JASON E. RAISCH, Employee/Appellant, v. FORTUNA FARMS and CREDIT GEN./GAB ROBINS, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 15, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - MULTIPLE EMPLOYMENTS. Substantial evidence supports the compensation judge's finding that the employee's work with a band was not regular and therefore the employee's income from that band should not be included in the employee's weekly wage.

EARNING CAPACITY. A finding regarding earning capacity in a specific dollar amount is not based upon substantial evidence where the finding was based solely upon one potential job opening, and is therefore vacated.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's findings that the employee had not conducted a diligent job search and that he had not cooperated with rehabilitation services, therefore the compensation judge's denial of temporary partial disability benefits are affirmed.

Affirmed in part and vacated in part.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's denial of temporary partial disability benefits and the compensation judge's finding that the employee's self-employment income should not be included in determining the employee's weekly wage. We affirm in part, and vacate in part.

BACKGROUND

On February 6, 1997, Jason Raisch (employee) sustained an admitted injury to his right foot and ankle while working as a foreman for Fortuna Farms (employer), which was insured for workers' compensation liability by Credit General/GAB Robins, Inc. (insurer). The employee was injured when he fell while climbing a ladder. He sustained a severely comminuted closed calcaneal fracture on his right foot (fracture of right heel bone). On February 21, 1997, the

employee underwent a closed reduction of the fracture. The employee was taken off work by his treating surgeon, Dr. John T. Anderson. On May 27, 1997, Dr. Anderson advised the employee that he was likely to have substantial permanent stiffening in his subtalar joint, such that he might have difficulties with the work tending horses and walking on uneven ground required of his previous farm job.

As of October 30, 1997, the employee's symptoms continued; walking and standing remained painful. On that date, Dr. Anderson released the employee to full-time work, with restrictions of no lifting over 50 pounds, and no standing more than 30 minutes twice daily in an eight hour work day. Dr. Anderson also advised the employee and his QRC that he would need to reconsider restrictions at three-month intervals, that the employee had not yet reached maximum medical improvement (MMI) and that a rating for permanent partial disability could not be addressed for another 12 to 18 months. (Ee. Ex. D.) Dr. Anderson also told the employee that he required an over-the-ankle boot and an orthotic device to stabilize his ankle and to even his leg length. (Ee. Ex. M.)

At the request of the employer and insurer, the employee underwent independent medical examinations with Dr. Jack Drogt, on September 23, 1997 and May 27, 1998. As of September 23, 1997, Dr. Drogt determined that the employee had not yet reached MMI, and would have a minimum rating of three percent permanent partial disability to the body as a whole, in addition to further permanency due to loss of function and range of motion. Dr. Drogt determined that the employee had a considerable disability as a result of his physical impairment, and assigned physical work restrictions. Dr. Drogt believed that the employee was capable of full-time work in a clerical, sedentary position, and might need further surgery in the future. As of May 27, 1998, Dr. Drogt determined that the employee had reached MMI one year post-injury and assigned a rating of nine percent permanent partial disability to the body as a whole. Dr. Drogt believed that no medical treatment was necessary at that point, but that the employee might require additional surgery if his symptoms continued. Dr. Drogt assigned the following physical work restrictions: full-time work with alternating sitting and standing; walking on a level surface; sitting four to six hours per day; and standing or walking two to four hours per day. Dr. Drogt limited the employee to a 25 pound lifting and carrying restriction, and restricted him from any work on unlevel ground, and any work ascending or descending ladders or stairs repetitively. Dr. Drogt specifically determined that the employee was unable to return to work in his regular capacity as a stable hand. (Er. Exs. 1 and 2.)

By March 4, 1998, Dr. Anderson revised the employee's permanent restrictions to allow him to stand one hour twice daily in an eight hour work day, and to lift up to 100 pounds. Dr. Anderson determined that the employee reached MMI by March 4, 1998, and assigned a 6 percent permanent partial disability rating due to the employee's right foot fracture and limited range of motion.

The parties stipulated that the employee's weekly wage earned from the employer at his time of his injury was $344.81. The employee also claims that on the date of his injury, he was self-employed as a member of a musical band which he formed in early 1995. The employee

testified that he had been involved in the music industry approximately 15 years, had played in three other bands, owned extensive recording gear and had worked as a recording engineer. Since his band's inception in early 1995, the employee purchased additional equipment, played lead guitar, bass and drums, sang, wrote 12 or 13 songs for the band and practiced with the two other band members. The band's first professional appearances were in early March 1996 and extended through September 28, 1996. During this period of time in 1996, the employee earned $13,074 from his band. (Ee. Ex. K.) The judge's finding confirming the employee's 1996 band income was not appealed. (Finding 17.) In late 1996 and through January 1997, the band continued to rehearse and to record and edit demonstration CDs, intending to use those recordings for marketing purposes. Members of the band also discussed the band business on a regular and routine basis. Whereas the employee was the lead member of the band, another band member, John Tolbert, acted as the business manager and scheduler of band performances. At the time of the injury, the employee was continuing to write songs, record and rehearse new music for performances in 1997, but the band had not earned any income for four months, since September 28, 1996, and did not yet have any performances scheduled for the 1997 season. (See Finding 8.)

The employer commenced provision of rehabilitation assistance in May 1997, three months post-injury. On October 21, 1997, the employee underwent a rehabilitation consultation with QRC Dawn Chicilo, shortly before the employee's release to return to work provided by his treating physician. The QRC determined that the employee was a qualified employee for rehabilitation services, and commenced those services, assisting the employee with resume development, identification of target job areas, and communications with the employee's physician and the insurer. The rehabilitation goal was to return the employee to work within restrictions with a different employer.

The employee's job search initially focused on the music industry, at the employee's request. Entry level positions within the recording and sound services industry were identified as being consistent with the employee's music career goals, including a "gofer" (assistant), tape-copy engineer, and assistant engineer. The employee's job search was delayed due to his transportation difficulties. In March 1998, the QRC referred the employee to Kari Terwey, Placement Specialist, for job placement services. Ms. Terwey identified job contacts in the above target areas. By April 1998, Ms. Terwey indicated that the job search in the recording industry had been exhausted without success. In an April 17, 1998, letter, the QRC indicated that the employee had participated fully in the placement plan, that job seeking skills training had been conducted, a resume developed, target areas identified, and a job search begun. Also in April 1998, sales positions were added as a job target area as requested by the insurer's adjustor. Although the employee was "not pleased" about the inclusion of sales as a job target area, placement efforts continued in this and the other chosen areas. By May 1998, Ms. Terwey began contacting employers in the music sales and sound and lighting areas.

In June 1998, the employee met with the QRC and Ms. Terwey and agreed to further expand the list of job target areas, including customer service/catalog order positions, ticket booth positions, daytime bartending positions, telephone operator positions, parking lot attendant positions, and manufacturing/assembly positions. The placement specialist provided numerous

job leads to the employee in these areas, and sent resumes to many prospective employers at the employee's request. On June 24, 1998, Ms. Terwey informed the employee of an opening at Damark International in a customer service position at $10.25 per hour. The employee did not apply for this position, as he did not wish to do telephone work. In July 1998, the employee interviewed with Schmitt Music Center, and in August 1998, he accepted an offer for part time work to start in September. (Ee. Ex. M.)

On or about September 12, 1998, the employee began working part time at Schmitt Music Center as a salesperson for $7.25 per hour. The employee worked approximately 12 to 15 hours per week, and testified that he was told by his manager that no more hours were available. (T. 118, 120-121.) On September 23, Ms. Terwey contacted Schmitt Music Center without identifying herself and was told by a Schmitt representative that there were both part-time and full-time positions available at Schmitt. When Ms. Terwey informed the employee of this conversation, the employee became very upset. The employee advised the placement specialist that he believed she was unprofessional because she did not obtain the name of the person at Schmitt Music who answered the phone, and that he felt she was telling him to quit his job at Schmitt Music Center and to return to a sedentary telemarketing job. He also complained about the lack of services obtained from the QRC and placement specialist. The employee's QRC terminated rehabilitation services on or about September 23, 1998, due to the employee's language used and his abusive behavior towards Ms. Terwey. (T. 23-24.) No further rehabilitation services were provided to the employee, even though an R-3 Rehabilitation Plan Amendment approved by the insurer on October 7, 1998, proposed an extension of rehabilitation services. (Ee. Ex. M.) The employee continued working part-time for Schmitt Music.

While receiving rehabilitation assistance in 1998, the employee continued pursuing his goal of a career in the music industry. In June or July 1998, the employee recorded three songs with a producer, Dale Strength, owner of a recording company. By the time of the hearing, the employee continued to work with that producer. His goal was to produce a CD in order to market his musical talent and services. (T. 123-124.) Since June or July 1998, the employee has continued to practice daily, or at least four to five hours per night, four to five nights per week. He has continued to seek employment beyond his Schmitt Music position, by communicating with and applying to recording studios. He has limited his job search to that target area. (T. 125.)

On December 8, 1997, the employee filed a claim petition, claiming entitlement to an underpayment of temporary total disability benefits from February 7, 1997 to the present and continuing. The employee claimed he was due an underpayment of temporary total disability benefits, arguing that his band income should be included in calculation of his average weekly wage. The employee also claimed entitlement to reimbursement for taxi cab fare related to his job search, and also claimed entitlement to retraining benefits.

The employee later amended his claim to include temporary partial disability benefits based on his actual wages at Schmitt Music earned since September 1998. A hearing was held on January 5, 1999. The compensation judge found that the employee was not regularly employed with the band at the time of the injury and therefore that his band income should not be

included in his weekly wage. The judge also found that the employee was not entitled to temporary partial disability benefits due to lack of cooperation with rehabilitation, lack of a diligent job search, and based upon an imputed earning capacity greater than his weekly wage at the time of injury. The employee appeals.

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 (1998). 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

Weekly Wage

Minn. Stat. § 176.011, subd. 3 provides that the wage calculation for workers' compensation benefit purposes is to be determined on the basis of the wages the employee was receiving from the employment engaged in at the time of injury. Minn. Stat. § 176.011, subd. 18 states in part, "If, at the time of injury, the employee was regularly employed by two or more employers, the employee's days of work for all such employments shall be included in the computation of weekly wage." The object of a wage determination is to arrive at a fair approximation of the employee's probable future earning power which has been impaired or destroyed by the injury. Sawczuk v. Special School District 1, 34 W.C.D. 282, 312 N.W.2d 435 (Minn. 1981). See also, Bradley v. Vic's Welding, 39 W.C.D. 921, 405 N.W.2d 243 (Minn. 1987); Beissel v. Marschall Line, Inc., 58 W.C.D. 470 (W.C.C.A. 1998).

The compensation judge found that the employee was not "regularly employed" by the band at the time of the injury since the band had not earned any income for over four months before the injury and did not have any performances scheduled for 1997. The employee argues that the band's performance schedule was seasonal, from February or March through September or October. The peak performance season for the band's venues revolved, in part, around school and the summer vacation season, commencing in March at spring break time and ending in September or October. (T. 43-44, 102.) The band's manager, who was also a member of the

band, testified that the band was still functioning in February 1997, and that the only reason that the band did not have any performances scheduled yet for 1997 was due to a temporary hiatus in work resulting from the deaths of close family of two band members in December 1996 and January 1997.

The term "regularly employed," as it applies to inclusion of earnings from a second job, is not defined within the statute. In Newbauer v. Pepsi Bottling Group, 43 W.C.D. 339 (W.C.C.A. 1990), this court noted that, "'regular' means, in common parlance, 'steady or uniform in course, practice or occurrence, not subject to unexplained or irrational variation;' and 'returning, recurring, or received at stated, fixed or uniform internals.'" Id. at 342 (quoting Webster's Third International Dictionary, 1913 (1966)). In Newbauer, the court found that the employee's earnings from a second, seasonal job (a lawn care business) were includable in the employee's weekly wage because that employment was not casual or irregular, even though the employee was injured during the off season for the second job. In Newbauer, the employee had operated his lawn care business for three to four years prior to his work injury. Further, in Bladow v. Len's Standard, slip op. (W.C.C.A. Jan. 29, 1987), this court found that a janitorial job an employee had just started in addition to his primary employment was regular, on the basis that the janitorial services were to be provided "for an indefinite time into the future . . . on a regular, routine and predictable basis." Id.; see, e.g., Slominski v. Grazzani Bros., 45 W.C.D. 412 (W.C.C.A. 1991) (the employee's seasonal "extra" work, which he contracted with the employer, was included). By contrast, see, Brummond v. Simcote, Inc., slip op. (W.C.C.A. May 16, 1995) (secondary employment with no guarantee to work and no set hours or shifts was inherently casual); Welter v. CDL Commissary, Inc., slip op. (W.C.C.A. May 5, 1994) (summer income from officiating at softball games was irregular and casual); Boline v. Sunny Fresh Foods, Inc., slip op. (W.C.C.A. June 20, 1992) (wages from a second employer were not includable where the employee was not guaranteed employment or specific work hours). In Meyer v. Theis and Talle Management, slip op. (W.C.C.A. Sept. 22, 1992), this court excluded wages earned from a secondary job prior to the injury date because the employee's secondary job as a day-care worker had changed from regular part-time work to irregular and on-call status one month prior to date of injury.

In this case, there was testimony in the record that the band's performance schedule was regular, on a seasonal basis. In addition, there was testimony that the band would have continued throughout the next performance season but for the employee's injury and his resulting inability to stand on stage as required for his musical performances. For these reasons, the fact that the band had not earned any income for over four months before the injury would not necessarily render the employment "irregular" or "casual." The employee argues that, as in the Newbauer case, the employee's work in the band could be considered seasonal, and "an ongoing activity which recurred every year at fixed intervals." Newbauer, 43 W.C.D. at 342. In contrast, the employer argues that unlike the facts in the Newbauer case, the employee's band was only in existence for part of 1995, in which they earned no money, and in 1996 when they earned money for a portion of the year. The employer also argues that it is speculative whether the band would have continued, focusing on the absence of band performances dates set up for 1997 by the date of the employee's injury in February 1997. The employer argues that this does not constitute regular, steady or uniform employment. The employee refutes this argument by asserting that the

band attempted to continue working together in 1997 for a short period of time, but eventually disbanded when it became clear that the employee could not continue performing on stage as a rock band musician.

The compensation judge did not make any reference to a consideration of whether the employee's job could be considered "seasonal," and therefore includable in the calculation of average weekly wage. However, she scrutinized factors previously considered by this court when evaluating the nature of an individual's employment. The judge found that, based upon a preponderance of the evidence, that the employee's work for the band, Psych'O'Phelia, was not regular and that the employee's income from the band may not be included in the calculation of the employee's average weekly wage. The factors cited by the judge were as follows:

1. The employee was not employed in this second job at the time of the injury.
2. The band work was not regular.
3. As of the date of injury, the employee had earned no income from the band for almost 19 weeks.
4. There were no bookings in place for any time after the date of injury.
5. There was no guarantee of future earnings from the band.

Substantial evidence of record exists to support the compensation judge's exclusion of the employee's 1996 income from his band. Whereas we may have reached a different conclusion had we been the trier of fact, it was not unreasonable for the compensation judge to exclude those wages, and we therefore affirm that portion of the judge's decision.

Temporary Partial Disability

The compensation judge denied the employee's claim for temporary partial disability benefits from September 23, 1998, through the date of the hearing, finding that the employee had not performed a diligent job search, had failed to cooperate with rehabilitation, and had an earning capacity of $410.00 per week.

Temporary partial benefits are payable while an employee is working and "earning less than [his] weekly wage at the time of injury, and the reduced wage the employee is able to earn in [has] partially disabled condition is due to the injury." Minn. Stat. Sec. 176.101, subd. 2(b) (1992). An employee must show (1) a physical disability, (2) an ability to work subject to the disability, and (3) an actual loss of earning capacity that is causally related to the disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101. In order to be eligible for temporary partial benefits, the employee must establish a reduction in earning capacity which is causally related to the work injury. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48 (Minn. 1988). Where a disabled employee is released to work on a full-time basis but works only at a

part-time job, the employee may still be eligible for temporary partial disability benefits if any wage loss is causally related to the personal injury. Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995). Working less than full-time may or may not be reasonable under the particular facts of a case. See e.g., Fisher v. Corn Belt Meats, 52 W.C.D. 687 (W.C.C.A. 1995), summarily aff'd (Minn. June 30, 1995), cited in Nolan, supra.

"[T]emporary partial benefit awards are generally based on post-injury wages because post-injury wages are presumptively representative of an employee's reduced earning capacity. In appropriate circumstances, however, this presumption can be rebutted with evidence indicating that employee's ability to earn is different than the post-injury wage." Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citation omitted). In order to establish an earning capacity different from actual earnings, there must be more presented than evidence of a hypothetical job paying a theoretical wage. Saad v. A.J. Spanjers Co., 42 W.C.D. 1184, 1194 (W.C.C.A. 1990); Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989).

The compensation judge found that the employer and insurer had rebutted the presumption that the employee's wages were representative of his earning capacity. One factor which may be considered in rebutting such presumption is the availability of other specific job openings which would provide the employee with greater earnings. The compensation judge found that the employee had an earning capacity of $410.00, based upon a single job opening located through job placement services. The job opening was at Damark, International, for a full time sedentary job which paid $10.25 per hour. The placement specialist provided this lead to the employee in June 1998. The employee did not apply for this job as he did not want to work in a telemarketing or telephone position.

There was no specific evidence presented that this job would fit within the employee's restrictions or that the employee would have been offered this position, had he applied. The employee's QRC, the only vocational expert or representative to testify at trial, admitted that she was unaware of any full-time job offers presented to the employee during his rehabilitation assistance, either from Schmitt Music or any other employers. She also was unaware of any other job offers presented to the employee, other than his part-time position at Schmitt Music. (T. 25-26.)

There was additional evidence, however, that the employee could earn more than his part time wage. Based upon her knowledge of the relevant labor market, the QRC opined that the employee's position at Schmitt Music Center was not economically suitable since he was released for full time work, and that the employee had an earning capacity of $320.00 based on full-time employment at the hourly wage the employee was earning at Schmitt Music.

The judge rejected the QRC's assessment of a $320.00 earning capacity, and instead utilized the wage from the Damark job opening identified in June 1998. (Finding 25.) The judge's determination of a $410 retained capacity is not supported by substantial evidence of record, as it is based solely on a single job lead and not on a specific offer. See, Saad, 42 W.C.D. at 1194. We therefore vacate the compensation judge's finding that the employee had an earning capacity of $410.00.

However, the employee is still required to prove that his wage loss is causally related to his work injury. The compensation judge found that the employee had not performed a diligent job search and had failed to cooperate with rehabilitation assistance. (Findings 21, 22, 24.) An employee's job search and cooperation with rehabilitation are not necessarily legal prerequisites to an award of temporary partial disability benefits, but constitute evidence which the compensation judge may consider in determining whether the employee's wage loss is causally related to his work injury. Johnson v. Axel Ohman, 48 W.C.D. 198 (W.C.C.A. 1992), summarily aff'd (Minn. Mar. 2, 1993); see also Thomas v. Holman Steel Erectors, slip op. (W.C.C.A. Nov. 17, 1995). Whether wage loss during part-time employment is a result of the personal injury is generally a question of fact, and can be based on other relevant factors such as 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 hours, the number of hours available with the employer and the size of the wage loss. Nolan, supra.

The issue of whether an employee has sought work with reasonable diligence is viewed within the context of the scope of rehabilitation assistance provided by the employer and insurer. Hunter v. Crawford Door Sales, slip op. (W.C.C.A. Aug. 4, 1993) (citing Sellner v. B.F. Goodrich Co., 39 W.C.D. 463 (W.C.C.A. 1986)). In this case, the employee conducted a limited job search in the music industry which produced a part time job, and met with the QRC and the job placement specialist. Whereas the employee received rehabilitation assistance until approximately September 23, 1998, thereafter he received none. By September 23, 1998, the QRC terminated her assistance to the employee, as earlier described, due to the employee's angry outburst at the Placement Specialist. We therefore only can review rehabilitation records prepared prior to September 23, 1998.

In her report of April 17, 1998, the QRC reported that the employee's job search efforts "had improved," but that the employee continued to express frustration with "having to consider jobs he [was] not particularly interested in because of his work injury." The rehabilitation records reflect the employee's reluctance to target job search outside the music industry. He ultimately agreed to expand his job search efforts into other areas, but his limited job search is evident from the very limited job logs submitted to the placement specialist. The rehabilitation records are replete with the job leads provided to the employee, and the names of potential employers to whom the placement specialist sent resumes on the employee's behalf. Although the QRC and Placement Specialist repeatedly requested the employee for copies of his job logs, documenting the job applications he had made, he provided none after June 19, 1998. According to the QRC's report dated August 19, 1998:

> At this time, it appears that Mr. Raisch's cooperation in the rehabilitation plan is marginal. We have not received job logs. I am recommending that a meeting take place to review his efforts to date and determine whether or not he is likely going to benefit from ongoing rehabilitation services, given his level of participation.

In August 1998, the employee applied for and was offered a part-time position with Schmitt Music. According to the Placement Specialist's report dated September 14, 1998, the employee had "not been doing much of a job search because he thought he would have had the job at Schmitt Music by now. He had no job logs to turn in, but indicated he had been making contacts, but just not documenting them."

After the employee started working part time for Schmitt Music Center on September 23, 1998, the employee only made inquiries at recording studios and other music related businesses a few hours a week. The employee had not submitted any job logs since June 19 and the rehabilitation records describe the limited level of his participation with rehabilitation. He has presented no evidence of an adequately diligent job search which may have led to additional work hours beyond the 12 to 15 hours he worked at Schmitt Music. In fact, he continued to work in the music industry, albeit on a nonpaying basis, in order to continue his musical career.

Substantial evidence supports the compensation judge's finding that the employee did not perform a diligent job search after September 23, 1998. The compensation judge also found that the employee failed to cooperate with rehabilitation services. When an employee is receiving rehabilitation assistance, eligibility for temporary benefits may be affected by the employee's lack of cooperation with rehabilitation. Schreiner v. Alexander Constr. Co., 48 W.C.D. 469 (W.C.C.A. 1993); Grieco v. Minnesota Natural Foods, 48 W.C.D. 174 (W.C.C.A. 1993). Whereas we believe that the employee did participate to some extent with his rehabilitation plan, under these circumstances it was not unreasonable for the compensation judge to determine that the employee failed to cooperate with rehabilitation services. We acknowledge that the judge's denial of temporary partial disability benefits applies to a period when the employee was receiving no rehabilitation assistance. Given the employee's lack of a diligent job search and previous lack of cooperation with rehabilitation, however, the compensation judge could reasonably conclude that the employee has not proven that his loss of earning capacity is causally related to his February 6, 1997, work injury, and we therefore affirm the compensation judge's denial of temporary partial disability benefits after September 23, 1998.