Sons and its insurer, Liberty Mutual Insurance Company. (Resp. Egan & Sons/Liberty Mutual Ex. 1, 3/9/95 report.) Following an interview and testing of the employee, it was Ms. Lowe's opinion that the employee could no longer function as a journeyman plumber. Ms. Lowe opined that the employee's current job at Tool Products "is a reasonable reflection of his current earning capacity." She also recommended that the employee explore training and future employment in the construction industry, such as a mechanical systems designer, construction estimator, or a project supervisor/coordinator. She opined that these positions could return the employee to his pre-injury earning capacity.

The employee filed a claim petition on July 16, 1993, alleging entitlement to temporary total disability benefits from May 31, 1993 to the present and continuing, and the payment of certain medical expenses, as a result of his December 26, 1990 cervical spine injury. The employee's claim petition was amended by a letter, filed July 1, 1994, to include a request for permanent partial disability benefits pursuant to a 14% rating, temporary partial disability benefits

from February 1, 1994 to the present and continuing, and attorney fees under Minn. Stat. § 176.191. The employee filed an amended claim petition on July 29, 1994, alleging that he also sustained a work injury in September 1991 at Egan & Sons and a May 31, 1993 Gillette injury at Cherne Contracting. The employee also alleged entitlement to payment of further medical benefits. A hearing was held at the Office of Administrative Hearings before Compensation Judge William R. Johnson on April 3, 1995. The compensation judge issued a Findings and Order on April 5, 1995, in which he ordered payment of "an undisputed 7% permanent partial disability, payable as economic recovery compensation." The compensation judge issued a subsequent Findings and Order on May 11, 1995, in which he found that the employee had sustained work-related neck injuries on December 26, 1990 and September 9, 1991 while employed at Egan & Sons. The compensation judge found that the employee failed to prove that he had sustained a Gillette injury on May 31, 1993, and that he had failed to prove entitlement to temporary total disability benefits from May 31, 1993 through February 1, 1994. The compensation judge also found that the employee had sustained a 14% permanent partial disability, and was entitled to temporary partial disability benefits, but only from October 13, 1994, to the present and continuing. The employer, Egan & Sons, and its insurer, Liberty Mutual Insurance Company, filed a notice of appeal on June 12, 1995, appealing the compensation judge's finding that the employee had not sustained a Gillette injury while working for Cherne Contracting. The employee filed a notice of cross-appeal on June 14, 1995, attacking the compensation judge's findings with respect to temporary partial and temporary total disability benefits.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals 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." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. At 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. V. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

Gillette Injury

In his Findings and Order dated May 11, 1995, the compensation judge found that the employee had failed to prove that he sustained a Gillette injury on May 31, 1993 while

employed at Cherne. (Finding 8.) In making his determination, the compensation judge adopted the findings of Dr. Boxall who opined that the employee's continuing cervical problems were related to his two earlier work injuries, and discounted the medical opinions of Dr. Barron and Dr. Johnson, both of whom opined that the employee had sustained a Gillette injury in May of 1993. (Findings 8 and 9.) The employer, Egan & Sons, and its insurer, Liberty Mutual Insurance Company, appeal the compensation judge's finding that the employee did not sustain a Gillette injury by arguing that, to the extent that the compensation judge's denial of a Gillette injury was based on the employee's lack of reporting such an injury to his employer or his doctors, it should be reversed because the employee should not have been expected to be familiar with repetitive trauma injuries or immediately aware of the fact that his symptoms may be caused by his work at Cherne. (Egan & Sons Brief at 8-9.) The employer and insurer also argue that despite the compensation judge's finding to the contrary, the employee did experience an increase in symptoms after working repetitive duties at Cherne, and that the compensation judge improperly ignored the testimony of the employee, Dr. Barron, and Dr. Johnson. (Egan & Sons Brief at 9-11.)

Injuries which result from the cumulative effect of repetitive minute trauma caused by the performance of the employee's ordinary job duties are compensable under the Minnesota worker's compensation act. Gillette v. Harold, Inc., 101 N.W.2d 200, 21 W.C.D. 105 (Minn. 1960). A pre-existing disease or infirmity does not disqualify the employee from making a workers' compensation claim if his employment aggravated, accelerated, or combined in a significant way with the disease or infirmity to produce the disability for which compensation is sought. Id. at 204, 21 W.C.D. at 109. While evidence that "specific work activities caused specific [symptoms] which led cumulatively and ultimately to disability" may be helpful, as a practical matter, in establishing a work-related Gillette injury, the question of compensability depends primarily on the existence of objective medical evidence and the opinion of a medical expert establishing a causal link between the employee's disability and his job. Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994).

Three expert medical opinions concerning the causation of the employee's neck and arm symptoms were considered by the compensation judge. Dr. Johnson and Dr. Barron both opined that the employee sustained a May 1993 Gillette injury which was a substantial contributing cause of his current neck and arm symptoms. (Pet. Ex. H, Dr. Barron's 1/6/94 report; Pet. Ex. K, deposition of Dr. Donald Johnson at 11.) Dr. Boxall, on the other hand, opined that the employee's December 1990 injury was a significant cause of his problems and that the employee's September 1991 injury simply caused a temporary aggravation of the pre-existing condition. Dr. Boxall further opined that there is no medical evidence to support the occurrence of a 1993 Gillette injury. (Resp. Cherne Ex. 1, 7/12/94 report.) The compensation judge, whose authority it was, as the trier of fact, to assess the credibility and persuasiveness of, and choose between, the conflicting medical evidence and opinions, adopted the opinion of Dr. Boxall, and discounted those of Dr. Barron and Dr. Johnson. Allen v. Federal Express, 49 W.C.D. 59 (1993); Field v. Fiberich Technologies, 51 W.C.D. 325 (1994); Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The compensation judge's reliance on Dr. Boxall's opinion was reasonable in light of the employee's testimony and his medical records. The employee testified that his symptoms following his work at Cherne were essentially the same as those he had experienced following his December 1990 and September 1991 injuries. (T. 43.) The employee's medical records indicate that the employee's doctors found no new objective medical findings following his alleged May 1993 Gillette injury. (See Resp. Cherne Exh. 1, 7/12/94 report; Pet. Exh. K, Dr. Donald Johnson Deposition at 26.) These facts are supportive of Dr. Boxall's medical opinion that the employee did not sustain a Gillette injury in May 1993, and that his current condition is the result of the degenerative effects of his previous work injuries at Egan and Sons.

The compensation judge discounted the medical opinion of Dr. Barron as internally inconsistent and lacking adequate foundation. (Finding 9.) The compensation judge appeared to be troubled by Dr. Barron's statement that the employee's cervical symptoms were causally related to his December 16, 1990 injury and his September 1991 aggravation, while also finding that 50% of the employee's continuing disability was caused by a 1993 Gillette injury. The compensation judge also expressed concern about Dr. Barron's statement that the numbness in the employee's arm and hands after the September 1991 injury resolved following chiropractic treatment, a finding which was directly contrary to the employee's testimony. (T. 17.) Under these circumstances, the compensation judge can not be faulted for determining that Dr. Barron's opinion as to the existence of a May 1993 Gillette injury was not compelling.

The compensation judge discounted the medical opinion of Dr. Johnson because it was ambiguous, included inaccurate assumptions and did not contain a clear explanation or support for certain conclusions. (Finding 9.) The compensation judge stated that "Dr. Johnson does not really give an accurate opinion as to what new symptoms [or] objective medical evidence he can point to [to] substantiate his Gillette injury opinion." As suggested by the compensation judge, a review of Dr. Johnson's testimony and medical records does not indicate the existence of any new symptoms following the employee's alleged Gillette injury. Furthermore, Dr. Johnson admitted on cross-examination that if the employee had arm tingling and arm pain prior to the spring of 1993, then there would be no "new" symptoms after May 1993. (Pet. Exh. K, Dr. Donald Johnson Deposition at 31.) The medical records support the compensation judge's conclusion that the arm tingling and pain existed prior to May 1993.

The compensation judge also found Dr. Johnson's opinion to be based on several "inaccurate assumptions." First, the compensation judge referenced Dr. Johnson's assumption that the employee's job at Cherne involved overhead work approximately 80% of the time, and noted that it contradicts the employee's admission on cross-examination that he wasn't sure he worked above his head even 50% of the time. (see T. 50.) Second, the compensation judge pointed to Dr. Johnson's belief that the employee had no arm or shoulder symptoms prior to the spring of 1993. (see Pet. Exh. K, Dr. Donald Johnson Deposition at 30.) To the contrary, however, the employee testified that he experienced such symptoms as early as September 1991, and his medical records from the Chiro Center confirm that he had left arm symptoms by April 29, 1992. (T. 16, and Pet. Exh. I, 4/29/92 exam note.) In the end, the compensation judge felt that Dr. Johnson's testimony simply was "not convincing." (Finding 9.)

We find no fault with the compensation judge's assessment of the expert medical opinions and find his choice between them to be reasonable. Given the importance of expert medical opinions in determining whether a Gillette injury has occurred, and the fact that the expert medical opinion of Dr. Boxall, upon which the compensation judge relied, represents substantial evidence in support of the compensation judge's finding that the employee did not sustain a Gillette injury, we need not address the employer and insurer's arguments concerning the employee's lack of knowledge about Gillette type injuries, and, therefore, affirm the compensation judge's decision. Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994); Gillette v. Harold, Inc., 101 N.W.2d 200, 21 W.C.D. 105 (Minn. 1960).

Temporary Total Disability

In his Findings and Order, the compensation judge found that the employee had failed to prove by a preponderance of the evidence that he was entitled to temporary total disability (TTD) benefits from May 31, 1993 to February 1, 1994. (Finding 13.) In support of his decision, the compensation judge relied on the fact that the employee had failed to search for work during the period for which benefits are claimed. (Id.) On cross-appeal, the employee attacks the compensation judge's denial of TTD benefits as clearly erroneous. He argues that the he was laid off due to his physical restrictions, told by his union that they had no work for him, and that the physical restrictions imposed by his physicians, in conjunction with the failure of the employer and insurer to provide rehabilitation assistance, rendered him temporarily and totally disabled. We find the employee's arguments unpersuasive.

Entitlement to TTD benefits requires a finding that the employee's "physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967). The determination of whether an employee is temporarily and totally disabled "is primarily dependent upon the employee's ability to find and hold a job, not his physical condition." Id. The ability or inability of the employee to secure a job is demonstrated by evidence of a diligent job search. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988) "The injured employee proves total disability by showing that work the employee is capable of doing is unavailable, and unavailability is shown by a diligent job search to no avail." The determination of whether an employee has performed a diligent job search is a question of fact. Neither statute nor caselaw defines with any degree of certainty what constitutes a diligent job search. It is, therefore, left up to the compensation judge to make a determination regarding the diligence of an employee's job search on a case-by-case basis.

In the case at hand, the employee admitted during his testimony at the hearing that he did not perform any job search during the period for which temporary total disability benefits are claimed. (T. 33.) Although, as the employee points out, his job search must be viewed in light of the fact that he was not provided with any rehabilitation assistance, the employer and

insurer's failure to provide such assistance did not completely relieve him of his responsibility to search for work. Because the employee failed to perform any job search, and was not totally unable to work at any job, the compensation judge reasonably denied the employee's claim for TTD benefits. We, therefore, affirm the compensation judge's denial of TTD benefits.

Temporary Partial Disability

The compensation judge denied the employee's claim for temporary partial disability (TPD) benefits from February 2, 1994 through October 12, 1994, but awarded such benefits from October 13, 1994 to the present and continuing. (Finding 15.) The compensation judge cited the fact that the employee failed to perform a job search while employed at Clark Oil Company at "basically minimum wage." The compensation judge held that it was not until approximately the time that the employee left his position at Clark on October 13, 1994, that he became "serious" about returning to work. The compensation judge, therefore, awarded TPD benefits from that date. (Id.) On cross-appeal, the employee attacks the compensation judge's denial of TPD benefits by arguing that the employee obtained work in February of 1994 and remained continuously employed thereafter, at times even working two jobs. (Employee's brief at 4.) The employee contends that he has satisfied the criteria set forth by the Minnesota Supreme Court in Dorn v. A.J. Chromy Constr. Co., 245 N.W.2d 451, 29 W.C.D. 86 (Minn. 1976), for establishing entitlement to TPD benefits, and he should, therefore, receive such benefits beginning in February 1994.

Temporary partial disability benefits are payable while an employee is working and "earning less than [his] weekly wage at the time of injury, and the reduced wage the employee is able to earn in [his] partially disabled condition is due to the injury." Minn. Stat. § 176.101, subd. 2(b) (1992). To establish entitlement to temporary partial disability benefits, an employee must prove that he has sustained a work related temporary partial disability that has resulted in an actual loss of earning capacity. Dorn v. A.J. Chromy Constr. Co., 245 N.W.2d 451, 29 W.C.D. 86 (Minn. 1976). When a disabled employee who is released to return to full-time work finds a full-time job, the earnings from such employment create a presumption of earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 454, 21 W.C.D. 314 (1960); Einberger v. 3M Co., 41 W.C.D. 727 (1989). In certain circumstances, however, this presumption can be rebutted with evidence indicating that the employee's ability to earn is different than the post-injury wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 874 (1989); Einberger, 41 W.C.D. at 739.

In the case at hand, the only evidence presented by the employer and insurer concerning the employee's earning capacity was the March 9, 1995 report of Jan Lowe, a qualified rehabilitation consultant. (Resp. Liberty Ex. 1.) Although Ms. Lowe did opine that the employee's current job at Tool Products is a "reasonable reflection of his current earning capacity," she did not offer an opinion concerning the employee's earlier position at Clark. (Id.) The employer and insurer presented no other affirmative evidence concerning the employee's earning capacity, or the existence of higher paying, physically suitable jobs in the employee's community, during the time in which he was employed at Clark. Absent persuasive evidence showing that

the employee's actual earnings at Clark were not representative of his then current earning capacity, upon which the compensation judge could have found the earning capacity presumption rebutted, the employee's actual post-injury earnings are presumed an accurate reflection of his earning ability.

By finding that the employee should have continued to search for employment despite having a full-time job, the compensation judge essentially ignored the earning capacity presumption. The compensation judge summarily determined that the employee's actual earnings were not representative of his earning capacity without any factual evidentiary basis for such a finding. The compensation judge simply stated that the employee should have performed a search for higher paying work. Even if it was true that the employee failed to search for work, he is not thereby automatically disqualified from receiving TPD benefits. Evidence of a diligent job search is not a legal prerequisite to an award of TPD benefits, but is instead one of several factors that may be considered by a compensation judge in determining whether the employee has sustained a wage loss that is causally related to his work injury. Nolan v. Sidal Realty Co., No. *[redacted to remove social security number]* (W.C.C.A. Oct. 20, 1995), citing Johnson v. Axel Ohman, 48 W.C.D. 198 (1992), *summ. aff'd* (Minn. Mar. 2, 1993). The compensation judge's denial of TPD benefits, which was based primarily on the failure of the employee to perform a diligent job search, was an error of law. We, therefore, reverse the compensation judge's denial of TPD benefits from February 2, 1994 through October 12, 1994, and order payment of such benefits.