

MARK REGENSCHEID, Employee, v. GYSBER EXCAVATING and RELIANCE/GEN. CAS. INS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 23, 1999

No. [REDACTED SSN]

HEADNOTES

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony, medical reports and expert medical opinion, provided substantial evidence to support the compensation judge's finding that the employee did not reach MMI until July 22, 1998 following a second surgical procedure to the right knee.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony, job logs, rehabilitation records and expert vocational opinion supported the finding that the employee had engaged in a reasonably diligent job search for the periods at issue.

RETRAINING - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony, job logs, rehabilitation records and expert vocational opinion supported the compensation judge's approval of the employee's proposed retraining plan.

Affirmed as modified.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Kathleen Nicol Behounek

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's determination that the employee had not reached MMI until July 1998, that he had conducted a diligent job search, that the employee's weekly wage was \$628.04 and that the proposed retraining plan was appropriate. We affirm, with the exception of the weekly wage finding, which we modify to reflect the stipulation of the parties concerning the right of the employer and insurer to provide documentation for a lower level after the hearing.

BACKGROUND

The employee, Mark Regenscheid, was born in 1967. He is a resident of Randolph, Minnesota. He did not complete high school, but subsequently did obtain a GED certificate in about 1989. After leaving high school, the employee worked for a variety of employers either as a construction laborer or as a truck driver. He began working for the

employer, Gysber Excavating, in October 1996. Gysber is located in Cannon Falls, Minnesota. The employee's duties for Gysber included driving a dump truck, operating bulldozers, excavators and rollers, and laying sewer pipes. On February 20, 1997 the employee sustained admitted work-related injuries to his right shoulder, right knee, low back and cervical spine when he fell from a skid loader while attempting a repair in the employer's shop. The employee testified that, at the time of the injury, he was earning \$12.00 per hour plus substantial overtime pay. There remains a dispute between the parties as to the employee's weekly wage, the employer and insurer arguing that it is \$614.73, while the employee contends it is \$628.04. For purposes solely of the issues raised at the hearing below the parties stipulated that the compensation judge could assume that the employee's weekly wage was \$628.04. They also agreed that the employer and insurer reserved its right to provide documentation of a lower wage after the hearing. (T. 8, 37-45, 50-51.)

The employee saw his family physician the next day, February 21, 1997, and was taken off work. He subsequently was treated chiropractically but with only short-term improvement. The employee's chiropractor then referred the employee to Dr. Douglas A. Becker, an orthopedic surgeon, who saw the employee on April 9, 1997. The employee underwent a right knee arthroscopy on May 6, 1997, with lateral retinacular release and debridement of the medial and lateral menisci. On July 1, 1997, the employee underwent a right shoulder arthroscopic procedure. A VAPR procedure was used for shrinkage of the anterior capsule. Dr. Becker noted a partial thickness tear of the insertion of the supraspinatus tendon, which was then debrided. Also performed were a subtotal bursectomy, coracoacromial ligament release, anterior acromioplasty and partial distal clavicle excision. Dr. Becker released the employee to return to work beginning August 15, 1997, with restrictions consisting of no repetitive use of the right arm or use of the right arm for lifting over 10 pounds, and with limited bending, twisting, stooping, standing, walking, squatting, kneeling and stair climbing. (Exh. 6; Judgment Roll: 8/13/97 return to work form.)

The employee was unable to return to work for the employer in his pre-injury job following the February 20, 1997 injury and the employer was unable to provide any light duty work. The employee began receiving vocational rehabilitation services from a QRC, Ken Askew, in September 1997. A job placement plan and agreement were developed which contemplated a full-time job search focusing in the areas of delivery driver, parts runner, route sales driver, machine operator, production and assembly. The employee was provided with job placement assistance from Diane Tyler, a job placement specialist. (T. 54-56, 125-135; Exh D: 10/26/97 job placement report.)

On January 26, 1998 the employee was seen by Dr. Mark E. Friedland, an orthopedic physician, for the purposes of an examination on behalf of the employer and insurer. Dr. Friedland offered restrictions against repetitive use of the right arm above shoulder level and against repetitive kneeling or squatting. He further opined that the employee had reached maximum medical improvement from all of the conditions resulting from the February 20, 1997 work injury. The employer and insurer served Dr. Friedland's 1/26/98 report on the employee on February 6, 1998. (Exh. 6; Finding 2.)

In a report dated February 26, 1998, Dr. Becker noted that the employee continued to have persistent knee pain but that “[n]o additional specific treatment is recommended at this time other than annual follow-up evaluation with x-rays for the right shoulder and right knee. It is possible that Mr. Regenscheid will come to more definitive right knee surgery which would entail tibial tubercle osteotomy although this is not planned at this time.” He agreed that the employee was at MMI as “a healing plateau has been reached effective 2/23/98 with regard to both the right shoulder and right knee.” The employer and insurer served the employee with a copy of this report on March 19, 1998. (Exh. 4 at 2, 3; Finding 2.)

The employee first found work in the spring of 1998 as a security guard for Menard’s Lumber at \$8.75 per hour. The job involved checking the materials leaving the lumberyard in customer vehicles against purchase receipts. The employee testified that after two or three days on this job, which required him to stand 90 percent of his work day, his knee symptoms troubled him too much to continue. (T. 59-63.)

The employee returned to Dr. Becker on April 20, 1998 with persistent anterior right knee pain, which the employee indicated had been disabling when attempting work which required protracted standing. The employee discussed his treatment options with Dr. Becker, who agreed that since the employee was having significant difficulty with his knee further surgery would be reasonable. The employee underwent arthroscopic knee surgery on April 28, 1998. In a Return to Work form dated June 10, 1998, Dr. Becker released the employee to “desk work only” on June 11, 1998. Dr. Becker also ordered that the employee undergo twice weekly physical therapy treatments for four weeks. Also on June 10, 1998, Dr. Becker stated that the employee was subject to permanent restrictions limiting bending, twisting, stooping, standing, walking, squatting, kneeling and stair climbing, restricting the employee from overhead work or lifting over 15 pounds with the right arm and limiting the employee to an eight-hour workday. On July 22, 1998, Dr. Becker completed a Return to Work form in which he again specified a series of permanent restrictions, including working only eight hours, no lifting over 15 pounds with the right arm, limited (3 hours/day) repetitive or overhead right arm activity and limited bending, twisting, standing, squatting, kneeling, etc. (3 hours per day). In November Dr. Becker opined that the employee’s knee condition had reached MMI on July 22, 1998. (Exh. K: Office notes or forms dated 4/20/98, 6/10/98; Exh. 1: 11/16/98.)

The employee testified that following recovery from the April surgery and release by Dr. Becker he resumed his job search activities and next found work as a security guard for Allied Security starting in August 1998. He stated that in his job search efforts he worked and cooperated with his QRC, Mr. Askew and Ms. Tyler, the job placement specialist. He testified that at first he made an unspecified but significant number of phone calls looking for desk work per Dr. Becker’s work release. (T. 107.) After July 22, he testified that he looked for light duty work of all types until he found the job at Allied. (T. 100-104, 111.) The employee’s QRC’s Report dated 8/23/98 details the employee’s job search activities from July 21 through July 29, 1998. (Pet. Ex. D.) The security job paid \$9.00 per hour and the employee continued to work in that job full time through the date of hearing, November 17, 1998. (T. 64-68.) The employee works from 4 a.m. to noon, five days per week. (T. 75.) The employee testified that

since he found the security job he has not continued to look for work.

The employee's QRC testified that because the employee's job search had not returned the employee to work paying close to the employee's weekly wage, rehabilitation efforts began focusing on the possibility of retraining. Based on vocational interest and aptitude testing and discussions with the employee, the employee's QRC prepared a retraining plan which involves 104 weeks of training at the St. Paul Technical College as an electronics technician at a total cost of \$24,907.05, excluding retraining wage benefits. (T. 143-164, Pet. Ex. B.) The proposed plan was served on the employer and insurer on May 26, 1998.

The employer and insurer opposed the proposed retraining and a hearing was held before a compensation judge of the Office of Administrative Hearings on November 17, 1998. In addition to consideration of the proposed retraining, the issues presented included determination of the date of maximum medical improvement and entitlement to temporary total disability compensation from June 8, 1998 through August 2, 1998. The compensation judge found that maximum medical improvement had been reached on July 22, 1998, awarded temporary total disability benefits from June 8 through August 2, 1998 and approved the proposed retraining. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

Temporary Total Disability

The employer and insurer appeal the award of temporary total disability from June 8, the date the employee was released to return to work, through August 2, 1998, when he returned to work. They argue that no temporary total disability is due for either of two reasons: (1) more than ninety days had passed since the employee reached maximum medical improvement with the service of Dr. Friedland's and Dr. Becker's MMI reports; and (2) the employee did not conduct a reasonably diligent search for work within his restrictions.

Maximum Medical Improvement

The compensation judge found that the employee did not reach maximum medical improvement (MMI) until July 22, 1998, when he was released to return to work with restrictions following his second knee surgery in April 1998. Since no report evidencing MMI on that date had been served on the employee following the surgery, the judge determined that the effective date of MMI was the date of the hearing below. (Findings 4, 5.)

The employer and insurer argue that the compensation judge erred in failing to find that the employee had reached MMI effective with the service either of Dr. Friedland's report dated January 26, 1998 or of Becker's report dated February 26, 1998. Specifically, they argue that the employee's knee surgery in late April 1998 did not result in further improvement to the employee's condition, but rather represented a medical response to a worsening of the employee's condition which returned him to the level of improvement he had previously attained.

It is not clearly obvious from the medical evidence alone whether the second knee surgery in April 1998 resulted in improvement beyond that which the employee had attained by February 1998. In September 1997 the employee's right knee showed minimal swelling with patellofemoral crepitus and 0-100 degrees of motion. (Exh. K: 9/24/97.) Dr. Becker next saw the employee on December 31, 1997 and noted that the employee had persistent knee pain but that "[i]f his right knee symptoms continue, he may need to consider more definitive treatment but hopefully this can be avoided." The employee was seen again by Dr. Becker on February 23, 1998, on which date the doctor noted that the employee continued to have persistent right knee pain but that "[h]is knee symptoms are at a moderate level at this stage and I would not recommend additional treatment unless that progresses at which stage may need to consider TTO surgery. I will plan on seeing him back in 2-3 months if he is having any persistent symptoms." (Exh. K: 12/31/97, 2/23/98.) In his February 26, 1998 report, Dr. Becker again stated the employee continued to have persistent knee pain but that "[n]o additional specific treatment is recommended at this time other than annual follow-up evaluation with x-rays for the right shoulder and right knee. It is possible that Mr. Regenscheid will come to more definitive right knee surgery which would entail tibial tubercle osteotomy although this is not planned at this time." He agreed that the employee was at MMI as "a healing plateau has been reached effective 2/23/98 with regard to both the right shoulder and right knee." (Exh. 4 at 2, 3.)

The employee returned to Dr. Becker on April 20, 1998 with persistent anterior right knee pain, which the employee indicated had been disabling when he attempted the Menard's job, which required protracted standing. Dr. Becker noted that the employee's examination "continues to show retropatellar symptoms with pain on compression and he has significant intermittent swelling in the knee. Stability is normal, otherwise, and the remainder of the knee exam is unremarkable." The employee discussed his treatment options with Dr. Becker, and Dr. Becker agreed that since the employee was having significant difficulty with his knee, "in light of his retropatellar symptomology, I feel that tibial tubercle osteotomy

surgery would be reasonable.” (Exh. K: 4/20/98.) This surgery was performed on April 28, 1998. On July 22, 1998, Dr. Becker saw the employee and observed that “[h]is knee is actually doing quite well with 0-110 degrees of motion. He has much less discomfort and is improved from preoperatively.” (Exh. K: 7/22/98.) In his report dated November 16, 1998, Dr. Becker related the need for the April 28, 1998 surgery to the February 20, 1997 work injury. He opined that the employee had reached MMI on July 22, 1998 when he was released to return to work with restrictions. (Exh. 1: 11/16/98.)

While other interpretations are possible, it would have been reasonable for the judge to interpret these records to conclude that in December 1997 and February 1998 Dr. Becker hoped to avoid a second knee surgery, anticipating that the employee’s right knee symptoms might continue to improve, rather than persist, but that upon the persistence of the symptoms into April 1998, the doctor determined that the surgery was reasonably required. In this interpretation, the MMI opinion Dr. Becker offered in February 1998 was based solely on the prognosis that further treatment would not be required, a prognosis that proved to be overly optimistic. Thus the compensation judge could reasonably adopt the later MMI date of July 22, 1998 subsequently offered by Dr. Becker in his November 1998 report.

In addition to the medical evidence, the employee testified that, as of the date of hearing on November 17, 1998 his right knee was “a lot better than it was after the first surgery” in May 1997. (T. 70.) This testimony further supports the conclusion that the April 1998 surgery resulted in additional improvement, rather than simply a return to the plateau reached after the prior surgery.

We conclude that the compensation judge’s findings regarding the date of MMI are adequately supported by the evidence and affirm. The ninety day provision in Minn. Stat. § 176.101, subd. (j), does not prevent the receipt of temporary total disability benefits as awarded to the employee by the compensation judge.

Job Search

The compensation judge found that the employee had performed a diligent search for employment within his restrictions from July 22, 1998 until August 2, 1998 and cooperated with the rehabilitation assistance provided. (Finding 6.) The employer and insurer argue that during this specific period the employee continued to avoid his responsibility to search for work, much in the way he had allegedly failed to diligently look for work since rehabilitation efforts had been commenced in 1997.¹ In their overall attack on the employee’s efforts, the employer

¹ In their brief, the employer and insurer’s arguments concerning job search are primarily made in the context of their position that retraining was unnecessary. They contend that the employee would have found a job approaching the economic status of his preinjury position if he had engaged in a diligent job search from the time rehabilitation services were provided in the fall of 1997 to the date of hearing. It is very difficult to isolate from the discussion in the retraining section of their brief a specific argument concerning the brief period of temporary total disability in July and August 1998 being appealed. Because the two arguments are intertwined,

and insurer point to instances when the employee did not follow up with prospective employers or submit job applications or attempt to determine whether certain prospective employers would be willing to accommodate his restrictions by modifying jobs they had advertised. They also argue that the employee's efforts did not satisfy the standards set forth in the rehabilitation plan he had accepted. (Er/Ins. brief at p. 26-32, 41.) The employer and insurer further rely upon the opinion of their vocational expert, Richard W. VanWagner, who performed a vocational evaluation of the employee at their request on September 8, 1998. In Mr. VanWagner's opinion, the employee's job search had not been reasonably diligent and had focused too heavily on occupational areas in which jobs were not likely to exist within the employee's restrictions. (Exh. 8; T2: 35-43.)

The employee's QRC, Ken Askew, however, testified that during the period he worked with the employee from September 1997 until he found employment in August 1998 the employee made 724 employer contacts, submitted 103 applications and obtained 16 job interviews. In his testimony he discussed many of the factors which formed the basis for Mr. VanWagner's objections. (T. 136-140, 173-184, 194-198; T2: 7-9.) In his opinion, however, the employee had performed a diligent job search. (T. 135.) The employee testified that he had cooperated with the vocational rehabilitation efforts and followed up on all leads provided to him. (T. 65.) During the job search period the employee's job placement vendor's reports contain statements to the effect that the employee "has continued to be very diligent in his job search effort." (See, e.g., Exh. D: 4/27/98 report at 5.) This evidence supports the compensation judge's finding that the employee generally engaged in a diligent job search, which conclusion supported the employee's claim that he needed to be retrained in order to be able to improve his economic status to the level he would have enjoyed had he not been injured.

With respect to the specific period in 1998 involving the appeal of the temporary total disability award, the employee testified that he had looked for work, mostly by making phone calls. His job search efforts ended when he obtained the position at Allied Security. His mileage claim exhibit indicates that he made a number of trips to prospective employers and the QRC's August 23, 1998 report further details the employee's efforts. The employee explained his lack of contact with several leads during this period by stating that he stopped looking for work after accepting the Allied job, and did not consider another job because it would have required him to work at night. (T. 100-111, Pet. Ex. D.)

Based on this evidence the finding of a reasonably diligent job search in July/August 1998 has adequate support in the record. We affirm the award of temporary total disability.

Retraining

Factors relevant in evaluating the propriety of a proposal for retraining include (1)

we will address the employer and insurer's larger argument concerning job search and the specific argument concerning temporary total disability here rather than in the retraining discussion below.

the reasonableness of retraining as compared to job placement activities or the employee's return to work with the employer; (2) the likelihood that the employee has the abilities and interest to succeed in the proposed formal course of study; (3) the likelihood that retraining will result in reasonably obtainable employment; and (4) the likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability. See, e.g., Poole v. Farmstead Foods, 42 W.C.D. 970 (W.C.C.A. 1989); Minn. Stat. § 176.102, subd. 1.

The compensation judge specifically found after considering each of these factors that the proposed retraining plan was a reasonable alternative and was likely to produce the intended results. (Findings 11-14; Order 2.) The employer and insurer appeal, relying primarily on the opinion of their vocational expert, Richard W. VanWagner. They also offered specific arguments concerning the employee's failure to establish that the proposed retraining would be successful in satisfying the four Poole concerns.

The employee's QRC testified at length about the employee's vocational background and experience, the results of vocational and academic testing, the process by which the proposed retraining plan was suggested and the prospects for the employee in the proposed field. His expert opinion was that the proposed retraining would be successful based on a consideration of each of the Poole factors. (T. 123-203.) The employer and insurer's vocational expert, Richard W. VanWagner, offered a contrary opinion. (T2. 12-54; Exh. 8.) The compensation judge essentially adopted the views of the employee's QRC rather than those of Mr. VanWagner. Since both experts based their opinions on adequate foundation, we cannot say that the compensation judge clearly erred in her choice between their divergent conclusions.

The employer and insurer also raise specific objections to the judge's findings with respect to certain of the Poole factors. First, they argue that the employee failed to prove that he could not return to work with the employer or at least return to work with another employer as a heavy equipment operator. (Er/Ins. brief at p. 21.) The employee testified that he had contacted the employer after the injury about a return to work within his restrictions and was told that the employer could not accommodate him. (T. 54, 70.) The employee's QRC testified that he also had contacted the employer about accommodating the employee's disabilities and was given the same response. (T. 130.) Neither of the vocational experts in this case, both of whom considered and discussed the kinds of work which could be suitable for the employee within his restrictions, suggested that reemployment as a heavy equipment operator might be an appropriate option.

The employer and insurer next argue that, if the compensation judge had adopted the medical restrictions proposed by their expert, Dr. Friedland, rather than those provided by the employee's treating physician, Dr. Becker, retraining might not be necessary. (Er/Ins. brief at p. 23.) The compensation judge, however, found that Dr. Becker's restrictions were those applicable to the employee. We must affirm the finding as to the applicable restrictions based on the judge's choice between conflicting expert opinion. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Since the restrictions found applicable in this case are those of Dr. Becker rather than Dr. Friedland, it is not relevant whether retraining might have been

unnecessary under other restrictions. In this context the employer and insurer also argue that if the employee worked overtime or at a second job he would reduce the disparity between his pre-injury weekly wage and his post-injury earnings, thus reducing the need for incurring the expense of retraining. First, it is unclear if Dr. Becker actually released the employee to more than eight hours per day. Dr. Becker's permanent restrictions from July 22 included an eight-hour per day limit, but in his November 16, 1998 report he made no comment concerning the amount of time the employee could work. Second, the only evidence in the record is that the employee's current security guard job offered very little, if any, overtime even if he were able to work the extra time. Third, even if the employee worked overtime or obtained a second job, the compensation judge could have concluded that the employee's chances of returning as close as possible to the economic status he would have attained had he not been injured would have been better under the retraining plan. As a result, we reject the employer and insurer's arguments concerning overtime and a second job.

The third objection to retraining raised by the appellants is that the employee generally failed to perform a diligent job search through which he might otherwise have found suitable work. We have affirmed the compensation judge's finding that the employee did perform a diligent job search above and therefore need not consider this argument again in the context of rehabilitation.

The employer and insurer next argue that the compensation judge erred in awarding retraining as an electronic technician where the judge found that the employee would not be able to perform such work unless employers modified the jobs to suit the employee's restrictions. (Er/Ins. brief at p. 32.) They argue that the compensation judge found that the employee could only perform bench work jobs where carts could be used to move equipment being repaired to and from the bench or where an employer agreed to accommodate the employee's restrictions by having other employees assist in lifting objects over 15 pounds. The employee's QRC, however, testified that based on discussions with the employee's treating physician, with staff at the Technical Institute and with potential employers the employee's restrictions would not prevent employment. The QRC determined that the use of carts for bench work was standard industry practice. (T.154, 159-161, 189-190.)

The employer and insurer argue that the employee is not likely to be successful in the retraining program. (Er/Ins. brief at p. 35.) They contend that the employee will have difficulty gaining certain math skills in order to successfully complete the proposed retraining program because psychological testing showed that the employee tends to prefer practical learning environments and short-term goal-oriented training over a more traditional academic setting. They argue that since the retraining requires an extensive period of classroom instruction it would be unsuited for the employee. The employee's QRC, however, testified that in his opinion the employee had sufficient aptitude and motivation to successfully complete the course work. (T. 156-157.) The compensation judge also listened to the employee testify about his desire to undertake the proposed retraining and found that the employee was sufficiently motivated to complete the retraining, noting that the employee had previously demonstrated a willingness to do formal academic work by completing his GED and by successfully completing a course in computers on his own prior to the injury. The assessment of

motivation is akin to the assessment of credibility, in that the hearing judge is uniquely positioned to observe the employee's demeanor while the employee testified as to his interest in the proposed retraining. We see no reason to reverse the compensation judge's assessment of the employee's ability and motivation.

Finally, the employer and insurer argue that other less expensive retraining options exist by which the employee may regain his lost earning capacity. (Er/Ins. brief at p. 36.) They contend that there are specific short-term training and certification programs in the computer field which the employee could complete, as discussed by their vocational expert in his report. (Exh. 8.) The employee's QRC, however, testified that programs of all types and durations had been considered during the framing of the retraining plan, that he was unaware of any short-term programs to prepare the employee for an electronics technician position, that on-the-job training was rarely provided by employers as they generally preferred to hire qualified trained technicians and that most of the short-term types of programs tended to be skills enhancement for those already working in the technology field. (T. 165-168, 200-203.)

The compensation judge thoroughly considered and discussed each of the employer and insurer's arguments and the evidence concerning each of the four Poole factors. There was adequate evidence in the record, as outlined above and in the compensation judge's memorandum, which supported her conclusions. As a result, we conclude that the compensation judge's award of retraining is supported by substantial evidence and is not clearly erroneous, and affirm.

Weekly Wage

The employer and insurer appeal from Finding 1.a., which stated that the parties had stipulated that on the date of injury the employee was employed "at an average weekly wage of \$628.04." They contend that the actual stipulation concerning the employee's weekly wage was that the issue was "left open for future determination should the issue arise." (ER/INS brief at p. 42.) They request that the weekly wage finding be vacated. They agree that the employee has a weekly wage of at least \$614.73, which was the figure used by the employee in his TTD calculation in Exhibit B, and voluntarily agree to make payments based on that amount.

At the hearing the following discussion took place concerning the employee's weekly wage:

THE JUDGE: Okay, do we have a weekly wage stipulated with respect to the '97 injury?

MR. MEUSER: Your Honor, there are some potential discrepancies so the parties will for purposes of this hearing abide by the rate of - - or the average weekly wage which is currently being paid on of 628.04 (sic). The employer specifically reserves the right to go back and document a change in average weekly wage if appropriate and I have no objection to that.

THE JUDGE: Okay.

MS. JOHNSON: As long as I submit documentation. I'd like the ability to amend that average weekly wage. I don't know about being by hearing but . . .

THE JUDGE: At this point the parties are proceeding with the understanding that the weekly wage was \$628.04 but that may be subject to further clarification at a time beyond this hearing.

MR. MEUSER: Correct.

(T. 7-8.)

While it is true that Exhibit B, the employee's TTD calculation, is apparently based on a weekly wage of \$614.73, the employee's attorney specifically stated that the parties had agreed that the weekly wage "for purposes of this hearing" would be \$628.04. He also agreed, however, that if the employer and insurer could document a lower wage that he would not object to changing the weekly wage figure at a later date. The employer and insurer's attorney and the compensation judge indicated that the \$628.04 figure was not absolute and was subject to clarification based on documentation presented by the employer and insurer after the hearing.

Given this record, we agree with the employer and insurer that the parties did not stipulate that the employee's weekly wage was \$628.04. The compensation judge's finding of such a stipulation is vacated and in its place the following finding is substituted:

Finding a. For purposes of this hearing, the weekly wage of the employee as of the date of injury is \$628.04 . The parties shall use this figure until such time as the employer and insurer are able to document a different wage.