

JEFFREY A. PLAN, Employee/Appellant, v. TURNER EXCAVATION and MINN. ASSIGNED RISK PLAN/OHMS, Employer-Insurer, and ALLDONE CONSTR. and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer, and MED. ADVANCE PAIN, OPERATING ENG'RS LOCAL #49 H&W, and MINNEAPOLIS CLINIC OF NEUROLOGY, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 10, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION. Substantial evidence supports the compensation judge's determination that the cervical, thoracic and lumbar injuries sustained by the employee on August 16, 1995 were a temporary aggravation of his pre-existing condition, and had resolved by November 16, 1995.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee failed to make a reasonably diligent search for work between May 20, 1996 and August 1, 1997, and her denial of temporary total disability benefits.

PRACTICE & PROCEDURE - REMAND; TEMPORARY PARTIAL DISABILITY. Where the compensation judge failed to determine whether the employee had sustained a physical disability or loss of earning capacity causally related to his 1995 left arm injury, the denial of temporary partial disability benefits must be vacated and the matter remanded for further findings.

Affirm in part, vacated in part and remanded.

Determined by: Johnson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the effects of the August 16, 1995 personal injury were temporary and ended on November 16, 1995. The compensation judge found the employee's temporary total and temporary partial disability after November 16, 1995 was wholly attributable to the employee's July 11, 1991 injury which the employee settled on a full, final and complete basis. The compensation judge, therefore, denied the employee's claims for benefits. The employee appeals the denial of wage loss benefits after November 16, 1995 and the denial of permanent partial disability benefits.

BACKGROUND

On July 11, 1991, Jeffrey A. Plan, the employee, was injured while working for Alldone Contractors (Alldone) insured by the Minnesota Assigned Risk Plan/Berkley Administrators. On that date, the employee was working in a building, removing part of an elevator shaft, when he fell 20 to 30 feet down the shaft, landing on his back on a plywood floor. (T. 38-40.) Alldone and its insurer accepted liability for the employee's personal injury.

The employee was taken by ambulance to the Hennepin County Medical Center where he was hospitalized from January 11 through January 15, 1991. The employee complained of left shoulder and mid and low back pain. A left shoulder and thoracic x-ray was normal but a spinal x-ray showed an L1 burst fracture with anterior wedging and a 12 degree acute kyphosis from T12 through L2. A CT scan of the lumbar spine showed the L1 fracture with a mild protrusion of fragments into the spinal canal. The employee was fitted with a TLSO brace and discharged with limitations on lifting, twisting and turning activities. (Resp. Ex. 11.) Upon discharge, the employee testified that he continued to experience severe pain in his mid and lower back. (T. 41.)

On February 8, 1991, the employee saw Dr. Sunny S. Kim at the Institute for Low Back Care complaining of back pain. X-rays showed a compression fracture at L1 and an anterior Schmorl's node at L3-4. Dr. Kim diagnosed an L1 compression fracture. The doctor instructed the employee not to return to work and recommended he wear his TLSO brace for a period of three months. (Resp. Ex. 7.) A lumbar x-ray on March 15, 1991 showed multiple compression fractures of T8, T11 and L1 with a Schmorl's node and spurring at L3-4. (Resp. Ex. 4.) On April 12, 1991, Dr. Kim concluded the burst fracture was healed and sent the employee to Backs at Work, a program combining work hardening, functional capacity assessment and physical therapy. Dr. Kim continued the employee's off work status. The employee participated in the Backs at Work program from May 1991 through July 1991. (Resp. Exs. 6, 9.)

On June 6, 1991, the employee saw Dr. Lawrence Farber at the Noran Neurological Clinic. On examination, the doctor noted cervical and lumbar tenderness with limitation of lumbar motion. Dr. Farber diagnosed a concussion, neck and low back strain and an L1 compression fracture and ordered further tests. A cervical MRI obtained on July 17, 1991 was normal. A thoracic MRI showed a marked compression burst fracture of L1 and a mild compression of T7 and T10. An EEG was mildly abnormal but Dr. Farber concluded the abnormality had no significance. By report dated July 23, 1991, Dr. Farber stated the concussion and neck strain were not a major problem but the thoracic fracture might prevent the employee from returning to heavy equipment operation. (Resp. Ex. 5.) On September 3, 1991, Dr. Richard E. Golden at the Noran Clinic examined the employee. The employee then complained of memory difficulty, back pain and headaches. Dr. Golden diagnosed a concussion with memory complaints, depression, mid thoracic and lumbar pain and cervical spine syndrome. Dr. Golden referred the employee to Dr. Gary Krupp for a neuropsychological evaluation. Dr. Krupp completed what he described as an "essentially normal neuropsychological evaluation" and found no objective evidence for acquired memory disorder. On October 1, 1991, Dr. Golden stated the

employee's neuropsychometric testing suggested significant psychological distress and recommended counseling. (Resp. Ex. 5.)

The employee underwent a functional capacity evaluation at Abbott Northwestern/Sister Kenny on August 7 and 8, 1991. Ms. Piela, the therapist, concluded the employee could work eight hours a day with limitations on sitting, standing and walking with occasional position changes as necessary. Ms. Piela placed the employee's physical capabilities in the light to medium work level. (Resp. Ex. 6.) On August 21, 1991, Dr. Kim wrote that he agreed with the functional capacity evaluation and released the employee to return to work 20 hours per week, gradually increasing to 40 hours a week. The doctor recommended light-duty work with a 20-pound lifting restriction.

On August 13, 1991, the employee saw Dr. Glen L. Detlefson, his family physician, for evaluation of the January 1991 injury. Dr. Detlefson took an extensive history from the employee, reviewed his prior medical care and examined the employee. The doctor noted full range of motion of the shoulders and knees with bilateral tenderness in the knees and the acromioclavicular area. He concluded the employee's shoulder, knee and headache and memory problems needed further evaluation. (Resp. Ex. 15.) X-rays of the right shoulder and both knees on August 14, 1991 were normal. (Resp. Ex. 20.) A thoracic x-ray showed old compression fractures and end plate depressions at T8, T11, T12 and L1. A lumbar x-ray showed the T11 and L1 compression fractures and evidence of L3-4 disc degeneration. (Resp. Ex. 4.) The employee continued to see Dr. Detlefson periodically thereafter for evaluation of his work injury. On October 2, 1991, the doctor stated the employee was still totally disabled. On November 6, 1991, the doctor diagnosed neck, mid and low back pain with cognitive impairment secondary to depression. On November 27, 1991, Dr. Detlefson, the employee and his QRC discussed a pain clinic evaluation. (Resp. Ex. 15.)

On December 17, 1991, the employee was evaluated by Dr. Matthew Monsein for a chronic pain assessment on referral from Dr. Detlefson. The employee complained of constant mid and low back pain aggravated by physical activities. On examination, the doctor found tenderness at T7 and L1 but his neurological examination was normal and the employee had good range of motion of the cervical and lumbar spines. Dr. Monsein concluded the employee was not depressed, did not need ongoing psychological counseling and stated a pain rehabilitation program was not appropriate. (Resp. Ex. 6.)

On January 28, 1992, Dr. Kim opined the employee had reached maximum medical improvement and rated a 7 percent whole body disability based on degenerative disc disease at L3-4¹ and 10.5 percent permanent partial disability secondary to multiple vertebral compression fractures of the thoracic spine.² Later, Dr. Kim added an additional 15 percent permanent partial

¹ See Minn. R. 5223.0070, subp. 1.A.(3)(a).

² See Minn. R. 5223.0070, subp. 3.C.(2).

disability for the vertebral compression fracture at L1.³

The employee, Alldone and its insurer arrived at a settlement of the employee's claim in April 1992. The employee then contended he was entitled to payment of a 32.5 percent whole body disability and retraining benefits. In exchange for a payment of \$90,000.00, the employee agreed to settle his claim on a full, final and complete basis except reasonable and necessary medical expenses which remained open. An award on stipulation was served and filed on April 27, 1992. (Judgment Roll.)

From April 1992 through April 1993, the employee worked on a part-time basis for Al Herman Construction doing touch-up painting on finished homes. The employee described this as very light-duty work. The employee testified, however, the jarring from riding in a truck caused problems to his mid and lower back. The employee performed exercises at home on a daily basis. By April 1993, the employee testified he was "doing quite well" and his pain level was "significantly low." (T. 46-49.) He testified his condition had stabilized; he had good and bad days but felt he was not generally getting better. (T. 96-97.)

In April 1993, the employee was hired by Turner Excavation (Turner) as a Bobcat operator. On August 16, 1995, the employee was driving a dump truck when it tipped over and the employee's left arm and chin hit the ground in the rollover. (T. 52-55, 58-59.) Turner was then insured by the Minnesota Assigned Risk Plan/OHMS. Turner and its insurer admitted liability for a left arm injury.

The employee was taken by ambulance to Fairview Southdale Hospital. Dr. Jeffrey Groner, a plastic surgeon, performed surgery to clean, debride and suture left arm and elbow wounds, repair damage to the common flexor tendon origin at the medial epicondyl and cleanse chest and nasal abrasions. On August 30, 1995, Dr. Groner reoperated on the employee's left elbow to further debride the wound. The employee was discharged from the hospital with a splint on his left arm. (Resp. Ex. 16.)

On September 6, 1995, Dr. Groner performed a skin graft from the employee's left thigh to his elbow. On September 18, 1995, the doctor ordered a course of gentle rehabilitation therapy. The employee continued to wear a splint and remained off work. On December 11, 1995, Dr. Groner released the employee to return to work with light left arm duties to advance to normal left arm duties in two weeks. On May 16, 1996, Dr. Groner released the employee to full work duties but instructed him to wear padding on his left elbow. On July 15, 1996, the doctor stated the employee could continue his normal work activities but should protect the left elbow from cold, heat, mechanical injury and solar exposure. (Resp. Ex. 12.)

The employee returned to work for Turner in December 1995 plowing snow and working on a survey crew. (T. 64-65.) The employee plowed snow with a front-end loader on

³ See Minn. R. 5223.0070, subp. 1.E.(3).

eight to ten occasions between December 1995 and January 1996. (T. 65-67.) The employee testified that after he returned to work his neck, mid and lower back pain increased. By February 1996, the employee felt his pain was much more severe than the pain he experienced after the 1991 injury. (T. 68-71.) The employee returned to see Dr. Detlefson on February 19, 1996 complaining of an aggravation of mid and lower thoracic and upper lumbar back pain over the past two months. The doctor diagnosed chronic thoracic and low back pain with recent exacerbation and recommended physical therapy. On February 28, 1996, Dr. Detlefson again diagnosed chronic thoracic and low back pain which he related directly to the January 11, 1991 injury. On May 2, 1996, Dr. Detlefson limited the employee to working four hours a day. On June 28, 1996, Dr. Detlefson recorded the employee's upper back was "just about back to the baseline of where it was perhaps a year ago. He is able to do activities without pain in the upper back." By report dated July 15, 1996, Dr. Detlefson stated the August 16, 1995 personal injury was substantial and of a nature which would significantly jar and strain the employee's back. The doctor opined the 1995 injury was a substantial contributing cause of the employee's current disability. (Resp. Ex. 15.)

On or about May 1, 1996, Kevin Turner, president of Turner Excavation, offered the employee a job driving a dump truck at his date of injury rate of pay. (T. 163.) The employee told Mr. Turner he would not accept the position because he was having back problems related to a 1991 injury. (T. 165.) The employee remained off work and did not actively seek other employment. The employee testified that people did call him asking if he was ready to return to construction work but he did not feel he was capable of doing the kind of work offered. (T. 86-89.) In August 1997, the employee returned to work for Al Herman Homes Construction and then worked for Greif Brothers from late February to April 1998. (T. 89-90.)

An x-ray of the lumbar spine on May 9, 1996 showed an old compression fracture at L1 with moderate spurring at L3-4. The radiologist concluded there was no change in the appearance of the lumbar spine as compared to August 21, 1991. A thoracic spine x-ray showed a compression fracture at T11, also unchanged in appearance compared to August 21, 1991. (Resp. Ex. 20.) An MRI scan of the thoracic and lumbar spine was obtained on June 18, 1996. The thoracic film showed an irregularity of T8, most likely a Schmorl's node or compression fracture. The lumbar scan showed an old compression fracture at L1 with degenerative disc disease at L1-2 and L3-4, without evidence of disc herniation or nerve root impingement. (Resp. Ex. 23.)

On August 20, 1996, the employee was examined by Dr. William T. Simonet, an orthopedic surgeon, on referral from Dr. Detlefson. Dr. Simonet obtained a history of the 1991 and 1995 injuries and reviewed the employee's x-rays and the 1996 MRI scan of the thoracic spine. The doctor diagnosed low back pain without evidence of radiculopathy, probably secondary to degenerative disc disease, past history of a mild compression fracture of L1 and chronic pain syndrome. The doctor concluded the Schmorl's node at T8 was not a traumatic occurrence and opined the L1 compression fracture was healed. The doctor opined the employee did not have any serious problems with his back but was intensely focused on pain issues. Dr. Simonet concluded he had nothing to offer the employee orthopedically and recommended the employee

return to work. (Resp. Ex. 2.)

Dr. Jack E. Hubbard, a neurologist, examined the employee on September 4, 1996, also on referral from Dr. Detlefson. The employee complained of chronic pain with activity from his neck to his low back with numbness over the left medial forearm. Dr. Hubbard noted multiple areas of myofascial trigger points along the posterior spine but his neurological examination was normal, except for some sensory changes in the left arm. The doctor concluded the employee's main problems were myofascial trigger point in nature and recommended trigger point injections with post-injection therapy. (Resp. Ex. 19.) Dr. Lon Lutz provided trigger point injections on September 12, 1996. (Resp. Ex. 18.) The employee then participated in a course of rehabilitation at the Minneapolis Clinic of Neurology and a TENS unit was prescribed. (Resp. Ex. 19.)

Dr. David W. Boxall examined the employee on September 24, 1996, at the request of Turner and its insurer. Dr. Boxall received a history of the employee's injuries and reviewed the employee's medical records, including the prior MRI scans and x-rays. The employee complained of numbness and stiffness in his left elbow, stiffness between his shoulder blades and low back pain, radiating into the buttock and groin area bilaterally. Dr. Boxall diagnosed a compression fracture of T11 and L1 and a soft tissue and ulnar nerve injury of the left elbow. The doctor opined the cause of the fractures at T11 and L1 was the January 11, 1991 injury and stated the left elbow injury resulted from the August 16, 1995 personal injury. Dr. Boxall further opined the pre-existing condition in the employee's thoracic and lumbar spine was temporarily aggravated by the 1995 injury and concluded this temporary aggravation lasted for a three-month period after the accident. Dr. Boxall rated a zero percent permanent partial disability for the left elbow injury pursuant to Minn. R. 5223.0460, subp. 2.D.(2). Finally, the doctor concluded no further physical therapy was appropriate.

The employee returned to see Dr. Groner on September 25, 1996, complaining of hypersensitivity and aching along the medial border of his forearm particularly after significant use of the left arm. On examination, the doctor noted the skin graft was well healed and durable but palpation elicited mild to moderate tenderness. Tinel's sign and tenderness was present over the medial sensory nerve which was avulsed and lost in the injury. Dr. Groner diagnosed phantom pain from a neuroma at the proximal nerve stump and recommended the employee continue with desensitization exercises. On November 12, 1996, Dr. Groner diagnosed a sensory deficit and adhesion about the medial epicondyl. The doctor recommended the employee continue with his normal work activities but protect the area from heat, cold and sun. By report dated November 26, 1996, Dr. Groner rated a two percent whole body disability⁴ based on a loss of sensation of the medical antibrachial cutaneous nerve and concluded the employee had reached maximum medical improvement. (Resp. Ex. 12.)

On September 28, 1996, Dr. Paul T. Wicklund examined the employee at the

⁴ Minn. R. 5223.0410, subp. 2.B.

request of Alldone and its insurer. Dr. Wicklund obtained a medical history, reviewed medical records and performed a physical examination. Dr. Wicklund concluded the employee sustained an injury to his low back on August 16, 1995 and also sustained an injury when he returned to snow plowing with Turner in the winter of 1995-1996. The doctor opined these injuries were unrelated to the employee's original 1991 injury, and concluded there should be no apportionment between the two injuries. Dr. Wicklund stated the employee needed no further medical care and opined the employee could return to the same type of work he did before the 1995 injury. (Resp. Ex. 3.)

The employee was re-examined by Dr. Hubbard on November 13, 1996 and reported he had improved somewhat with the exercise and conditioning program. On examination, Dr. Hubbard felt the employee was quite depressed and disabled by pain having some organic basis. Dr. Hubbard referred the employee to Dr. Ralph McKinney, a licensed psychologist, whom the employee saw on December 10, 1996. Dr. McKinney diagnosed Adjustment Reaction with Depressed Mood in an individual who appeared to have some features of a character disorder. Dr. McKinney recommended the employee attend a pain management and relaxation mental imagery group. The employee last saw Dr. Hubbard on May 1, 1997 with continued complaints of mid and low back pain. On examination, the doctor noted myofascial trigger points in the mid back and lumbar paraspinal muscles with a normal neurological examination. Dr. Hubbard recommended the employee see Dr. William Ganz for a neurosurgical consultation. (Resp. Ex. 19.)

The employee saw Dr. Ganz on May 14, 1997. The doctor obtained a history from the employee and reviewed the plain spine x-rays, the original CT scans of the lumbar spine from Hennepin County Medical Center and the MRI scans of the cervical, thoracic and lumbar spines obtained in 1995 and 1996. The doctor concluded these studies showed no evidence of significant compression of any neurological element and found no significant mechanical instability. Thoracic kyphosis and lumbar lordosis was normal with no evidence of any deformity related to the compression fractures at L1 and the cervical spine. The employee's neurologic examination was normal but Dr. Ganz noted palpable pain over the paraspinal muscles indicating significant paraspinal muscular spasticity. Dr. Ganz diagnosed severe muscular spasticity which had not been adequately treated and recommended a one to two-year course of physical therapy. The doctor concluded the employee did not need surgery. Dr. Ganz doubted the employee should return to heavy labor and recommended he avoid work which required heavy lifting on a regular basis. (Resp. Ex. 17.)

On September 5, 1997, Dr. Hubbard wrote to the employee's then attorney responding to certain questions. Dr. Hubbard concluded the employee sustained significant injuries to his neck, back and left arm on August 15, 1995 and sustained a cervical, thoracic and lumbosacral myofascial pain syndrome as a result of the injury. The doctor further stated the employee sustained thoracic and lumbar compression fractures as a result of his 1991 injury. The

doctor rated a 3.5 percent permanent disability for lumbar pain syndrome,⁵ a 4 percent permanent disability for the L1 compression fracture,⁶ a 2.5 percent permanent disability for thoracic pain syndrome,⁷ a 4 percent permanent disability for the T10 thoracic fracture,⁸ and a 3.5 percent permanent disability for cervical pain syndrome.⁹ Dr. Hubbard recommended a gradual consistent, active conservative exercise plan but noted the employee would have occasional flare-ups of pain. Finally, Dr. Hubbard apportioned the employee's present medical problems 75 percent to the 1995 accident¹⁰ and 25 percent to the 1991 injury. (Resp. Ex. 19.)

Dr. Boxall re-examined the employee on December 17, 1997. He again diagnosed compression fractures of T11 and L1, soft tissue injury and ulnar nerve contusion of the left elbow and evidence of symptom magnification and functional overlay. His opinions on causation remained the same as those expressed in his report of September 24, 1996. (Resp. Ex. 1.)

The employee filed a claim petition on February 28, 1997 seeking temporary total disability benefits from May 20, 1996 and continuing based upon back and left arm injuries.¹¹ The employers and insurers admitted that the employee sustained personal injuries on January 11, 1991 and August 16, 1995, but denied the extent of the injuries claimed and denied liability for temporary total disability benefits and medical expenses. The employee amended his claim in December 1997 to add claims for injuries to the thoracic and cervical spine areas. The employer and insurers denied liability for these alleged injuries. The case was heard by a compensation judge at the Office of Administrative Hearings on October 14, 1998. In a Findings and Order served and filed January 11, 1999, the compensation judge found the employee sustained an injury to his cervical, thoracic and lumbar spine on August 16, 1995, but found this was a temporary aggravation which ended on November 16, 1995. The compensation judge found the employee was totally disabled from May 20, 1996 to February 19, 1997, and partially disabled from February 23 through April 9, 1998, but found the employee failed to conduct a diligent job search

⁵ See Minn. R. 5223.0390, subp. 3.B.

⁶ See Minn. R. 5223.0390, subp. 2.A.(2).

⁷ See Minn. R. 5223.0380, subp. 3.B.

⁸ See Minn. R. 5223.0380, subp. 2.A.(2)

⁹ See Minn. R. 5223.0370, subp. 3.B.

¹⁰ The doctor's report refers to the accident of 1985. We assume this is an error.

¹¹ Turner and Assigned Risk Plan/Berkley apparently paid wage loss benefits through May 28, 1996, the date of an administrative conference under Minn. Stat. § 176.239. By Order filed May 30, 1996, a settlement judge at the Department of Labor and Industry allowed the employer and insurer to discontinue benefits. (Judgment Roll.)

during these periods. The judge further found the employee was temporarily and partially disabled from February 23 through April 9, 1998 due to restrictions related to his back. Since the employee had entered into a full, final and complete settlement with respect to the 1991 injury, the compensation judge found the employee was entitled to no workers' compensation benefits for this time period. The compensation judge found the employee sustained a 2 percent permanent partial disability of the left upper extremity as a result of his 1995 injury. Finally, the compensation judge found the employee was entitled to a rehabilitation consultation to be provided by Turner and its insurer. The employee appeals the denial of wage loss benefits.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Temporary Aggravation

The compensation judge made 68 factual findings of which the employee appealed 30. A majority of the judge's findings, both appealed and unappealed, are primarily a recitation of the extensive medical evidence in the case. The *pro se* employee's brief contains argument as to why each of the appealed findings is inaccurate, incorrect or susceptible of a different inference than that drawn by the compensation judge. The employee also attached to his brief numerous medical records and other documents, some of which were not offered or received in evidence at the hearing.¹² It appears to the court the primary basis for the employee's appeal is the compensation judge's finding relative to the nature and extent of the August 16, 1995 injury. The compensation judge found the 1995 injury was a temporary aggravation to the employee's cervical, thoracic and lumbar spine which completely resolved by November 16, 1995. The first

¹² This court's review on appeal from a compensation judge's finding and order is limited to the evidence submitted to the compensation judge. Vagts v. Tromco Electric, 48 W.C.D. 622 (W.C.C.A. 1993). The court has not considered any documents other than those received in evidence at the hearing.

issue before the court is whether substantial evidence of record supports this finding.

Whether an injury results in a temporary or permanent condition is primarily a question of fact. Factors to consider in determining whether a work-related incident is a temporary or permanent aggravation of a pre-existing condition may include, but are not limited to: (1) the nature and severity of the pre-existing condition and the extent of restrictions and disability resulting therefrom; (2) the nature of the symptoms and extent of medical treatment prior to the aggravating incident; (3) the nature and severity of the aggravating incident and the extent of restrictions and disability resulting therefrom; (4) the nature of the symptoms and extent of medical treatment following the aggravating incident; (5) the nature and extent of the employee's work duties and non-work activities during the relevant period; and (6) medical opinions on the issue. Which of these factors are significant in a particular case and the weight to be given to any factor is generally a question of fact for the compensation judge. Wold v. Olinger Trucking, Inc., slip op. (W.C.C.A. Aug. 1994).

It is clear the 1991 personal injury was significant. The employee sustained thoracic and lumbar spinal fractures and claimed entitlement to a 32.5 percent whole body disability as a result of that injury. The employee was totally disabled for a lengthy period of time after February 1991 and only returned to work on a part-time basis in April 1992. Dr. Kim restricted the employee to light-duty work with a 20 pound lifting restriction because of the effects of the 1991 injury. Following the August 1995 injury, the employee was initially treated for a left arm injury only. The first recorded complaint of thoracic and lumbar pain is contained in the February 19, 1996 medical record of Dr. Detlefson. Thoracic and lumbar spine x-rays on May 9, 1996 were read by the radiologist to be unchanged as compared to the August 1991 films. The compensation judge noted the June 1996 thoracic and lumbar MRI scans showed no structural changes in the employee's spine as compared to the MRI study obtained at the Noran Clinic in 1991. (Memo. at p. 11.) Based, in part, on this evidence, the compensation judge concluded the employee's periods of disability after August 16, 1995 were attributable solely to the 1991 injury. With respect to the 1995 spinal injuries, this is a reasonable inference to be drawn from the evidence. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The compensation judge specifically adopted Dr. David Boxall's opinion that the 1995 thoracic and lumbar injury was a temporary aggravation of the 1991 spinal injury which resolved by November 16, 1995. The employee argues the doctor's opinion is not reasonable and lacks foundation. We disagree.

In his September 24, 1996 examination report, Dr. Boxall reviewed numerous medical records and x-ray reports, outlined a history of the employee's injuries and treatment, set out the employee's current complaints and conducted a physical examination. The doctor diagnosed compression fractures of T11 and L1 which he related to the January 1991 personal injury. The 1995 injury, Dr. Boxall concluded, caused a soft tissue injury and ulnar nerve contusion of the left elbow and caused a temporary flare-up of the 1991 T11 and L1 spinal injuries.

This temporary flare-up, the doctor opined, ended by November 16, 1995. With respect to the left elbow, the doctor recommended the employee avoid resting the elbow on anything or bumping his left elbow, but otherwise placed no restrictions on the employee's activities. Dr. Boxall rated zero permanent partial disability for the left elbow and ulnar nerve injury. Dr. Boxall re-examined the employee on December 17, 1997 and stated his opinions were unchanged from his report of September 24, 1996. (Resp. Ex. 1.)

Dr. Boxall was provided with the historical and medical background regarding the nature, care and treatment of the employee's 1991 and 1995 injuries and conducted a physical examination. We have carefully reviewed Dr. Boxall's medical reports and conclude the doctor had adequate foundation to render opinions as to the nature and extent of the employee's injuries. We acknowledge the records and opinions of Dr. Groner, Dr. Detlefsen, Dr. Hubbard and Dr. Ganz are, in part, inconsistent with the opinions of Dr. Boxall. However, it is the compensation judge's responsibility, as trier of fact, to resolve conflict in expert medical testimony. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The compensation judge resolved that dispute by adopting the opinions of Dr. Boxall. The compensation judge could reasonably rely upon Dr. Boxall's opinions, and the judge's decision to do so is affirmed.

In addition to the opinions of Dr. Boxall, other medical evidence of record supports the compensation judge's decision that the 1995 spinal injuries were temporary. Dr. William Simonet examined the employee on August 20, 1996. The doctor obtained a history of the employee's 1991 and 1995 injuries and reviewed medical records and x-rays. He diagnosed low back pain without evidence of radiculopathy, past history of mild compression fracture of L1 and chronic pain syndrome. The doctor concluded the L1 fracture was not causing low back pain or any neurologic dysfunction and opined the employee was intensely focused on pain issues. Dr. Simonet felt he had nothing to offer the employee orthopedically and recommended he return to work. (Resp. Ex. 2.) Dr. Paul Wicklund examined the employee on September 28, 1996. Dr. Wicklund also obtained a history of the two injuries and reviewed the employee's medical records. The doctor diagnosed multi-level degenerative disc disease of the lumbar spine and a healed L1 burst fracture. Dr. Wicklund opined the 1995 injury was to the employee's lower lumbar spine. The doctor concluded the employee did not need any further medical care and could return to the same work he did prior to his 1995 injury. The opinions of Dr. Simonet and Dr. Wicklund are consistent with Dr. Boxall's opinion that the 1995 injury did not permanently aggravate the employee's pre-existing thoracic and lumbar spine disability. We, therefore, affirm.

The compensation judge also found Turner and its insurer were liable for an injury to the employee's cervical spine on August 16, 1995. (Finding 58.) The compensation judge found, however, the 1995 cervical injury was temporary only. The employee appeals this finding. The employee argues he had no permanent cervical spine damage as a result of his 1991 injury as evidenced by the July 17, 1991 cervical MRI scan. (Resp. Ex. 5.) A cervical scan obtained in May 1999, in contrast, showed spinal stenosis at C4-5 and C5-6 and a posterior annular tear at C3-4 with mild flattening of the ventral aspect of the spinal cord. This later study, the employee contends, proves he sustained a new cervical injury in 1995. Accordingly, the employee argues substantial evidence does not support the compensation judge's findings that the 1995 cervical

injury was temporary in nature. We disagree.

The cervical MRI scan relied upon by the employee was not obtained until May 1999, after the hearing before the compensation judge. The court cannot, on appeal, consider any evidence not submitted at the hearing before the compensation judge. Vagts, 48 W.C.D. 622. The 1999 MRI scan was not considered by the court for purposes of this appeal.

Dr. Lawrence Farber diagnosed a concussion and neck strain resulting from the 1991 injury. (Resp. Ex. 5.) Dr. Detlefson also diagnosed a cervical injury secondary to the 1991 injury. (Resp. Ex. 15.) The employee claimed he reinjured his neck in 1995 and the compensation judge agreed. Dr. Hubbard concluded the employee sustained a cervical, thoracic and lumbosacral myofascial pain syndrome secondary to the 1995 injury. No doctor, however, opined the employee sustained any permanent injury or damage to the cervical spine as a result of the 1995 injury. The July 1991 cervical MRI scan was normal. No x-ray, MRI or CT scan of the cervical spine taken after August 1995 was offered in evidence. The compensation judge could reasonably conclude the employee failed to prove he sustained more than a temporary aggravation of his cervical condition. We, accordingly, affirm.

Temporary Total Disability Benefits

The employee claimed entitlement to temporary total disability benefits from May 20, 1996 through August 1, 1997. The compensation judge found the employee failed to perform a reasonable and diligent job search during this period of time and denied the employee's claim. (Finding 67.) Although the employee appealed this finding, his brief contains no specific argument on the job search issue. Based on our review of the record, we conclude the evidence adequately supports the compensation judge's finding.

We have affirmed the compensation judge's finding that the employee's 1995 cervical, thoracic and lumbar injuries were temporary and resolved by November 16, 1995. Since the 1995 spinal injuries resulted in no restrictions or permanent disability, the employee proved no entitlement to wage loss benefits for those injuries. Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (1987). The employee closed out all claims for wage loss benefits for the 1991 injury in a stipulation for settlement. Any claim for benefits after November 16, 1995, therefore, must be based on disability or restrictions which resulted from the admitted 1995 left elbow injury. The compensation judge, however, made no findings regarding whether the employee had restrictions or disability related to his left elbow injury. With respect to the employee's claim for temporary total disability benefits, however, this failure to make a finding does not necessitate a remand.

Temporary total disability is found when the employee's physical condition, together with his training, experience, and type of work available in his community cause the employee to be unable to obtain anything but sporadic employment at an insubstantial wage. Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981). The basic principle of the Workers' Compensation Act is that an employee's loss of earning capacity must be causally related to the disability before benefits are due. Arouni v. Kelleher Constr., 426

N.W.2d 860, 41 W.C.D. 42 (Minn. 1988). An “injured employee proves total disability by showing that work the employee is capable of doing is unavailable, and unavailability is shown by a diligent job search to no avail.” Redgate v. Sroga’s Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 848, 954 (Minn. 1988). The determination of whether or not an employee’s job search is diligent is a question of fact for the compensation judge. Bauer v. Winco/Energex, 42 W.C.D. 762 (W.C.C.A. 1989).

Between May 1996 and August 1997, the employee testified that people talked to him “every week or every month there, 96, 95, 97” about heating and air conditioning and other construction type jobs. The employee refused the offered work because he felt his doctor’s restrictions precluded him from doing that kind of work. (T. 86-89.) The employee acknowledged that he did not actively seek work, but only talked to people who talked to him about returning to work. Further, the employee stated he did not look for work up until 1997 because he felt his back was not “fixed.” (T. 138-139.) Substantial evidence supports the compensation judge’s finding that the employee failed to conduct a diligent job search between May 20, 1996 and August 1, 1997. Accordingly, we affirm the compensation judge’s finding and the denial of temporary total disability benefits on that basis.

Temporary Partial Disability Benefits

The employee claimed entitlement to temporary partial disability benefits from February 23 through April 9, 1998. The compensation judge found the employee was temporarily and partially disabled during this time due to restrictions for his back. The compensation judge found this period of disability was caused solely by the 1991 injury which had been settled. (Finding 60.) The compensation judge further found that although the employee was working, “there is no evidence that he continued to seek more lucrative employment during this time.” (Finding 67.)¹³ Based, apparently, on these findings, the compensation judge denied the employee’s claim for temporary partial disability benefits.

To be entitled to temporary partial disability benefits, an employee must establish three elements: (1) there must be a physical disability; (2) the employee must be able to work subject to the disability; and (3) there must be an actual loss of earning capacity that is causally related to the disability. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). Temporary partial disability benefits are generally based on the post-injury wage of the employee, which is presumed to be representative of an employee's reduced earning capacity. However, in appropriate circumstances, this presumption can be rebutted with evidence indicating the employee's ability to earn is different than his post-injury wage. Schwan v. Fabcon, 45 W.C.D. 209 (W.C.C.A. 1991). Finally, we note 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.,

¹³ We note the employee worked essentially full-time during six of the seven pay periods from the pay period ending March 1, 1998 through the pay period ending April 12, 1998. (See: Pet. Ex. B.)

53 W.C.D. 388 (W.C.C.A. 1995).

The compensation judge made no findings regarding whether the employee sustained a physical disability or loss of earning capacity causally related to the 1995 left arm injury. Nor did the judge make a finding regarding the employee's earning capacity during the period of claimed disability. Absent such findings, the compensation judge erroneously denied the employee's claim for temporary partial disability benefits. We, therefore, vacate finding 60 and that portion of order 2 in which the compensation judge denied the employee's claim for temporary partial disability benefits. The case is remanded to the compensation judge to make further findings consistent with this decision.