ALEX DELEON, Employee, v. DONALD S. ANDRINGA and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 3, 1998

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

HEADNOTES

EVIDENCE - RES JUDICATA. Where the compensation at issue and denied in the prior proceeding was compensation for an alleged specific injury at C3-4 consequent to a truck roll-over in January 1993, whereas the compensation at issue in the current proceeding was compensation for an alleged minute trauma injury at C6-7 consequent to field activities in the summer and fall of 1993, the claim was not a case of intentionally splitting a cause of action, and the employee's claim to benefits was not barred by res judicata principles of merger or bar.

EVIDENCE - RES JUDICATA. Where the employee's doctor had taken him off work in February 1994 to investigate the employee's cervical symptoms, where the compensation judge's denial of benefits in a prior proceeding for lack of a diligent job search had not credited that restriction from work because the cervical condition there at issue was at C3-4 and was found unrelated to the employee's specific work injury on January 1993, the compensation judge did not err in concluding in the current proceeding that the employee was not precluded by the judge's previous decision from receiving benefits up through the date of the prior proceeding for an October 1993 Gillette-type injury at C6-7.

CAUSATION - GILLETTE INJURY; GILLETTE INJURY - DATE OF INJURY. Where, by stipulation of the parties, the specific date of the alleged Gillette injury was not at issue, and where the judge's decision was supported by expert medical opinion, the compensation judge's finding of a Gillette-type injury was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the opinion relied on was based on a discogram/CT scan that post-dated the alleged work injury by about a year and a half and was preceded by an MRI scan that also post-dated the alleged injury but did not reveal the cervical abnormality at issue

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee's treating doctors' restriction of the employee from working during the period at issue was not precluded as evidence by res judicata effect of the compensation judge's previous decision that the employee was not medically restricted from working during that same period, which decision had been reversed in pertinent part on appeal, the compensation judge's award of temporary total disability benefits for the period at issue was not clearly erroneous and unsupported by substantial evidence.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Less than ideal behavior and less than perfect compliance in rehabilitation efforts do not compel a denial of benefits. See

McGrew v. Independent School Dist. #196/Rosemount, No. *[redacted to remove social security number]* (W.C.C.A. Jan. 22, 1992) (the statute requires of an employee only "a good faith effort [to comply with the rehabilitation plan], not perfect compliance"). Where there was evidence that the employee was complaining to his rehabilitation providers of significant pain during the period at issue, and where there was evidence that the employee was making at least some employment contacts during that period, sometimes accompanied by a placement coordinator, the compensation judge's conclusion that the employee did not demonstrate sufficiently bad-faith cooperation with rehabilitation efforts to preclude an award of benefits was not clearly erroneous and unsupported by substantial evidence, particularly in that the employee's QRC remained the same individual who had functioned earlier as his case manager.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee was subject to the effects not only of his pain but also of a broad variety of injected and other medications, and where medical and rehabilitation records indicated that he had been scrupulously warned by his doctor that these medications might cause drowsiness and other disabling side effects, the compensation judge's conclusion that the employee was effectively disabled totally by his injury-related medical treatment during the period at issue was not clearly erroneous and unsupported by substantial evidence.

EVIDENCE - BURDEN OF PROOF. Where the employee's temporary restriction from working had not been expressly recommended by a medical expert but was inferred by the compensation judge based on the potential side effects of a temporary treatment regimen, where prior to that treatment regimen the employee had been released to work with restrictions, and where there was no evidence that the employee conducted a reasonably diligent search for work subsequent to that treatment regimen, the compensation judge erred by applying an improper burden of proof in awarding benefits on grounds that there was no clear release of the employee to return to work subsequent to the treatment regimen.

PERMANENT PARTIAL DISABILITY - OBJECTIVE FINDINGS. Where several physicians had made findings confirming symptomology either at or potentially stemming to the C6-7 level of the employee's spine but, aside from the employee's IME's discogram/CD study, radiographic studies had not supported a radicular problem at that level, and where the discogram/CD had ultimately produced ten out of ten concordant pain at that level and had revealed abnormal morphology at that level that had not been observed on MRI studies, the compensation judge's award of permanent partial disability benefits based on a conclusion that the discogram/CT study constituted correlation of radiological with neurological findings was not clearly erroneous and unsupported by substantial evidence.

Affirmed in part and reversed in part.

Determined by Pederson, J., Johnson, J. and Hefte, J.
Compensation Judge: Jennifer Patterson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary total and permanent partial disability benefits consequent to a Gillette-type injury[1] at the C6-7 level of the employee's spine culminating on October 27, 1993. We reverse on a four-month period of temporary total disability benefits and affirm the remainder of the judge's decision.

BACKGROUND

On January 28, 1993, the employee was injured when a grain truck that he was driving rolled over in the course of his employment with Donald S. Andringa [the employer]. Subsequent to the injury, the employee was treated by several different physicians for symptoms of left shoulder pain and occasional numbness in the left upper extremity. Cervical x-rays proved normal, a rotator cuff tear was ruled out, and the employee was ultimately diagnosed by Dr. Eric Johnson with a first degree acromioclavicular joint separation and shoulder strain. On April 26, 1993, after cortisone injections proved ineffective in relieving the employee's pain, shoulder specialist Dr. Brian Briggs referred the employee to rheumatologist Dr. James Lessard, whom the employee began seeing in May 1993. Dr. Lessard eventually diagnosed bicipital tendinitis, recommended an aggressive rehabilitation program, and released the employee to return to work as a tractor driver, restricted from doing [h]ard physical labor.

On August 18, 1993, the employee returned to work driving a tractor in cultivation of the employer's sugar beet fields. The employee worked in this capacity an average of slightly over four hours a day on a total of five days over the course of the next two weeks. The fields were bumpy, and as he drove over them the employee evidently had to look back over his left shoulder every few minutes to ensure proper operation and alignment of his equipment. The employee's physical therapy records indicate that his main complaint on August 20, 1993, was of sharp, shooting pain whenever he is moving, particularly the bounces associated with riding a tractor.

In early September 1993, the employee began serving a thirty-day jail sentence. During the last half of this sentence he was released during the day to work again for the employer. Over the course of the next two weeks, the employee drove a tractor for the employee just under nine hours a day, at least six days a week, applying liquid ammonia to newly harvested grain fields. On September 20, 1993, the employee was released by his treating physiatrist, Dr. Genaro Tiongson, to work twelve hours a day for two weeks, driving a truck in the employer's sugar beet harvest. Upon completion of his jail sentence on October 4, 1993, however, the employee returned instead to field tractor work again, working 10.5 hours a day towing a machine that cut

[1] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

the tops off of the ripened beets, a job that occasionally required his wielding a ten-pound bar to unclog the machine.

On October 20, 1993, after completing his field work, the employee returned to see Dr. Lessard for the first time in over four months. He complained on that date that, although he was now feeling somewhat better, he thought his physical therapy had made his shoulder pain worse. Dr. Lessard attempted to relieve the employee's pain with an injection, but the employee noticed no change in symptoms. For about a week thereafter, the employee worked for the employer a little over eight hours a day at machinery shop tasks that included greasing and changing oil on the employer's vehicles.

On October 27, 1993, the employee left work for about a month on a long-anticipated trip to Texas to attend his daughter's wedding. When he returned from Texas, he was informed by the employer that there was no light work available for him. On December 2, 1993, the employee returned to see Dr. Lessard, complaining of continuing left shoulder pain. On examination, Dr. Lessard noted a decreased pinprick response involving the left C6 dermatome. X-rays revealed only minimal scattered degenerative changes without significant narrowing of the cervical disc interspaces, but Dr. Lessard nevertheless referred the employee to neurologist Dr. Nader Antonios for consultation regarding the possibility of lower cervical or upper thoracic radiculopathy.

The employee saw Dr. Antonios on December 22, 1993. Dr. Antonios diagnosed neck pain with intermittent tingling and numbness involving the left upper extremity, and he recommended an MRI scan of the cervical spine. The MRI, conducted January 18, 1994, was read to reveal a small disc herniation at C3-4. No significant disc abnormality was noted at any other level. On January 31, 1994, Dr. Antonios referred the employee to neurosurgeon Dr. Stuart Rice, and the insurer denied the employee's request for reinstatement of benefits. On February 1, 1994, Dr. Lessard wrote to the employee's attorney, indicating that he found it totally unreasonable to outline any restrictions . . . until we have a better or clearer idea as to what is going on. The employee saw Dr. Rice on February 15, 1994, complaining of persistent neck pain that radiated down into his left arm and hand. Upon examination, Dr. Rice recommended discectomies at C3-4 and C4-5. On March 4, 1994, the employee filed a Claim Petition, alleging entitlement to temporary total disability benefits continuing from November 10, 1993, consequent to a specific left shoulder injury on January 28, 1993.

On March 15, 1994, the employee was examined for the employer and insurer by neurosurgeon Dr. Severt Jacobson. Dr. Jacobson found the employee's MRI very unimpressive, noting also from records accompanying the employee that there had been no positive findings on his EMG. On the employee's x-rays, Dr. Jacobson found only the slight bulge at C3-4, which he considered clinically insignificant, and some mild degenerative changes, but nothing very specific. Noting that [m]ost of the symptoms that [the employee] complains of are in the C7, T1, T2 area, Dr. Jacobson concluded that he was not exactly sure how to classify the employee's problem but that it would not be solved by a cervical discectomy. On March 25, 1994, the employer and insurer filed their Answer to the employee's Claim Petition, admitting that the employee had

sustained a left shoulder injury on January 28, 1993, but denying that the employee was temporarily totally disabled for the period claimed. On April 25, 1994, the employee filed a Medical Request, seeking preauthorization for surgery to treat a neck and left shoulder injury on January 28, 1993. In their Medical Response three days later, the employer and insurer refused to pay for the surgery, based on the opinion of Dr. Jacobson and on grounds that their liability regarding the cervical spine has not been established.

On June 1, 1994, Dr. Lessard indicated in treatment notes that the employee clearly is unable to return to work in his current state. About a week later, on June 9, 1994, the employee was examined for the employer and insurer by orthopedist Dr. Robert Fielden. Dr. Fielden diagnosed a shoulder contusion, apparently due to the January 1993 injury, and concluded that the employee had attained maximum medical improvement with regard to that injury as of June 9, 1994, without causally related need for surgery or temporary total disability after November 10, 1993. On July 20, 1994, the employee's case manager informed the employee that, pursuant to a request of the insurer, she would be placing the employee's file on hold.

Following a hearing on August 12, 1994, Compensation Judge Jennifer Patterson concluded, by Findings and Order filed September 27, 1994, that the employee's January 1993 left shoulder injury had not completely healed and that any claim based on it remained open. However, the judge denied all wage replacement benefits after December 6, 1993, on grounds that, while no doctor after June 1993 had advised the employee to remain off work entirely because of his work-related shoulder condition, the employee had not conducted a reasonably diligent search for work. In Finding 14, the judge explained that Dr. Lessard took the employee off work on February 1, 1994, . . . in the belief that the employee would be having [cervical] surgery, rather than because of his shoulder injury. Later in that same finding, however, the judge stated, in apparent contradiction to that conclusion, that, [b]etween January 1, 1994, and the date of hearing, no doctor had issued a report stating that the employee should be off work entirely because of a deterioration in the condition of his left shoulder or because of any other health problem the employee may have had (emphasis added). In her memorandum, the judge indicated also that, while the employee had apparently sustained a minor cervical injury in addition to his shoulder injury in his January 28, 1993, roll-over accident, the cervical injury had healed up by March 16, 1993, when he saw Dr. Johnson. Conspicuously, the judge also found, in Finding 8, that [t]his Decision is not meant to express an opinion upon whether or not the employee may have suffered any work injuries besides the admitted motor vehicle accident as either specific injuries or Gillette injuries at any point during his employment relationship with the employer.

In our February 17, 1995, decision on the employee's appeal, this court reversed the judge's denial of wage replacement for a shoulder condition from December 6, 1993, to February 1, 1994, on grounds that the employee's rehabilitation during that period was being directed by a disability case manager, an agent of the employer, and therefore the insurer had no grounds to complain if the employee does no more than the case manager suggests. DeLeon v. Donald S. Andringa, No. *[redacted to remove social security number]* (W.C.C.A. Feb. 17, 1995). We affirmed, however, the judge's denial of benefits for a shoulder condition after February 1, 1994, and we also found sufficient evidence to compel affirmance of the judge's conclusion that a

cervical condition at C3-4 had not been shown to be causally related to the employee's January 1993 roll-over accident.

Subsequent to the compensation judge's September 1994 decision, the employee's case management services had been terminated, and in December 1994 statutory rehabilitation services had apparently been commenced, with the employee's former disability case manager, Julie Winkelman, assuming the duties of qualified rehabilitation consultant [QRC]. On February 22, 1995, Dr. Lessard released the employee to return to work as of March 1, 1995, subject to restrictions.

On March 29, 1995, the employee was examined by orthopedist Dr. Robert Wengler. Dr. Wengler concluded that an annular tear apparent at the employee's C3-4 disc bulge was unrelated to the employee's symptoms. However, neurological examination revealed an absence of reflexes, and the employee complained of decreased sensation about the left hand and forearm. In addition, Dr. Wengler found acute localizing tenderness at C5-6 and C6-7, radiat[ing] into the left shoulder blade area. Dr. Wengler concluded that the employee's neck and left shoulder and arm pain . . . is characteristic of a cervical nerve entrapment and that [i]f this is disc pathology it is very likely at C5-6 or at C6-7. Based on those findings, Dr. Wengler recommended a discogram/CT nucleogram to further evaluate the employee's cervical condition. On that same date, he informed the employee's attorney that, in his opinion, the employee was temporarily and totally disabled from sustained gainful employment.

The recommended discogram and CT scan, conducted on May 11, 1995, was read to reveal in part a central disc herniation and annular tear with mild flattening of the spinal cord at C6-7. In his report on that date to the employee's attorney, Dr. Wengler stated that, [t]o the best of our ability to determine, the C6-7 disc is symptomatic, concluding that there was a reasonable chance that surgery would help. On that conclusion, Dr. Wengler rated the employee's related whole body impairment at 14%, under Minn. R. 5223.0070, Subp. 2B(1)(b). On June 23, 1995, Dr. Wengler expressed an opinion that the employee's roll-over on January 28, 1993, had resulted in disruption of the annular fibers of the C6-7 disc and the subsequent radicular phenomenon into the left upper extremity. The employee's work activities of the fall of 1993, he then added, may be considered to have been activities which aggravated the pre-existing condition and sufficiently specific to cause a permanent increase in [the employee's] symptoms. On that basis, Dr. Wengler indicated that it was reasonable to conclude that a Gillette injury had occurred in the summer and fall of 1993.

On August 1, 1995, the employee filed another Claim Petition, alleging entitlement to compensation for a 14% whole body permanent partial disability, to temporary total disability benefits continuing from February 1, 1994, and to certain medical benefits including payment for a spinal fusion at C6-7. The petition was based on an injury to the employee's intervertebral disc at C6-7 and consequent radicular symptoms, alleged to have occurred on 1/28/93 and/or summer and fall of 1993 (Gillette injury). In their Answer on August 11, 1995, the employer and insurer denied liability for the injury, listing among affirmative defenses [t]hat the employee's alleged disability, if any, and need for medical treatment is solely the result of significant disease processes

not related to the alleged work injury of January 28, 1993" (underscoring in original) and that the prior Findings and Order of Judge Jennifer Patterson served and filed September 27, 1994 are *res judicata* . . . relative to the issues of the employee's neck injury as it relates to the admitted date of injury of 1/28/93.

On September 18, 1995, the employee was examined by pain management specialist Dr. Charles Guernsey. Dr. Guernsey's diagnosis included degenerative joint and disc disease of the cervical spine, with probable left upper extremity radiculopathy. Dr. Guernsey treated the employee apparently about eight times over the course of about five weeks. He employed a broad variety of modalities, including a broad range of medications whose potentially disabling side effects he emphasized to the employee. Dr. Guernsey also anticipated the need for renewed physical therapy in order to normalize use of the injured extremity. Dr. Guernsey completed his treatment of the employee on October 23, 1995, reporting that he and the employee's current treating physician, Dr. Bruce Ring, had jointly determined that the employee needed to be referred for a reevaluation of his spine. In a note dated December 6, 1995, QRC Winkelman indicated that Dr. Guernsey had informed her that, because the employee hadn't responded to injection or other conservative therapy, he was discharging the employee from his care and referring him back to Dr. Ring to arrange for a neurosurgical evaluation.

On November 22, 1995, the employee had seen spine surgeon Dr. Michael Smith. In a report dated January 26, 1996, Dr. Smith reported that discograms had revealed diffuse levels of disk wear and tear but none that was markedly severe enough to warrant surgery. Dr. Lessard subsequently referred the employee for a functional capacities evaluation [FCE], which was conducted near the end of March 1996. The conclusion of the FCE was that the employee could work with restrictions, and on April 3, 1996, Dr. Lessard adopted that conclusion and released the employee to return to work pursuant to the restrictions outlined in the FCE report. The employee apparently searched for work until June 10, 1996, when he left Minnesota to visit relatives in Texas. On September 18, 1996, the employee moved with his family to Texas permanently, and he has not looked for work since that time.

On October 10, 1996, Dr. Fielden issued an addendum to his June 1994 report, indicating that he did not believe that the employee had sustained a Gillette-type injury during his period of employment in the fall of 1993. He noted that there was evidence of changes in the employee's cervical discs, but he concluded that they were natural, had taken many years to develop, and were not affected, aggravated, or changed in any way by the injury or by [the employee's] work activities.

The matter came on for hearing on February 6, 1998. Issues at hearing included the employer and insurer's primary liability for a Gillette-type injury at C6-7, the employee's entitlement to permanent partial disability benefits consequent to such an injury, and the employee's entitlement to temporary total disability benefits after February 1, 1994, based on such an injury. At the hearing, the employee testified in part that he had experienced neck pain for only about two months immediately following his January 28, 1993, work accident and then had experienced renewed neck pain again just prior to his incarceration in September 1993. He

testified that the latter pain was different from the earlier pain, in that it included sharper flashes or explosions of pain, which sometimes resulted in headaches. He testified that this pain eventually limited his driving to about three hours a day and on some days precluded his working at all. He testified also that his left shoulder and neck pain had not subsided since he moved to Texas in September 1996.

By findings and order filed March 31, 1998, the compensation judge concluded that the employee did sustain a Gillette-type injury to the C6-7 level of his spine, culminating on October 27, 1993, that he was entitled to benefits for a permanent partial disability to at least 12% of his whole body[2] as a consequence of that injury, and that he was entitled to temporary total disability benefits from February 1, 1994, to June 9, 1996, as a consequence of that injury. The employer and insurer appeal.

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 (1996). 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

The employer and insurer contend on appeal that the compensation judge's finding of a Gillette-type injury is legally erroneous under principles of res judicata, that that finding is also unsupported by substantial evidence, and that the judge's specific awards of temporary total and permanent partial disability benefits are unsupported by substantial evidence also on other grounds.

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[2] Dr. Wengler had mistakenly applied the permanency schedules for injuries occurring prior to July 1, 1993. While accepting Dr. Wengler's opinion that the employee sustained a permanent whole-body impairment at C6-7 due to his work activities in the fall of 1993, the compensation judge rejected Dr. Wengler's 14% particular rating and in its place substituted a 12% rating as the minimum awardable under the current schedules.

Res Judicata

The compensation judge awarded the employee benefits for disability between February 1994 and June 1996, based on a Gillette injury culminating in October 1993, after earlier denying benefits for disability between December 1993 and August 1994, based on a specific injury in January 1993. The employer and insurer contend that the judge's award was improper under res judicata principles of merger or bar and collateral estoppel, which they gloss respectively as claim preclusion and issue preclusion.[3]

Claim Preclusion

The employer and insurer argue first that the judge erred in not precluding the employee's current claim by applying the res judicata principle of merger or bar to prevent the employee from changing his theory of the case from that of a specific injury on January 28, 1993, to that of a Gillette-type injury on October 27, 1993.[4] Arguably, res judicata was originally alleged by the employer and insurer as an affirmative defense only with regard to a specific injury on January 28, 1993. At hearing, where the only injury still at issue was a Gillette injury at least half a year later, res judicata was not identified as an issue for determination by the judge, nor was res judicata listed as an issue by the judge in her decision. Normally, issues raised for the first time on appeal are not properly before this court and will not be addressed. See Malinoski v. North American Cable Sys., No. *[redacted to remove social security number]* (W.C.C.A. Dec. 14, 1989). However, even if we are to presume that the res judicata defense raised by the employer and insurer in their answer might have been presumed to apply to the employee's entire claim, we are not persuaded that its application here would preclude the employee's current claim.

The compensation at issue and denied in the prior proceeding was compensation for an alleged specific injury at C3-4 consequent to a truck roll-over in January 1993, whereas the compensation at issue in the current proceeding is compensation for an alleged minute trauma injury at C6-7 consequent to field activities in the summer and fall of 1993. Thus, not only are these two alleged work injuries different in kind and in vertebral level affected but they are the products of entirely different kinds of work activities separated by several months in time and so

[3] The employer and insurer cite Gulbranson v. Gulbranson, 408 N.W.2d 216 (Minn. Ct. App. 1987).

[4] The employer and insurer cite Gulbranson, 408 N.W.2d at 217-18, citing Hauser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978) (a plaintiff may not split his cause of action and bring successive suits involving the same set of factual circumstances), and Klinkert v. Streissguth, 155 Minn. 388, 390-91, 193 N.W. 687, 688 (Minn. 1923) (as paraphrased in Gulbranson, a judgment in a particular action is final and conclusive as to all issues and matters therein in litigation, as well as all other issues or matters which could have been litigated as a part and parcel of the controversy in suit).

are injuries requiring entirely different proofs. Moreover, in that the abnormality at the employee's C6-7 disc was not radiologically identified and medically diagnosed until subsequent to the August 1994 hearing, this is not a case of intentionally splitting a cause of action. That the employee's symptomology prior to the fall of 1993 might have been somewhat similar to and continuous with his symptomology after that date, often puzzling even to his treating physicians, does not render erroneous or unreasonable the compensation judge's implicit conclusion that the earlier claim does not preclude the later claim under principles of merger or bar.

Issue Preclusion

The employer and insurer argue also that the mere fact that the Employee is seeking now to change the date of his alleged injury cannot rewrite the judge's prior conclusions as to the issue of the employee's job search through the August 1994 date of the prior hearing. In her previous decision, the judge had found that, subsequent to February 1, 1994, and up through that August 1994 date of hearing, the employee was released to work but failed to make a reasonably diligent search for work. These conclusions, the employer and insurer argue, would preclude the payment of any wage replacement benefits up through at least that August 1994 date of the prior hearing, regardless of what injury is being alleged. Again we are not persuaded.

In Finding 13 of her September 1994 decision, the compensation judge concluded as follows:

> Between February 1, 1994, when Dr. Lessard expressed the opinion that the employee should not work pending surgical evaluation and March 15, 1994, when Dr Jacobson saw the employee and expressed the opinion that the employee did not need surgery, the employee was justified in not making a diligent search for work. If he had prevailed in showing a causal relationship between his C3-4 problems and his [January 1993] work injury, he would have been entitled to temporary total disability benefits for the time span February 1 through March 15, 1994.

Finding 13 was not contested on appeal. In our February 17, 1995, opinion on review of the judge's September 1994 decision, we explained our affirmance of the judge's denial of benefits for a shoulder condition after February 1, 1994, in part by stating that Dr. Lessard effectively took the employee off work on [February 1, 1994] to investigate the employee's cervical symptoms, and the record as a whole reasonably supports the conclusion that the employee was off work after that date as a result of his nonwork-related cervical condition rather than his shoulder condition. DeLeon, No. *[redacted to remove social security number]* (W.C.C.A. Feb. 17, 1995). Thus, while affirming the judge's denial of benefits related to a shoulder injury, we in effect modified the judge's finding that the employee was never off work entirely after January 1994 because of his shoulder problem or because of any other health problem. In a footnote to that conclusion, we explained that [a]lthough Dr. Lessard's February 1, 1994, report does not expressly restrict the employee from all work, the doctor indicated that it would be totally unreasonable' to

outline restrictions until the employee's cervical condition was thoroughly evaluated. Id. No appeal was taken from our February 17, 1995, opinion, and the compensation judge expressly concluded in her more recent decision, at Finding 10, that [t]he Court of Appeals[‘] February 17, 1995 holding that the employee was medically disabled by his neck as of February 1, 1994 is res judicata and binding in the current proceeding. In light of these facts, we cannot say that the judge's current award of benefits for the period March 15, 1994, through the August 12, 1994, date of the previous hearing, evidently made in deference to our February 17, 1995, opinion, is erroneous for contradicting the judge's earlier denial.[5]

Substantial Evidence of a Gillette-Type Injury

The employer and insurer argue that, even aside from being erroneous on a res judicata basis, the compensation judge's finding of a Gillette-type injury on October 27, 1993, is unsupported by substantial evidence. Noting that the employee had long planned to go off work voluntarily at the end of October 1993, they argue that the employee was not medically disabled from working until perhaps late December 1993. Furthermore, they contend, there are no ascertainable events to support a finding of a Gillette-type injury in October 1993 pursuant to concepts discussed in Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230 (Minn. 1984). They contend still further that evidence of degenerative changes on scans obtained many months after the alleged injury does not support the judge's finding of a work injury in October 1993. They argue that Dr. Wengler's opinion based on those scans is not as good evidence as are records of the employee's treating doctors. Again, we are not persuaded.

The employee's Claim Petition had alleged a possible Gillette-type injury during the summer and fall of 1993. According to unappealed Finding 2(e) of the compensation judge's decision, the parties stipulated that [i]f it is found that the employee sustained a minute trauma injury to his neck in 1993, his date of disablement from that injury was October 27, 1993 (emphasis added).[6] The date of the alleged injury in this case therefore attaches only consequent to a general finding that the employee was disabled by work-related minute trauma suffered in the last half of 1993. The Schnurrer case addressed the issue of the proof necessary to establish a Gillette injury date other than the date on which the employee ultimately went off work. Because the date of the Gillette injury in the present case was not an issue, the court's holding in Schnurrer does not apply here. The employee had the burden only of proving that he sustained a minute trauma injury while working for the employer during the Asummer and fall of 1993," as generally alleged in his claim petition. He had the burden of proving such an injury by presenting primarily medical evidence. See Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467

[5] Subsequent to the August 12, 1994, date of the prior hearing in this matter, issue preclusion as to temporary restrictions with regard to wage replacement cannot be argued as applicable, in light of our conclusion that claim preclusion does not apply.

[6] Finding 2 indicates that this stipulation occurred [d]uring the course of the current proceedings. There is no reference to it in the transcript of hearing.

(Minn. 1994) (the question of a Gillette injury primarily depends on medical evidence), citing Marose v. Maislin Transport, 413 N.W.2d 507, 512, 40 W.C.D. 175, 182 (Minn. 1987). Although there is ample medical evidence upon which the compensation judge might well have concluded that the employee's neck condition was not substantially aggravated by minute trauma in the course of his work activities in the summer and fall of 1993, we cannot conclude that the judge's decision to the contrary was erroneous for insufficient support as to culmination on October 27, 1993.

In reaching her decision, the judge evidently relied on the opinion of Dr. Wengler, an independent examiner for the employee. The employer and insurer have alleged that the best evidence in the case is the records of the treating doctors, not Dr. Wengler's opinion. However, while a compensation judge may, in appropriate circumstances, choose to afford greater weight to the opinion of a treating physician than to that of an independent medical examiner, the judge is not required to do so. Caven v. Ag-Chem Equip. Co., Inc., No. *[redacted to remove social security number]* (W.C.C.A. Sep. 14, 1993). Moreover, this court has long granted substantial deference to a compensation judge's decision to accept and rely on the opinion of one medical expert over that of another, provided the facts assumed by the expert are not unsupported by substantial evidence. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). In this case, the employer and insurer have not demonstrated that Dr. Wengler based his opinion on any false premises. Moreover, Dr. Wengler's expert opinion itself was supported by a discogram and CT scan that were evidently conducted and read by a radiologist to reveal abnormality at the C6-7 level. We acknowledge that the discogram and CT scan, together with Dr. Wengler's opinion pursuant to them, post-dated the alleged work injury in this case by about a year and a half. And we acknowledge also that the C6-7 level of the employee's spine had not appeared substantially injured on an MRI scan conducted over a year prior to the CT scan and much sooner after the alleged work injury. Nevertheless, while these factors and other evidence of record may importantly challenge the weight of Dr. Wengler's opinion, these factors do not negate that opinion's substantiality. This is particularly true given Dr. Wengler's additional suggestion that the discogram and CT scan were capable of revealing information different from that revealed by an MRI.[7] Under the facts of record, we cannot say that the compensation judge's reliance on the opinion of Dr. Wengler was unreasonable. This court is not to substitute its view of the evidence for that adopted by the compensation judge if the compensation judge's findings are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 40. Therefore we must affirm the judge's finding of a Gillette-type injury to the employee on October 27, 1993. Id.

[7] In his March 29, 1995, report to the employee's attorney, Dr. Wengler explained that [t]he issue with respect to discogenic pain could easily be put to rest by the discogram/CT procedure, adding that [i]f disc pathology is not demonstrated it is probable that [the employee] sustained a traction injury and [a] normal MRI examination of the brachial plexus does not rule this out.

Temporary Total Disability between February 1994 and April 1996[8]

The employer and insurer suggest that, even if we do affirm a Gillette injury in October of 1993, the judge's award of temporary total disability benefits is unsupported by substantial evidence on other grounds during four specific periods identified by the compensation judge: February 1, 1994, through March 1, 1995; March 1, 1995, through September 29, 1995; September 18, 1995, through December 6, 1995, and September 29, 1995, through April 3, 1996.[9] We are not persuaded.

February 1, 1994, through March 1, 1995

The employer and insurer contend that, [t]o the extent that Judge Patterson previously found that the Employee was released to work, and should have been working during this time frame, Judge Patterson's award o[f] benefits from February 1, 1994 through March 1, 1995 must be reversed. As we affirmed earlier, the employee was still subject to his treating doctors' restriction from working as of the date of the previous hearing and was not obligated to be searching for work at that time, given that that restriction was affirmably consequent to a work injury to his cervical spine in October 1993. The employer and insurer do not contend that the employee was released from that same injury-related restriction from work prior to March 1, 1995. In that it was not unreasonable for the compensation judge to conclude that the employee remained restricted by his doctors from working due to his work-related cervical problems continuously during the period here at issue, we affirm the judge's award of temporary total disability benefits from February 1, 1994, through March 1, 1995. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

March 1, 1995, through September 29, 1995

On February 22, 1995, Dr. Lessard released the employee to return to work as of March 1, 1995. In Finding 13, the compensation judge acknowledged that goals set out in the April 1995 JPPA . . . were not entirely met by either the employee or the placement vendor. In Finding 14 she found also that the QRC and the vendor were having trouble contacting the employee from May 25, 1995, through September 1995. She concluded in that same finding, however, that the employee's testimony and medical records demonstrated that in the summer of 1995 the employee was having many episodes of increased pain that interfered with his ability to

[8] The employer and insurer nominally contest the judge's award of benefits into June 1996, but they brief that contention only with regard to benefits through April 3, 1996. Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court. See Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).

[9] These periods are distinguished in the judge's findings by the distinct rationale that the judge asserts for her award of benefits during each; where the periods overlap, multiple rationales apparently apply.

drive his car and look for work. This interference was sufficient, she concluded, to render adequate the employee's cooperation with rehabilitation during the period. The employer and insurer assert that the employee did not provide any evidence regarding any job search activities during the period, that he did not provided any testimony regarding his ability to drive a car and how it related to his search for work, and that he [i]n fact, . . . did not provide any testimony regarding his condition during this time frame. They argue furthermore that not only did the employee fail to fulfill obligations under his rehabilitation plan during the period but, according to reports of Teleserve, a professional job search analyst, any job search logs that the employee was keeping at the time were apparently falsified. This is a difficult issue, but we are unpersuaded that the compensation judge's decision was unreasonable.

We acknowledge that evidence regarding the employee's job search activities exists only in the records of the employee's rehabilitation providers and in the reports of job search analyst Teleserve, submitted into evidence by the employer and insurer. That evidence suggests that the employee's job search during this period was certainly less than ideal, and the reports of Teleserve do constitute evidence that the employee's job search records may not be entirely credible in every part. However, although the employee may not have offered hearing testimony as to his physical condition and ability to drive a car during the period, the employee's rehabilitation records contain substantial evidence that he was subject to substantial restrictions during the period,[10] and they also contain about thirty references to the employee's ongoing complaints of often severe pain, including spasm, pain while driving, pain that was evident during and distracted him during job interviews, pain that restricted his sleep at night, and pain that otherwise intruded on the effectiveness of his search for work.[11] Those records also contain a response from Dr. Lessard to a query from QRC Winkelman as to further treatment recommendations, in which the doctor indicates that the employee is currently under [prescription medication]. Furthermore, although it is evident that the employee's job search efforts and communication with his rehabilitation providers were clearly less than ideal during the period, less than ideal behavior and less than perfect compliance in rehabilitation efforts do not compel a denial of benefits. See McGrew v. Independent School Dist. #196/Rosemount, No. *[redacted to remove social security number]* (W.C.C.A. Jan. 22, 1992) (the statute requires of an employee only "a good faith effort [to comply with the rehabilitation plan], not perfect compliance"). There was evidence that the employee was making at least some employment contacts during the period at issue, sometimes accompanied by a placement coordinator or QRC. Moreover, notwithstanding

[10] The employee's rehabilitation status report for March 21, 1995, reiterates that Dr. Lessard's release of the employee to return to work on March 1, 1995, was conditional on Athe following indefinite restrictions: no lifting, pushing or pulling greater than 20 pounds, no repetitive use of the upper extremities, and no use of the upper extremities overhead or above chest level.@

[11] See, for instance, the records of QRC Julie Winkelman dated March 24, April 3, May 4, May 25, June 15, July 6, and August 18, 1995; the reports of Placement Coordinator DeAnna Torgerson dated April 11, May 4, May 25, June 15, July 6, and August 18, 1995; and the memorandum of Job Developer Julie Conzemius dated August 4, 1995.

some references to communication difficulties and to the job developer's follow-up investigation of four apparently questionable job contacts reported by the employee late in the period,[12] there is little if any clear evidence in the rehabilitation records that the employee's rehabilitation team was in any demonstrable way unsatisfied with the employee's cooperation during the period.[13] Given this evidence, we cannot say that it was unreasonable for the compensation judge to conclude that the employee did not demonstrate sufficiently poor cooperation with rehabilitation efforts to preclude an award of benefits for the period at issue. Cf. DeLeon, No. *[redacted to remove social security number]* (W.C.C.A. Feb. 17, 1995). Therefore we must affirm that conclusion. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

September 18, 1995, through December 6, 1995

The compensation judge awarded temporary total disability benefits from the middle of September 1995 through the beginning of December 1995, partly on grounds that during that period the employee was receiving medical treatment from Dr. Guernsey that substantially interfered with the employee's ability to look for work and would have prevented him from regularly performing at a full time job even if offered. The employer and insurer contend that this basis for the employee's claim was never asserted at the hearing, that the judge thus has created an argument on which to base her award of benefits, and that substantial evidence does not at any rate support this conclusion of the judge even if the basis is permitted. We do not agree.

The employee's total wage replacement claim was for a period spanning four full years--from February 1994 to the February 1998 date of hearing. In support of that claim, the employee submitted the medical records and opinions of some fifteen or more physicians, including the records of pain specialist Dr. Guernsey, whose particular treatment spanned only four months. The employee was alleging at hearing that he was limited in his search for work during the period of his claim by the severity of his symptoms and that he had searched for work during that period to the extent that his condition permitted. That he may not at hearing have related specific medical records to his claims to benefits for specific periods of alleged disability is not dispositive.[14] It was not unreasonable for the compensation judge to look at the totality of

[12] See the memorandum of Job Developer Conzemius dated August 11, 1995.

[13] Indeed, on May 25, 1995, Placement Coordinator Torgerson concluded that the employee had followed up with most of the job leads provided to him; on July 6, 1995, she reported that the employee's job logs were being more accurately completed; on July 27, 1995, she commended the employee for having successfully increased his efforts in maintaining contact with the job developer; and on August 18, 1995, as she had done before, she commended the employee's verbal contact, body posture, and eye contact during interviews.

[14] So far as we can determine, the four periods of disability here at issue were not distinguished until the compensation judge distinguished them in her Findings and Order. One of the stated issues for decision listed in that Findings and Order was [f]or what time spans, if any, between February 1, 1994 and the date of hearing has the employee been entitled to temporary

the evidence in reaching her conclusions as to the employee's claim and to break up the whole period of the claim into compensable and noncompensable time spans accordingly. During most of the 2.5-month time span here at issue, the employee was subject to the effects not only of his pain but also of a broad variety of injected and other medications. Dr. Guernsey's records indicate that he scrupulously warned the employee that these medications might cause drowsiness and other disabling side effects,[15] and rehabilitation records report that Dr. Guernsey had advised the employee not to drive while under their influence. In these circumstances, while the supporting evidence is not strong, it was not unreasonable for the judge to conclude that the employee was effectively disabled totally by his injury-related medical treatment during the period at issue. Therefore we affirm that conclusion of the judge. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

September 29, 1995, through April 3, 1996

The compensation judge awarded temporary total disability benefits from the end of September 1995 through the beginning of April 1996 because Dr. Guernsey's care had effectively precluded the employee from performing a sustained work search and accepting full time work in the fall of 1995 and because the employee did not have a clear release for work until April 3, 1996. The employer and insurer contend that this conclusion misplaces the burden of proof, that the burden should have been on the employee to show that he was restricted from working during this time, not on the employer and insurer to show that the employee was released to work. Since the employee has not made such a showing, they argue, the judge's award of benefits for this period is unsupported by substantial evidence. To the extent that this period post-dates December 6, 1995, the date on which Dr. Guernsey informed the employee's QRC that he was discontinuing treatment of the employee, we agree.

As we have already affirmed, Dr. Guernsey's treatment of the employee near the end of 1995 was reasonably tantamount to a restriction from working through December 6, 1995, and we reiterate our affirmance of benefits through that date. Subsequent to that date and prior to Dr. Lessard's express concurrence in the employee's FCE report on April 3, 1996, however, the

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total disability benefits?.

[15] Dr. Guernsey's prescriptions included the following: a suprascapular nerve block; a muscle relaxant to counteract upper back and neck muscle tension, regarding which he warned the employee of side effects such as seizures and drowsiness in addition to gastrointestinal disturbances; an anticonvulsant to counteract radicular pain, regarding which the employee was warned again of drowsiness side effects and also of the need to taper slowly to prevent withdrawal once he was up to significant dosages; cervical epidural steroid injections to counteract the employee's radicular pain, regarding which the employee was warned that risks could include but were not limited to bleeding, infection, no effect on the pain, increased pain, spinal cord damage, headache, and steroid side effects; other medications, regarding which the doctor reiterated warnings of drowsiness and other side effects; and warm compresses.

employee was apparently subject once more to Dr. Lessard's March 1, 1995, release to work. No evidence was offered that the employee was restricted by his work injury from working after December 6, 1995, or that he conducted any reasonably diligent job search at all thereafter until Dr. Lessard expressly accepted the FCE report on April 3, 1996, formally reiterating that the employee was still capable of working with restrictions. The compensation judge herself indicated in her memorandum that Dr. Wengler's late March 1995 opinion that the employee was totally disabled from working was expressly not accepted because it is clear that Dr. Wengler was expressing the opinion that the employee could not go back to farm equipment driving or maintenance . . . and not expressing an opinion on the employee's restrictions with respect to the entire labor market (emphasis added). Moreover, prior to April 3, 1996, neither Dr. Lessard nor ultimately Dr. Guernsey would offer an opinion concurring with Dr. Wengler's total restriction from work, even though both were given express opportunity to do so by the employee's QRC.[16] It was the employee's burden to present evidence that he had a diminution in earning capacity causally related to his work-related disability, see Krotzer v. Browning Ferris/Woodlake Sanitation, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990), not the employer and insurer's burden to present evidence to the contrary. Finding on review no presentation of such evidence with regard to the partial period here at issue, and concluding that the compensation judge imposed an improper burden of proof with regard to that period, we reverse the judge's award of benefits from December 7, 1995, through April 3, 1996.

12% Permanent Partial Disability

Finally, the employer and insurer contend that substantial evidence does not support the compensation judge's conclusion that the employee sustained a 12% permanent whole-body impairment as a result of his cervical condition, pursuant to Minn. R. 5223.0370, subp. 4D(1). They argue that the employee does not meet the fourth requirement for a rating under that rule--that medical imaging findings correlate anatomically with findings on neurologic examination. Again, we are not persuaded.

By the time he moved from Minnesota in June of 1996, the employee had been treated or examined for pain in his neck and shoulder virtually continuously for over three years, by some fifteen or more different physicians of various specialties. Several of these physicians, including Dr. Wengler, made findings confirming symptomology either at or potentially stemming to the C6-7 level of the employee's spine. Aside from Dr. Wengler's discogram/CT study, however, radiographic studies had not supported a radicular problem at the C6-7 level. The discogram ordered by Dr. Wengler revealed only nonconcordant pain at all studied levels other than C6-7, and apparently only mixed responses initially at C6-7, with findings radiat[ing] up and down the spine into the right shoulder and then into the left arm. The concordance of the

[16] See the status reports and records of QRC Winkelman dated September 8, 1995, October 31, 1995, December 6, 1995, and December 27, 1995.

pain in the neck and shoulder was ultimately ten out of ten, however,[17] and, given that the scan had revealed abnormal morphology also at C6-7 now, Dr. Wengler concluded, apparently in consultation with the radiologist,[18] that [t]o the best of our ability to determine, the abnormalities at C6-7 were the most likely cause of the employee's radicular-like symptoms. We conclude that this assessment was reasonably certain enough to be relied on by the compensation judge, and that it does constitute expert medical correlation of radiological with neurological findings. Because it was reasonable for the judge to rely on Dr. Wengler's opinion, we affirm the compensation judge's rating of the employee's permanent partial disability. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. 239.

[17] See Dr. Wengler's report to the employee's attorney dated June 23, 1995.

[18] According to Dr. Wengler's office notes on the date of the discogram/CT, The radiologist felt that the index of suspicion at C6-7 was the greatest.