CYNTHIA FENNIG, Employee, v. TRANSCOM, INC., and FEDERATED MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 19, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE; JOB SEARCH. Where the employee's medical and employment records reasonably indicated that she resigned from her job at least in part because of her work injury, and where hearing testimony and employment records reasonably indicated that the employee remained off work for about three months thereafter with a reasonable expectation of returning to work with the employer, the compensation judge's award of temporary total disability benefits for three months after the employee's resignation was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the employee conducted no reasonably diligent job search during the period at issue.

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY; JOB SEARCH; EVIDENCE - BURDEN OF PROOF. Even where a disabled employee is released to work full time but is only working part time, evidence of a reasonable and diligent job search is not a legal prerequisite to an award of temporary partial disability benefits but is only "evidence which the compensation judge *may* consider in determining whether the employee's wage loss is causally related to the work injury." Where the employer and insurer's appeal from the judge's imposition of the presumption was based only on the employee's failure to search for work, the WCCA declined to find improper the compensation judge's imposition of the rebuttable presumption provided for in Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989), that an employee's actual post-injury wages earnings reasonably reflect the employee's actual earning capacity absent a showing by the employer and insurer of "something more than a theoretical possibility of a [different] position or wage."

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Although the disabled employee had been released to return to work full time but was working at a wage loss only part time, where the employer and insurer made no showing of "something more than a theoretical possibility of a [different] position or wage," pursuant to Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989), the compensation judge's award of benefits based on the employee's post-injury wages was not clearly erroneous and unsupported by substantial evidence in light of factors articulated in Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995), notwithstanding the employee's testimony that her post-injury job just "sort of fell in my lap."

PRACTICE & PROCEDURE - INDEPENDENT MEDICAL EXAMINATION; STATUTES CONSTRUED - MINN. STAT. § 176.155, SUBD. 3. Where the employee had canceled a scheduled IME at the advice of a very recently retained attorney prior to incurring any reserved

time charges, but then had undergone an IME with another doctor at a later date, suspension of wage replacement benefits during the period of the employee's refusal was up to the sound discretion of the compensation judge, and the judge's award of benefits for the full period of the employee's claim, without suspension during the period of refusal, was not improper.

MEDICAL TREATMENT & EXPENSE - SURGERY. Where it was supported by expert medical opinion, the compensation judge's award of payment for exploratory shoulder surgery was not clearly erroneous and unsupported by substantial evidence.

REHABILITATION - SUBSTANTIAL EVIDENCE. Where substantial evidence had supported the compensation judge's conclusion that the employee's resignation from her job with the employer was related to her work-injury, the compensation judge's award of rehabilitation benefits was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

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 awards of temporary total disability, temporary partial disability, medical, and rehabilitation benefits. We affirm.

BACKGROUND

On February 19, 1996, Cynthia Fennig sustained a work-related injury to her left shoulder as a result of lifting some heavy boxes in the course of her employment as an assistant warehouse manager with Transcom, Inc. Transcom, Inc. [the employer], and its insurer admitted liability and commenced payment of benefits. At the time of her injury, Ms. Fennig [the employee] was thirty-two years old and was earning a weekly wage of $460.00. Her education at the time consisted of a GED and some community college courses in first aid and law enforcement. Her prior work history at the time consisted mostly of jobs in the food service industry and a self-employment venture as a window washer.

Subsequent to her injury, the employee saw orthopedic surgeon Dr. Robert Hartman. On March 5, 1997, Dr. Hartman diagnosed impingement syndrome, prescribed medication, icing, and stretching, and administered a corticosteroid injection, recommending that the employee limit her lifting, pushing, pulling, and carrying to twenty pounds or less and avoid overhead positioning of her arm. After none of these measures proved effective, on April 22, 1997, Dr. Hartman performed an arthroscopic decompression of the employee's left shoulder and

an arthroscopic distal clavicle excision. The surgery left the employee with a 3% permanent partial disability of the whole person and, the employee being left handed, a significant permanent impairment in her dominant arm.

About three weeks after the employee's surgery, Dr. Hartman released the employee to return to work May 19, 1997, restricted for six weeks from lifting, pushing, pulling, or carrying anything over twenty pounds and from any repetitious overhead use of the arm. Upon her return to work on Monday May 19, 1997, the employee was assigned to the employer's boxing room, where her work entailed feeding empty and still flattened cartons of various sizes through a labeling machine. The employee evidently performed this job for about a day and a half before complaining to her supervisor, Dennis, and then to her Human Resources Manager, Laurie Stern, that her arm was hurting. The employee was permitted to call Dr. Hartman, who apparently recommended that the employee be transferred to work that was less repetitious.[1] Subsequently the employee was assigned to do filing tasks in the office. She evidently continued to feel pain with this work, and on Wednesday May 21, 1997, she called the employer to say that her shoulder was inflamed and that she would not be coming in. She did not report for work or otherwise communicate with the employer for several days thereafter.

According to a "Note for the file" signed by Ms. Stern, Ms. Stern called the employee at home on May 28, 1997, to ask "how she was doing" and to inform her that "if she is not back on Monday, she will lose her job." The employee reportedly "said the arm was sore. She also said that she was in the midst of having to sell her house in the next three weeks." Ms. Stern evidently told the employee "that she needed to have the doctor's office fax me a note for last week's absence and that she could use personal time for this week." On Monday June 2, 1997, instead of reporting for work, the employee called in and left a message for Ms. Stern, resigning from her job, explaining in part, "I can't do it anymore." The employee was apparently in the process of selling her house as a consequence of bankruptcy proceedings at the time, and two days later she wrote a lengthy personal letter addressed to both Ms. Stern and the employer's president, John Rice, further explaining her resignation. In that letter, she stated in part, "life just gets tougher & tougher and th[r]ough the situation with being layed up with my arm and now losing my house it has been too much. I felt I had no choice in having to quit Transcom." She stated also in that letter, "the other reason[,] which is minimal, happens to be Dennis. . . . . [H]e made me feel as if what happened to my arm had cramped <u>his</u> style, and he was quite rude to me because of it, and made me feel very unwelcomed" (emphasis in original). Finally, she stated also as follows:

> [W]hen I came from the Dr's that day and I showed [Dennis] the paper that had m[y] restrictions on it and told him I could finally

[1] Dr. Hartman's written restrictions had not contained a restriction on repetitive motion below shoulder level, but the employee testified that, upon her calling the doctor's office on May 20, 1997, she was told that such a restriction would be faxed over to the employer if required, and immediately thereafter she was transferred out of the boxing room job.

> come back, he looked at it and said and I quote "You might as well be dead, there is nothing for you to do here." . . . . So that is also why I quit. I don't like the situation with my arm any[]more th[a]n he did. It didn't just inconven[i]ence my job, it did my whole life.

By letter dated June 5, 1997, Mr. Rice wrote back to the employee, wishing her well after "what I know has been a very difficult personal time" and thanking her for her comments about her "problems with Dennis." Near the end of the letter, Mr. Rice stated, "If things do clear up, I hope you will give us an opportunity to work with you once again." About a month later, sometime in July 1997, the employee called Ms. Stern to inquire into the prospects of returning to work at the employer, and she was told that no light duty work was currently available. For about two months thereafter, the employee neither worked nor actively looked for work.

In September of 1997, the employee worked for about a week and a half at a job with a messenger service, which was evidently terminated upon the employee's learning that she was required to lift and deliver boxes over twenty pounds, as opposed to more exclusively envelopes as the employee had expected. On September 25, 1997, the employee returned to see Dr. Hartman, complaining of recurrent left shoulder pain. Dr. Hartman concluded that the pain might be related to scarring in the employee's acromioclavicular joint, and by a report dated October 13, 1997, he indicated that the employee had reached maximum medical improvement [MMI] from her work injury subject to a 3% permanent partial disability. On October 23, 1997, however, he informed the insurer that he was recommending an MRI scan "to help identify the persistent problem." The scan, conducted two days later, revealed only some borderline abnormal subacromial bursal thickening and bursitis, without evidence of any impingement, rotator cuff tear, or tendinitis, and Dr. Hartman referred the employee for a second opinion from Dr. Mark Rodosky. In his report on November 6, 1997, Dr. Rodosky indicated that he found the employee's MRI scan "essentially normal," concluding that the most likely cause for the employee's continued symptoms was scar formation in and around her surgical sites. Dr. Rodosky recommended that any surgery be delayed four to six months and that, if the employee's symptoms continued unrelieved after that period of time, "then an exploratory arthroscopic surgery with removal of more clavicle bone, if necessary, could be entertained."

On January 8, 1998, the employee saw Dr. Hartman with complaints of continuing shoulder pain with even minor activities, which was making it difficult for her to sleep at night and was making pushing, pulling, lifting, and carrying virtually impossible. On that basis, and notwithstanding the fact that the employee's shoulder had appeared essentially normal on her MRI scan except for the bursa problem, Dr. Hartman recommended that the employee undergo an exploratory arthroscopic examination of both the subacromial and glenohumeral spaces. He noted that the employee's symptoms were most consistent with impingement at the AC joint and anticipated that, "[i]n all likelihood, she will require an open resection of the remaining portion of the distal clavicle."

The employee evidently sought and was denied approval for the surgery. By letter dated January 19, 1998, she was informed that she had been scheduled for an independent medical

examination [IME] with Dr. Scott O'Conner on February 4, 1998. The letter indicated that a cancellation fee would be assessed "unless the exam is canceled or rescheduled . . . on or before January 30, 1998," and that "assessment of a cancellation fee may . . . result in a suspension of benefits" (emphasis added). The employee sought legal counsel, and on January 27, 1998, she wrote to the insurer to document a call the previous day, informing the insurer that her attorney had advised her to cancel the scheduled IME with Dr. O'Conner. The IME was thereupon canceled prior to the January 30, 1998, deadline.

On February 5, 1998, the employee began working part time as a live-in caretaker at an apartment complex, a job she still held on the date of the eventual hearing. At the time she took the job, her last employment had been her week and a half's work at the messenger service in September of 1997, and she had not actively looked for work in about four months. Her duties as a caretaker are to show apartments, pick up the hall, change light bulbs, vacuum, mow the lawn, and perform various other miscellaneous tasks. Her compensation for this work consists of rent-free use of an apartment and garage with a reasonable rental value of $540.00 a month, or $125.58 a week.

On about March 11, 1998, the employee's attorney filed a Claim Petition for the employee, alleging entitlement to various benefits consequent to her February 19, 1997, left shoulder injury. In addition to entitlement to a rehabilitation consultation and approval of the surgery that Dr. Hartman had recommended, the petition alleged entitlement to temporary total disability benefits continuing from June 1, 1997, or, in the alternative, temporary total benefits from June 1, 1997, to February 4, 1998, and temporary partial benefits continuing from February 5, 1998. In their Answer to that petition on March 26, 1998, the employer and insurer specifically alleged that the employee voluntarily terminated her employment with the employer on June 1, 1997, for reasons "completely unrelated to any disability," indicating that the employer "has light duty work available for the employee and has had light duty work available for her since the date that she left her employment."

On May 19, 1998, the employee was examined for the employer and insurer by Dr. Elmer Salovich. Noting that neither Dr. Hartman nor Dr. Rodosky, "both of whom are excellent orthopedists," could establish a definite diagnosis of the employee's problems, Dr. Salovich concluded in his report on June 25, 1998, that surgery was not indicated. Dr. Salovich also concluded that the employee was permanently partially disabled, and he recommended that she avoid any lifting over thirty pounds and any strenuous and repetitious use of her left arm at shoulder level or above. On June 3, 1998, Dr. Hartman testified by deposition. In the course of that testimony, he indicated that, while the employee's MRI scan did not show any continuing shoulder impingement with the employee's arm in the position it was in on the scan, there was a substantial likelihood that the employee was experiencing impingement with her arm in positions other than that captured on the scan.

The matter came on for hearing on June 25, 1998. Issues at hearing included the employee's entitlement to wage replacement and rehabilitation benefits subsequent to June 1, 1997, and her entitlement to the shoulder surgery recommended by Dr. Hartman. When asked on

cross-examination, with regard to her first obtaining her caretaking job, "you weren't looking for [the caretaker] job, were you?", the employee responded, simply, "Kind of sort of fell in my lap," agreeing that she had been informed of the position by the realtor who was in the process of selling the employee's house. The employee testified also that she hopes to look for work other than caretaking, "[o]nce I get my shoulder fixed." By findings and order filed August 18, 1998, the compensation judge concluded in part that the employee was entitled to temporary total disability benefits from June 2 through August 31, 1997, and for the last half of September 1997, that she was entitled to temporary partial disability benefits for the first half of September 1997 and from February 5, 1998, through the date of hearing,[2] that the requested shoulder surgery was reasonable and necessary, and that the employee was entitled to rehabilitation services. 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

Temporary Total Disability

The compensation judge found that the employee was entitled to a total of about fifteen weeks of temporary total disability benefits subsequent to going off work on June 2, 1997. The judge's decision was based in part on conclusions (a) that the employee went off work on that date due to her shoulder condition and (b) that she remained off work for several months thereafter

[2] The judge expressly concluded that the employee had not proven entitlement to temporary total disability benefits from October 1, 1997, through February 4, 1998, as claimed, in that by October 1997, following her brief attempt at employment with the messenger service in September 1997, the employee no longer had a reasonable expectation of reemployment with the employer.

with a reasonable expectation of returning to work with the employer. The employer and insurer contend that the judge's decision is unsupported by substantial evidence. While there is certainly substantial evidence upon which the compensation judge could have reached a contrary decision, we are not persuaded that the judge's decision was unreasonable.

Off Work Due to Shoulder Injury

The employer and insurer argue that, at the time the employee resigned, no doctor had restricted the employee from working, the filing job from which she resigned was within her restrictions, and the employer was both willing and ready to accommodate her physical condition. They argue that, instead of by disability, the employee's resignation was motivated by her personality conflict with Dennis and her obligation to prepare her house for sale. We are not persuaded. The employee's complaints of incapacitating shoulder pain with her work both preceded and postdated her resignation from the employer. Although repetitious below-shoulder work with her arms was not precluded by her written restrictions at the time she resigned, Dr. Hartman had precluded repetitious arm work above shoulder level, and he apparently extended that restriction orally to repetitious below-shoulder arm work when the employee called him from work on May 20, 1997. Moreover, the employee called in the following day to inform Ms. Stern that her shoulder was inflamed. Certainly the record documents the fact that even the employee's "personality problems" with her supervisor, Dennis, were frequently related directly to her injury-related restrictions. Moreover, the employer and insurer's contention in their March 26, 1998, Answer to the employee's Claim Petition, that light duty work was always available to the employee at the employer, is contradicted by Ms. Stern's own testimony that there was no work available for the employee when the employee called back in July inquiring as to reemployment. Nor did the employee ever indicate that the obligation to prepare her house for sale would have kept her from working were it not for her shoulder problems. In virtually every documented explanation by the employee of her reasons for resigning, shoulder pain is basic. In light of this and other evidence of record, it was not unreasonable for the compensation judge to conclude that the employee's shoulder injury was a substantial factor in her resignation from her job on June 2, 1997.

Reasonable Expectation of Return

An injured employee who has been released to return to work but is still not working must prove that his total wage loss is causally related to his work injury in order to obtain workers' compensation benefits, and generally this causal relationship is demonstrated by evidence of a reasonably diligent search for suitable employment. See Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). This obligation to search for work, however, may be suspended where such a job search would be futile, see Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188-89, 30 W.C.D. 426, 432 (Minn. 1978), or where the employee has a reasonable expectation of returning to work with the date-of-injury employer in the near future. See, e.g., Lundberg v. Bemidji Ambulance Serv., slip op. (W.C.C.A. May 22, 1998). The compensation judge's award of temporary total disability benefits in this case was based in part on

a conclusion that, although she performed no job search during the period, the employee had a reasonable expectation between June 2 and August 31, 1997, of returning to work with the employer upon improvement of her symptoms. The judge's decision was based in important part on the June 5, 1997, letter from the employer's president, John Rice, to the employee, in which Mr. Rice expressed a hope that, "[i]f things do clear up, I hope you will give us an opportunity to work with you once again." The employer and insurer contend that Mr. Rice's letter was "simply a nice gesture . . . to wish the Employee a fond farewell." We are not persuaded. The notably very personal tone of both the employee's own earlier letter to Mr. Rice and this response of Mr. Rice to the employee compel the conclusion that Mr. Rice's apparent invitation - - indeed "hope" - - of reemployment could reasonably be taken by the employee to be sincere. Particularly in light of Mr. Rice's June 5 letter, it was not unreasonable for the compensation judge to conclude that the employee had a reasonable expectation of returning to work for the employer once her shoulder symptoms subsided.

Because it was not unreasonable for the compensation judge to conclude that Ms. Fennig went off work in June 1997 because of her left shoulder condition and that she remained off work thereafter, through August 31, 1997, with a reasonable expectation of returning to work for the employer, we affirm the judge's award of temporary total disability benefits to Ms. Fennig.[3] See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Temporary Partial Disability

In order to establish entitlement to benefits for temporary partial disability, an employee must be working and earning at an actual loss of earning capacity that is causally related to her work injury. See Dorn v. A. J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). Once an employee is so working and earning, the employee's actual post-injury earnings are usually presumed to be a fair measure of her current earning capacity, absent a showing by the employer and insurer of "something more than a theoretical possibility of a [different] position or wage." Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989). Noting that the employee was without professional rehabilitation assistance, the compensation judge indicated in Finding 21 that her award of temporary partial disability benefits continuing from February 5, 1998, was based on a conclusion that "[t]he employer and insurer in this case have not carried the burden of showing that the employee's actual earnings [at her caretaking job] are not a measure of her actual earning capacity." The employer and insurer contend that the compensation judge erred in imposing a "[r]esponsibility [t]o [r]ebut" and that, because the employee's lack of vocational assistance did not relieve her of an obligation to conduct at least some job search during the period at issue, the "burden of proof in this case never shifted."

[3] The employer and insurer do not brief any contention that the employee is not entitled to the temporary total disability benefits awarded her for the half-month period at the end of September, during which the judge concluded that she was making diligent efforts to become reemployed as a messenger for a delivery service. Therefore we deem the issue waived. See Minn. R. 9800.0900; see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).

In the alternative, they contend that, even if the burden of proof did shift to the employer and insurer, substantial evidence does not support the judge's conclusion that the employee's actual earnings at her caretaker job reflect a loss of earning capacity that is causally related to her work injury. Apparently as a second alternative, they also contend that, by not complying with the originally scheduled IME with Dr. O'Conner on February 4, 1998, the employee forfeited entitlement to all wage replacement benefits between February 4, 1998, and May 19, 1998, the date of her eventual IME with Dr. Salovich. We are not persuaded.

Rebutable Presumption/Obligation to Search Without Assistance

As the employer and insurer note, this court observed in 1991, in affirming a compensation judge's denial of benefits, that "generally, entitlement to temporary partial disability is established by a diligent job search resulting only in employment at a wage loss." Caron v. Beatrice/Hunt Wesson, slip op. (W.C.C.A. 1991). The employer and insurer contend that the compensation judge erred in applying the earning capacity presumption in this case, in that the employee's caretaker job offer simply "fell into [her] lap" and was neither the result of nor followed by any job search. However, while it remains true that an employee's entitlement to temporary partial disability benefits might "generally" be established by a diligent job search, we have also explained that a reasonable and diligent job search is "not a legal prerequisite to an award of temporary partial disability benefits." Nolan v. Sidal Realty Co., 53 W.C.D. 388, 394 (W.C.C.A. 1995) (emphasis added). This is true even where, as here, the employee is released to work full-time but only works part-time; "[i]f a part-time position is all that the employee is able to obtain because of the disability, the employee is entitled to benefits." Id., citing DeNardo v. Divine Redeemer Memorial Hosp., 450 N.W.2d 290, 293, 42 W.C.D. 626, 631-632 (Minn. 1990). Instead of being a requirement, evidence as to the extent of the employee's job search is merely "evidence which the compensation judge *may* consider in determining whether the employee's wage loss is causally related to the work injury." Id., citing Johnson v. Axel Ohman, 48 W.C.D. 198 (W.C.C.A. 1992) (emphasis added). We acknowledge that the absence of vocational assistance does not relieve an employee entirely of an affirmative obligation to prove a reasonably diligent search for work. However, because the compensation judge was under no legal obligation to consider evidence as to the diligence of the employee's job search in reaching her conclusion,[4] and because the absence of a job search is the only basis for the employer and insurer's argument on this issue, we decline to reverse on grounds that the judge erred as a matter of law in imposing the rebuttable presumption provided for in Patterson.[5]

[4] Thus relieving the employee of any affirmative obligation to prove a diligent search.

[5] Even had the compensation judge chosen to consider evidence of the employee's job search in this case, we would be reluctant to make legally dispositive, for purposes of triggering the presumption here at issue, the employer and insurer's distinction between jobs that one affirmatively "finds" and jobs that more easily "fall into one's lap."

Substantial Evidence of Lost Earning Capacity

The employer and insurer contend in the alternative that, even if the burden of proof is shifted to the employer and insurer to rebut the earning capacity presumption, the judge's finding of a loss of earning capacity causally related to the work injury is unsupported by substantial evidence. This is a close issue, and here too there exists evidence upon which the judge might well have drawn a contrary conclusion, but again we conclude that the judge's decision was not unreasonable or otherwise unsupported by substantial evidence.

We note initially that the "rebuttable presumption" provided for in Patterson does not entirely relieve an employee of her own and continuing "burden of proof" under Dorn, to show that she is working with an injury-related loss of earning capacity. The employee continues to carry, in temporary partial just as in temporary total disability cases, "the burden of establishing a diminution in earning capacity that is causally related to the disability." Nolan, 53 W.C.D. at 393, citing Arouni v. Kellheher Constr., Inc, 426 N.W.2d 860, 864, 41 W.C.D. 42, 48-49 (Minn. 1988). That is, even absent a showing by the employer and insurer of "something more than a theoretical possibility of a [different] position or wage,"[6] the compensation judge must still find that the employee's "return to work [is] genuine and at a bona fide job,"[7] that her earnings at that job are "not . . . 'sporadic and insubstantial income . . . [in]sufficient to establish gainful employment,'"[8] and that the post-injury wage loss reflected by these earnings is causally related to the work injury.[9] In making the latter determination, a compensation judge may consider, in addition to evidence of the employee's job search, see Nolan, 53 W.C.D. at 394, such things as the following: "testimony about the relevant labor market, the nature of the employee's disability and the employee's age, education, skills and experience," id., citing Jerabek v. Teleprompter Corp., 225 N.W.2d 377, 29 W.C.D. 621 (Minn. 1977), together with "the number of hours the employee worked during a pay period, the salary or hourly wage earned, the reason the employee worked less than full-time, the number of hours available with the employer, and the size of the wage loss." Id.

The compensation judge's findings on this issue are few, but the judge's decision and award are nevertheless supported by substantial evidence. Prior to her work injury, the employee was earning a weekly wage of $460.00. The employee's compensation for her post-injury work as a caretaker was evidently "in kind" compensation - - rent-free use of an apartment and a garage. The employee offered uncontroverted evidence that this compensation had a value of $540.00 a month, or $125.58 a week. Moreover, the judge accepted this evidence and in

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[6] Patterson, 42 W.C.D. at 875.

[7] Lindsay v. Yellow Freight Sys., No. [REDACTED SSN] (W.C.C.A. May 14, 1996).

[8] Nolan, 53 W.C.D. at 393, quoting Hubbell v. Northwoods Panelboard, 45 W.C.D. 515, 517 (W.C.C.A. 1991).

[9] See Nolan, 53 W.C.D. at 394, citing Johnson.

Finding 22 concluded expressly that these earnings were "neither sporadic or insubstantial,[10] because [the employee] had a regular job which paid her more than half the minimum wage." This was not an unreasonable conclusion, particularly in light of precedents cited by the employer and insurer.[11] In Findings 18 and 21, those pertaining most directly to her award of temporary partial disability benefits for the period here at issue, the judge made no reference to the virtual absence of any job search on the part of the employee. It appears, however, that she did consider that fact in the process of her decision, by her observation in Finding 21 that the employee "still did not have available to her professional [rehabilitation] assistance" during the period at issue. The judge made no reference to the labor market or to the employee's age, education, skills, or experience in the context of Findings 18 and 21, nor did she identify specifically the number of hours the employee was working at her part-time job. The record amply documents the nature of employee's work-injury, however, and the chronicity of her complaints of shoulder pain in the context of several attempts to return to work. Moreover, the judge expressly referenced in Finding 21 the fact that the employee was "await[ing] the outcome of her claim for surgery," and the employee testified that she intended to search for more work upon successful completion of the surgery she sought and was being denied.

Given this evidence, and in light of the fact that the employer and insurer have offered virtually no evidence at all that "something more than a theoretical possibility of a [different] position or wage" exists for Ms. Fennig, it was not unreasonable for the compensation judge, under the presumption provided for in Patterson, here properly applied, to conclude that Ms. Fennig's earnings at her caretaking job sufficiently reflected her earning capacity, and that the loss of earning capacity reflected in those earnings was sufficiently causally related to her work injury, to entitle her to an award of the temporary partial disability benefits at issue. Therefore we affirm the judge's award of benefits continuing from February 5, 1998. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Refusal to Undergo IME

The employee was scheduled to undergo an IME with Dr. O'Conner on February 4, 1998, but canceled the examination at her newly retained attorney's advice, apparently to permit the new attorney to become better briefed on her case prior to her undergoing the examination.[12]

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[10] See Nolan, 53 W.C.D. at 393, quoting Hubbell, 45 W.C.D. at 517.

[11] The employer and insurer have based their argument for denial of benefits importantly on precedents in Herrly v. Walser Buick, slip op. (W.C.C.A. 1988), and in Caron v. Beatrice/Hunt Wesson/ Gallagher Basset, slip op. (W.C.C.A. Aug. 12, 1991), cited above. In Herrly, benefits were denied to an employee who was earning less than $50 a week for six or seven hours of work performing house-sitting chores for his parents while they were away for the winter. In Caron, benefits were denied to an employee who was earning about $60 a week for about fifteen hours of work a week as a babysitter.

[12] In unappealed Finding 20, the compensation judge concluded in part, "In January 1998,

The employee eventually did undergo an IME on a later date, with Dr. Salovich on May 19, 1998. The employer and insurer contend that, by declining to be examined by Dr. O'Conner in February 1998, the employee forfeited all wage replacement benefits thereafter until her eventual examination with Dr. Salovich, pursuant to "the clear language" of Minn. Stat. § 176.155, subd. 3. We are not persuaded.

Minn. Stat. § 176.155, subd. 3, provides, "If the injured employee refuses to comply with any reasonable request for examination, the right to compensation may be suspended by order of the commissioner or a compensation judge, and no compensation shall be paid while the employee continues in the refusal" (emphasis added). The "clear language" of the statute is that an employee's benefits "may" (not "shall") be suspended by order of a compensation judge for the employee's refusal to comply with an IME request. We construe the second clause of the provision, that "no compensation shall be paid while the employee continues in the refusal," to be inapplicable until such an order has been issued. We conclude that Minn. Stat. § 176.155, subd. 3, very apparently leaves suspension of benefits to the sound discretion of a judge. While we are not convinced that the newness of Ms. Fennig's relationship with her lawyer is a very substantial reason for postponing an IME, we do not believe that the judge abused her discretion under the statute, and we decline to reverse the judge's award of benefits for the period at issue on grounds of Ms. Fennig's postponement of attendance at an IME.

Shoulder Surgery

The compensation judge concluded that the shoulder surgery recommended by Dr. Hartman and requested by the employee was reasonable and necessary in the treatment of the employee's work injury. The employer and insurer contend that the judge erred in this conclusion, in that the employee's MRI was essentially normal in the opinion of both Dr. Salovich and Dr. Rodosky. In support of their position they emphasize that Dr. Salovich specifically opined that the surgery was not indicated, while neither Dr. Rodosky nor Dr. Hartman, they argue, was able to establish a definite diagnosis of the employee's condition. We are not persuaded.

While he may have found the employee's MRI essentially normal and may not have been able to establish a definite diagnosis of the employee's condition, Dr. Rodosky did concede that exploratory surgery might be necessary. Moreover, Dr. Hartman affirmatively recommended the exploratory surgery here at issue, contrary to the opinion of Dr. Salovich. A trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985). There is no evidence that Dr. Hartman's opinion was based on any false premises. Particularly given the additional support in the opinion of Dr. Rodosky, it was not unreasonable for the compensation judge to rely on the

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the employee retained an attorney and, on the attorney's advice, canceled the February 1998 IME in a timely manner before any reserved time charges were incurred. After a reasonable time span for investigation of the employee's claims, her attorney filed a claim petition . . . ."

expert medical opinion of Dr. Hartman. Because it was not unreasonable, we affirm the compensation judge's conclusion that the proposed exploratory surgery is reasonable and necessary treatment for Ms. Fennig's work-related injury. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

Rehabilitation Services

Based on their contention all along, that the employee "voluntarily terminated her employment with Employer for reasons unrelated to her work injury," the employer and insurer argue that Ms. Fennig has forfeited any entitlement to rehabilitation benefits.[13] Having earlier affirmed the judge's conclusion that Ms. Fennig went off work for reasons related to her work injury, and because the judge's decision was not otherwise unreasonable, we affirm the compensation judge's award of rehabilitation benefits. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

[13] Pursuant to Minn. R. 5220.0100, subp. 22, an employee is not a "qualified employee" for rehabilitation services unless she "cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer" "because of the effects of a work-related injury or disease" (emphasis added).