

RENEE M. NJOS, Employee/Cross-appellant, v. TORGERSON PROPERTIES (PERKINS OF AUSTIN) and AM. COMP. INS. CO./RTW, INC., Employer-Insurer/Appellants, and MN DEP'T OF HUM. SERVS., MN DEP'T OF LABOR AND INDUS./VOCATIONAL REHAB. UNIT, and MAYO FOUND., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
MARCH 2, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - GILLETTE INJURY; PERMANENT PARTIAL DISABILITY - BACK. Where based on the employee's MRI scan and the history of her low back condition as reported in her medical records, the compensation judge's findings of a Gillette-type low-back injury and of permanent partial disability due to that injury were not clearly erroneous and unsupported by substantial evidence.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE; REHABILITATION - ELIGIBILITY; WITHDRAWAL FROM LABOR MARKET. Where the employee's post-injury schooling to upgrade her clerical and computer skills was pursuant to a QRC's rehabilitation plan, but where that plan was not only unapproved by the insurer on her low back injury, but was also evidently un compelled by that injury and related instead to the employee's earlier neck injury, the compensation judge's denial of temporary partial and rehabilitation benefits for insufficient causal relationship and for withdrawal from the labor market was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J. and Hefte, J.  
Compensation Judge: John E. Jansen

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's finding of a Gillette-type injury and liability for permanent partial disability benefits. The employee cross-appeals from the judge's denial of temporary partial disability benefits and reimbursement for rehabilitation expenses. We affirm.

BACKGROUND

On January 4, 1994, Renee Njos sustained a work-related injury to her cervical

spine while employed as a waitress by Torgerson Properties (Perkins of Austin), insured at the time by Minnesota Assigned Risk Plan/Wausau [Wausau]. Ms. Njos [the employee] saw a chiropractor for her injury, whose diagnosis included “[m]ild low back distress. Minor compared to neck.” On August 20 of that same year, the employee sustained a second work-related injury to her neck, and Torgerson Properties [the employer] and its insurer on that date, United States Fidelity and Guaranty Insurance Company [F&G], paid certain wage-replacement and medical benefits. Subsequent to that injury, the employee’s orthopedist, Dr. Stephen Kazi, restricted the employee from performing any overhead work, and the employee began carrying her food trays against her hip in the course of her work. A year later, on August 4, 1995, the employee sustained yet a third injury to her neck while working for the employer, which was insured on that date by Mid-Century/Farmers Insurance Company [Farmers]. The employee lost no time from work and received no medical treatment immediately subsequent to this injury.

On January 2, 1996, the employee saw Dr. DuCharme for symptoms that now included low back pain and radicular leg symptoms, which the doctor attributed to the employee’s manner of carrying food trays against her hip. Dr. DuCharme referred the employee for a neurosurgical consultation at the Mayo Clinic Spine Center, but both Farmers and F&G declined to approve the consultation. About two weeks later, on January 17, 1996, the employee sustained yet another injury working for the employer,<sup>1</sup> this to her low back, as she bent over to pick up a spray can. She lost no time from work immediately consequent to that injury, but about two weeks later she returned to Dr. Kazi for reevaluation of her neck condition and also for “low back pain with right sided radiation,” which she attributed to her August 1994 work injury. Dr. Kazi noted positive straight leg raising tests and indicated that range of motion in the lumbosacral spine was painful, but he recommended only conservative treatment, concluding that “most of the symptoms are cervical.” On February 8, 1996, the employee was seen on an emergency basis at the Mayo Medical Center at St. Mary’s Hospital with complaints of neck and low back pain, and she was again referred to the Mayo Clinic Spine Center. Again, however, no insurer would approve the consultation. On May 7, 1996, following an administrative conference on April 24, 1996, a settlement judge granted the employee’s request for a change of doctors from Dr. Kazi to the Mayo Clinic Spine Center. The following day, the employee was seen at the Mayo Medical Center, where records document complaints of chronic neck and arm pain, without mention of any low back symptoms. On or about that same date, May 8, 1996, the employer became insured against workers’ compensation liability by American Compensation Insurance Company/RTW.

On July 13, 1996, the employee wrote to the employer indicating that her neck condition was causing her “continual and sometimes unbearable pain” and requesting accommodation of her condition. On July 23, 1996, the employee filed an Amended Petition for a Temporary Order and a Claim Petition against the employer, Wausau, F&G, and Farmers. The Claim Petition alleged entitlement to various temporary total disability, temporary partial disability, and medical benefits, and reserved claim to permanent partial disability benefits, all consequent to “cervical spine injuries” on January 4, 1994, August 20, 1994, and August 4, 1995.

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<sup>1</sup> According to unappealed Finding 9 of the Findings and Order here at issue.

On August 1, 1996, the employee was examined by orthopedist Dr. Robert Wengler. Dr. Wengler diagnosed discogenic cervical nerve entrapment syndrome and recommended that the employee limit her lifting to ten pounds and avoid activities requiring repetitive bending or stooping or heavy pushing or pulling. There is no reference in Dr. Wengler's report to any low back complaints or findings.

On August 7, 1996, about a week after her appointment with Dr. Wengler, the employee was seen at the Mayo Clinic, complaining not only of neck pain but also of stabbing, burning, and deep ache in her lower back that extended down into her right leg to the ankle, ending with numbness in her right toes. On September 1, 1996, the employee was transferred by the employer out of what had once been apparently full-time waitressing work, at an average weekly wage of \$213.02, into working only an average of about two hours a day as a bookkeeper at \$6.00 an hour, for an average weekly wage of about \$60.00. The employee was forty-two years old at the time of this transfer. Although her wages were substantially reduced as a result of the transfer, the employee received no workers' compensation wage replacement or medical benefits, as the employers' insurers continued to refuse to pay benefits under a temporary order.

On September 13, 1996, about two weeks after her transfer out of waitressing, the employee was examined at the Mayo Clinic Spine Center, having borrowed money for payment. Records of that examination indicate that the employee was continuing to complain of "aching, sharp, burning pain in the low back area with pain into the posterior lateral right leg and numbness in the right toes three and four predominantly." An MRI scan of her lumbar spine on September 18, 1996, revealed "mild-moderate changes of lumbar spondylosis throughout the lumbar spine" and "[d]egenerative-type changes involving the L1, L2, L4 and lumbosacral intervertebral disks." The scan also revealed a "[s]light bulging anulus fibrosus at the L2 level" and "a midline focal disk protrusion with superior migration of extruded disk material along the posterior L1 body" that resulted in "deformity of the ventral thecal sac but . . . no significant central canal narrowing or nerve root compression."

Hearing on the employee's Amended Petition for a Temporary Order was held on October 14, 1996. On November 12, 1996, the employee underwent a rehabilitation consultation with QRC Kurt Lidke, for the Department of Labor and Industry Vocational Rehabilitation Unit [VRU]. QRC Lidke concluded that the employee was a qualified employee for rehabilitation services pursuant to work injuries on January 4, 1994, August 20, 1994, and August 4, 1995. By an order filed December 10, 1996, the settlement judge on the employee's Amended Petition for a Temporary Order denied the employee's petition and ordered that the employee's July 23, 1996, Claim Petition against Wausau, F&G, and Farmers be certified for hearing as soon as possible.

By December 17, 1996, still without compensation from any insurer and without an approved rehabilitation plan, the employee had enrolled in a technical college program designed to upgrade her clerical and computer and job search skills while she continued to search for supplementary employment. The employee had enrolled in the program under a grant to cover tuition and books, and QRC Lidke's report of that date implies that the employee had the QRC's support in the action.

On March 17, 1997, the employee underwent a follow-up examination by Dr. Wengler, to whom she complained of “ongoing back problems since January of 1996.” Having reviewed the employee’s Mayo Clinic MRI scan, Dr. Wengler diagnosed multiple level degenerative disc disease and a herniated disc at L1-2, “which has extruded and is migrating up behind the body of L1 about a third of its height[.]” He indicated in a letter to the employee’s attorney on that date that he did “not think that a single incident can be held responsible for [the employee’s] ongoing difficulties.” He concluded instead that those difficulties were probably the result of a Gillette-type injury<sup>2</sup> that had occurred over the whole course of the employee’s waitressing career, suggesting that the employee’s assignment to a lighter job in September 1996 be considered the date of her injury.

On May 27, 1997, the employee filed a second Claim Petition, alleging against the employer and American Compensation Insurance Company/RTW [the insurer] entitlement to temporary partial disability, permanent partial disability, medical, and rehabilitation benefits consequent to a work injury to her low back on September 1, 1996. On July 8, 1997, QRC Lidke drew up a Rehabilitation Plan Amendment embracing the employee’s schooling activities, which remained unapproved by any insurer. The employee ultimately attended classes up to full time and worked at various part-time jobs apparently related to her studies.

On October 7, 1997, the employee was examined for the employer and insurer by Dr. Jack Droggt. Dr. Droggt concluded that the employee’s lumbar condition preexisted May 1996, did not warrant any physical work restrictions, and was not at any rate work-related. He concluded also that the employee’s low back medical treatment since May 8, 1996, had not been reasonable and necessary, that the employee had not sustained any permanent partial disability, and that she was not in need of any further medical or chiropractic care.

On December 26, 1997, the employee, the employer, Wausau, F&G, Farmers, and several intervenors executed a Stipulation for Settlement. The stipulation purported to close out on a full, final, and complete basis, in exchange for payment of \$29,000 to the employee, any and all claims by the employee, without exception, for benefits stemming from work-related injuries with the employer on various dates prior to May 1, 1996, including cervical injuries on January 3, 1994, August 20, 1994, and August 4, 1995, and a low back injury on January 17, 1996. It was the employee’s position at the time that she had a total current exposure of \$69,149.71<sup>3</sup> and that she remained subject to a 12% permanent whole-body impairment related to her neck, but she asserted no claim that her low back injury in January 1996 had resulted in any permanent disability. An award on this stipulation was filed December 29, 1997, which expressly dismissed the employee’s Claim Petition of July 23, 1996.

Essentially all of QRC Lidke’s records through February 4, 1998, identify

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<sup>2</sup> See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

<sup>3</sup> According to the employee’s brief.

August 4, 1995, as the employee's date of injury, most of them referencing F&G, however, as the insurer of record. In those records through February 4, 1998, low back problems receive only very brief and passing reference and on only one date - - November 12, 1996, the date of the employee's rehabilitation consultation. Beginning on February 6, 1998, RTW replaces F&G as the insurer of record, and the report of March 4, 1998, asserts that the employee's most recent claim petition "states that the date of injury is 09/01/96 and that the said injury is lumbar pain syndrome with radicular pain and degenerative disc disease at multiple levels." Rehabilitation records thereafter continue to identify RTW as the insurer of record, but the operative injury date of record remains identified as August 4, 1995. Records for April 2, 1998, indicate that the employee reported that she was expecting to finish her technical college program on June 1, 1998, that she continued to work one hour a week at the employer as a bookkeeper at \$6.23 an hour, that she was also working about eleven hours a week at her technical college as a library clerk at \$9.85 an hour, and that she had access to as much other work as she had time for in the work study program at the college at \$6.00 an hour.

In deposition testimony on April 14, 1998, Dr. Wengler indicated that his working diagnosis of the employee's lumbar condition was degenerative disc disease at multiple levels, with a herniated disc at the L1-2 level that he concluded was causing the employee's present symptoms. He indicated also that the employee's current low back condition was "causally related to the work activity that she did as a waitress, I don't think there's any question about that." When asked to identify the date of the employee's injury, Dr. Wengler responded, "[t]echnically this is a Gillette injury" that "occurred in the fall of 1996 at which time the diagnosis was made and her job status changed." Dr. Wengler conceded, however, that it could also be argued that the injury occurred on January 17, 1996, when the employee bent over to pick up the can at work and was initially unable to straighten up again, "because that was the point in time when there was a distinct change in her symptom pattern and it may very well have been that that was the date that the extrusion occurred." Dr. Wengler indicated that it was because the employee "continued to work at her regular job after January 17, 1996 until September" that he was of the opinion that the fall date should be considered the date of injury. In the course of his testimony, Dr. Wengler also rendered an opinion that the employee was subject to a 12% permanent partial disability consequent to her herniated disc at L1-2. Finally, Dr. Wengler also indicated that the restrictions that he had recommended in August of 1996 with reference to the employee's cervical spine condition would also be appropriate now with reference to the employee's "further trouble with the lower back."

On April 21, 1998, hearing was held on the employee's May 1997 Claim Petition against the employer and insurer. By findings and order filed July 20, 1998, the compensation judge concluded in part that the employee had sustained a Gillette-type injury to her low back while working for the employer on or about September 18, 1996, consequent to which she was subject to a 12% whole-body permanent impairment. Also in his decision, however, the judge concluded that the employee's "loss of earning capacity since September 1, 1996 is causally related to her neck condition, rather than the Gillette injury to her low back" and that "[m]oreover, the employee removed herself from the full-time labor market by attending school on up to a full-time basis, and [accepting] work below her earning capacity." For those reasons the judge denied the

employee's claim to temporary partial disability benefits for her low back Gillette injury. Finally, the judge also denied VRU's claim for reimbursement for rehabilitation services provided to the employee. This denial was on grounds that those services "were apparently related to the employee's August 20, 1994 injury to her cervical spine" and therefore were not causally related to the employee's September 1996 Gillette work injury. The employer and insurer appeal from the judge's finding of a Gillette-type low back injury and from the judge's award of impairment compensation consequent to that injury. The employee cross-appeals from the judge's denial of temporary partial disability benefits and of reimbursement to VRU for rehabilitation assistance rendered.

## 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

### Gillette-Type Injury

Having already concluded at Finding 9 that the employee sustained a work-related injury to her low back on January 17, 1996,<sup>4</sup> the compensation judge found at Finding 21 that the employee sustained a Gillette-type injury to her low back on September 18, 1996, "based on the MRI scan of that date and on her reported history." The September 1996 MRI had revealed a protruding disc at L1-2, and the employer and insurer contend that "the only medical opinion as to when the L1 disc actually herniated[] was provided by Dr. Wengler," who "testified that the herniation or extrusion probably occurred on January 17, 1996." They argue that "[t]he mere fact that the MRI scan was not obtained until September 18, 1996 is insufficient to support the Compensation Judge's finding that the Employee's alleged injury did not result in an ultimate

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<sup>4</sup> Apparently a specific injury, since it is described as occurring as "the employee bent to pick up a spray can."

breakdown until that date.” With regard to the judge’s reliance on the employee’s “reported history,” the employer and insurer contend further that the employee’s own testimony is contradictory as to whether her symptoms increased or decreased between January 1996 and her deposition in August 1996. We are not persuaded.

Having quoted the supreme court’s pronouncement in Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994), that “the question of a Gillette injury primarily depends on medical evidence,” the compensation judge asserted in his memorandum that the employee’s low back injury “was conclusively documented by the medical evidence only on September 18, 1996,” and that “[i]t is not helpful to speculate on whether an MRI scan would have revealed comparable results at a much earlier date.” The fact that Dr. Wengler speculated that an extrusion of the employee’s intervertebral disc at L1-2 may well have occurred on January 17, 1996, does not negate the doctor’s other more affirmative opinion that “[t]echnically this is a Gillette injury” that “occurred in the fall of 1996.” The foundation for Dr. Wengler’s opinion has not been challenged. While the judge did not choose to rely on that opinion of Dr. Wengler expressly, that opinion does provide at least some medical support for the judge’s finding of a Gillette injury. Cf. Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (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). Moreover, the date on which minute trauma culminates in a Gillette-type injury is not so much a medical question as a question of ultimate fact for the compensation judge, to “be determined on all the evidence bearing on the issue.” Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230, 233, 36 W.C.D. 504, 509 (Minn. 1984). In determining that “ultimate breakdown” date, a compensation judge is not restricted to finding that the injury occurred on the date the employee became disabled from work, although that is a frequent conclusion;<sup>5</sup> instead, the judge may consider the full history of “ascertainable events” relevant to the injury’s development. Schnurrer, 345 N.W.2d at 233, 36 W.C.D. at 508, cited in Ellingson v. Thriftway, Inc., 42 W.C.D. 565, 573.

In the instant case, substantial “ascertainable events” do exist in the medical evidence of record to support the judge’s conclusion that the employee’s low back condition did not ultimately culminate in injury until well after the insurer’s May 1996 assumption of the risk.<sup>6</sup> This delay in deterioration and ultimate culmination is evident in several items of the medical records, including the following: records of the employee’s examination at the Mayo Medical Center on May 8, 1996, about the time the insurer assumed the employer’s risk, which document complaints only of chronic neck and arm pain on that date, without mention of any low back pain; the employee’s July 13, 1996, letter to the employer, in which the employee made no reference to

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<sup>5</sup> See Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350 33 W.C.D. 594, 598 (Minn. 1981).

<sup>6</sup> The only “reported history” that the employer and insurer cite as being contradictory is history drawn from the employee’s own depositional and hearing testimony.

any low back pain while complaining of “continual and sometimes unbearable pain” in her neck; the employee’s July 23, 1996, claim petition, in which the employee alleged various benefits consequent only to “cervical spine injuries,” although she had also sustained by then the evidently unremarkable January 1996 low back injury for which Farmers was already on the risk; and Dr. Wengler’s August 1, 1996, report, which references only cervical complaints. Nor is there substantial evidence that these items of “reported history” were intentional ruses to hide a more serious low back injury for legal purposes. The first substantial complaints of low back pain and radicular symptoms subsequent to the insurer’s coming on the risk do not occur until August 7, 1996, at the Mayo Clinic. Then, about a month later, on September 13, 1996, the employee reported to an examiner at the Mayo Spine Center that, “since” being transferred by the employer into bookkeeping earlier in the month, her back and right leg pain had increased. On that same date, the employee reported “aching, sharp, burning pain in the low back area with pain into the posterior lateral right leg and numbness in the right toes three and four predominantly,” with symptoms growing “worse with sitting” and “worse with walking, bending, and lifting” and coughing. A few days later the employee underwent the MRI scan that revealed the low back degeneration and herniation on which she has based her current claim.

We conclude that it would not have been unreasonable for the compensation judge to infer from this evidence that the employee’s low back condition was not compensably disabling prior to May 1996, when the insurer came on the risk, but became so by September 18, 1996. This is particularly true in light of Dr. Wengler’s testimony on April 14, 1998, that the employee’s low back condition had at least by then grown sufficiently severe to warrant the same restrictions as those Dr. Wengler had recommended in August 1996 with regard to her neck condition. The employer and insurer have contested the compensation judge’s finding of a Gillette-type injury, affirmatively alleging that the employee’s ongoing symptoms are merely noncompensable consequences of her specific injury at an earlier date. We conclude that Ms. Njos’s September 1996 MRI scan and the history of her low back condition as reported in her medical records constitute medical evidence sufficient to support the judge’s finding of a Gillette injury pursuant to the supreme court’s decision in Steffen; and we conclude that the judge’s dating of that Gillette injury was reasonable pursuant to principles asserted by the supreme court in its decision in Schnurrer. Therefore we affirm the judge’s conclusion that Ms. Njos sustained a Gillette-type injury to her low back on September 18, 1996, in addition to the specific low back injury that she sustained on January 17, 1996. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

#### Permanent Partial Disability

The employer and insurer contend that, even if the compensation judge’s finding of a Gillette-type injury on September 18, 1996, is affirmed, substantial evidence does not support the judge’s award of permanency benefits for a 12% whole-body impairment, in that there is insufficient evidence of any causal relationship between the employee’s herniated disc and any September 1996 Gillette injury. We are not persuaded. The very premise of the employee’s claim, and of the compensation judge’s finding of a low back work injury in September 1996, was that the employee sustained a permanent injury to her low back effective at that time. Although there is evidence that the extrusion of the employee’s L1-2 disc may have begun or increased in

January of 1996, that extrusion did not become materially disabling until at least September 18, 1996, on which date it compelled diagnosis and after which date its symptomatic consequences, in the opinion of Dr. Wengler, warranted work restrictions. It is well established that an extruded intervertebral disc does not constitute a compensably herniated disc until it becomes disablingly symptomatic. Moreover, to the extent that the employer and insurer's defense constitutes an argument that liability for permanency should be apportioned to a preexisting condition, we note that Minn. Stat. § 176.101, subd. 4a, requires that "[a]n apportionment of a permanent partial disability . . . shall be made only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury." In this case no such medical report or record exists. Because it was not unreasonable for the compensation judge to conclude that the employee's herniation at L1-2 occurred on September 18, 1996, rather than the previous January, we affirm the judge's award of benefits to Ms. Njos for a permanent 12% whole body impairment related to her lower back. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

#### Temporary Partial Disability and Reimbursement for Rehabilitation<sup>7</sup>

While granting the employee benefits for a permanent partial disability due to a Gillette-type injury to the low back on September 18, 1996, the compensation judge denied the employee's claim for temporary partial disability benefits. The judge's conclusion at Finding 22 is that

[t]he employee's loss of earning capacity since September 1, 1996 is causally related to her neck condition, rather than the Gillette injury to her low back. Moreover, the employee removed herself from the full-time labor market by attending school on up to a full-time basis, and it appears that she also accepted some work below her earning capacity.

Similarly, at Finding 25, the judge denied VRU's claim for reimbursement of rehabilitation expenses, on grounds that "any rehabilitation benefits related to [the employee's September 1996] change in duties are . . . attributable to the employee's cervical spine condition" and not to her September 18, 1996, low back Gillette injury. The employee contends on cross-appeal that these conclusions were unsupported by substantial evidence. We are not persuaded.

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<sup>7</sup> The employer and insurer argue that the rehabilitation reimbursement issue was appealed in the employee's Notice of Appeal but not addressed in the employee's brief and that therefore, pursuant to Minn. R. 9800.0900, subp. 1, the issue should be deemed waived. To the extent that the employee's arguments with regard to temporary partial disability are importantly premised on her post-injury cooperation with formal rehabilitation efforts, we include the reimbursement issue in our discussion. In any event, our affirmance on the temporary partial disability issue, based in part as it is on a conclusion that the those rehabilitation efforts were not causally related to the employee's low back injury, renders the waiver issue moot.

We note at the outset that the employee's original wage replacement claim was for benefits commencing September 1, 1996, the date she was transferred out of waitressing. The compensation judge found, and we have affirmed, that the employee's low back injury occurred on September 18, 1996. Nor did the employee appeal from that finding. Therefore, the judge's denial of benefits for the period September 1, 1996, to September 18, 1996, is affirmable without issue, and we address the employee's arguments only to the period of her claim commencing September 18, 1996.

Citing Webeck v. Mochinski General Contractor, 41 W.C.D. 1063 (W.C.C.A. 1989), the employee contends that, in denying wage replacement benefits for lack of low back causation,

[t]he Compensation Judge did not consider . . . settled law that when a second injury follows a first injury for which the liability was terminated by settlement, the employee need not show that the second incident is the *sole* cause of his disability. If the work-related injury [at the second employer] was a substantial contributing cause, the necessary legal test is met and the second insurer is responsible for all of the wage loss benefits.

(Emphasis in original.) She argues that “[t]he Compensation Judge considered only the *timing* of the restrictions, and not the fact that the restrictions applied both to her cervical spine as well as the lumbar spine” (emphasis in original). We find the facts in Webeck clearly distinguishable from the instant case and the employee's reliance on Webeck misplaced. In Webeck, the compensation judge had found, and this court affirmed, that the employee's post-settlement injury was a substantial contributing factor in his current disability. In the instant case, the judge made no finding that the employee's low back injury is contributing to her wage loss or working restrictions, and in fact the compensation judge expressly found the employee's loss of earning capacity to be related to her neck condition “rather than the Gillette injury to her low back.” The finding in Webeck that the employer and insurer on the second injury were liable for the employee's entire wage replacement entitlement, once the first employer and insurer's liability had terminated, was based very critically on the fact that the second injury was a substantial contributing factor in the employee's disability from working. It is certainly true that the employee's ratable permanent partial low back disability may be understood to constitute a functional impairment. However, there is no evidence at all, aside from inferences to be drawn from the employee's testimony, that that impairment has in any way increased or modified the employee's incapacity from working and earning since the employee changed jobs September 1, 1996. Indeed, even Dr. Wengler identifies no new restrictions since the advent of the employee's Gillette injury, and no contribution by that injury to the employee's disability from working.<sup>8</sup>

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<sup>8</sup> Cf. Lampa v. Utility Sys. of Am., slip op. (W.C.C.A. Dec. 16, 1998) (evidence that an employee's need for restrictions was not substantially affected by the work injury supported the judge's finding that the injury was not a substantial contributing factor in the employee's reduction of earning capacity, despite the fact that the employee sustained an 11.5% whole body impairment

The compensation judge based his denial of wage replacement also on the conclusion that, by attending school up to full time and accepting certain work below her earning capacity following her transfer into bookkeeping, the employee effectively removed herself from the full-time labor market, thereby continuing the absence of any causal relationship between the employee's work injury and any continuing wage loss that she might have sustained. The employee contends that both her attendance at school and her intermittent part-time employment was pursuant to a careful rehabilitation plan, which she not only cooperated with but ultimately succeeded in. The employer and insurer respond that the rehabilitation plan under which the employee justified her schooling-based activities constituted an unauthorized retraining plan. We agree and conclude that the judge's decision was not unreasonable.

The employee's argument here is premised on the theory that activities related to and affecting her post-injury job search were directly related to her formal rehabilitation efforts. However, that theory only applies if the work injury here at issue is a substantial contributing factor in the employee's need for the rehabilitation services that are being rendered. Although the employee did not ultimately undergo a rehabilitation consultation until November 12, 1996, well subsequent to her September 18, 1996, low back work injury, the employee's attorney originally contacted QRC Lidke on September 3, 1996, fifteen days prior to that injury. From that first communication through QRC Lidke's final report of record on April 9, 1998, the employee's low back problems are referenced only twice. The first is a very passing reference to apparently minor problems, in the consultation report on November 12, 1996. The second is an only slightly more substantive single-sentence reference over a year later, on March 4, 1998, in the sixth to the last report of record, about a month and a half before the hearing. In this context, it would not have been unreasonable for the compensation judge to conclude that the employee's rehabilitation activities under the supervision of QRC Lidke were not only unapproved by the insurer but also unrelated to and uncompelled by the problem for which the insurer was liable.

Because it was not unreasonable for the compensation judge to conclude that neither the employee's loss in earning capacity nor her rehabilitation services were causally related to her low back work injury, we affirm the compensation judge's conclusion that RTW is not liable either for temporary partial disability benefits through the date of hearing or for reimbursement to VRU for rehabilitation services rendered through the date of hearing. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

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as a result of that injury).