

GERALD SENART, Employee/Cross-Appellant, v. TENNECO PACKAGING and CIGNA INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF ECONOMIC SEC./RI and COLUMBIA PARK MED. GRP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 20, 1999

No. [REDACTED SSN]

HEADNOTES

**CAUSATION - SUBSTANTIAL EVIDENCE.** Substantial evidence, including expert medical opinion, medical records and lay testimony, supported the compensation judge's finding that the employee's work for the employer was a substantial contributing cause of his right shoulder injury.

**TEMPORARY BENEFITS - SUBSTANTIAL EVIDENCE.** Substantial evidence, including medical records, expert medical opinion and lay testimony, supported the compensation judge's award of temporary disability benefits from and after February 19, 1998. The compensation judge's award of temporary partial disability benefits from February 19 through March 8, 1998, cannot be correct, since the employee was not employed during that period. The compensation judge's award of wage loss benefits for that period is modified to be temporary total disability benefits rather than temporary partial disability benefits.

Affirmed as modified.

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.  
Compensation Judge: Karen C. Shimon.

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's determination that the employee's right shoulder injury was substantially caused or contributed to by his work activities at the employer, the award of wage loss benefits from and after February 19, 1998, and the reimbursement to the Minnesota Department of Economic Security. The employee cross-appeals from the compensation judge's denial of temporary partial disability benefits for the period December 8, 1997 through February 19, 1998, and from the award of an intervention interest to the Department of Economic Security.

BACKGROUND

The employee, Gerald Senart, was first hired by the employer, Tenneco Packaging, on September 9, 1997 as a general helper. His responsibility was to fill in where needed in the

employer's packaging plant. At that time the employee was almost 41 years old. From September 9, 1997 through October 9, 1997, the employee worked in the stacker position. This job required him to operate a machine which stacked corrugated cardboard. Essentially he worked at a control panel and did relatively little physical work. On October 9, 1997, the employee was assigned to be a transfer cart operator. This was a much more physically demanding job. In this position he was required to move stacks of corrugated material on a cart. The cart was stacked with four to five feet of cardboard material. The work was partially mechanized and partially required physical exertion. The employee testified that approximately half of the time he was required to physically push the cart into its proper position. The consensus of the testimony of the employee and the employer's representatives was that the maximum load on the cart would be approximately 60 pounds. The employee testified that when he was required to push the cart he did so primarily with his arms straight out in front of him. He also indicated that on some occasions, after he had started pushing, that his arms and shoulders moved backwards as a result of the pushing effort. (T. 39, 91, 98.)

On October 28 or 29, 1997, while employed as a transfer cart operator, the employee sustained an injury when some objects fell on his left foot. He was examined by the company's recommended physician, Dr. Niel C. Henry. X-rays showed that the employee had a fractured distal phalynx (great toe). The employee was given ibuprofen and was released to return to work at light duty not involving walking. The employee testified that he mentioned that he was having shoulder pain to Dr. Henry, but the office notes from October 30 and a follow-up visit on November 14, 1997 only relate to the toe problem. (Pet. Ex. E.)

On October 30, subject to Dr. Henry's restrictions, the employee was assigned to light duty work sorting shipping labels. He continued in this position until approximately November 24, when he was returned to his original stacker job. He worked in this position for approximately one week, until December 1, 1997, a Monday. From December 2 through December 4, the employee indicated that he had the flu and was unable to work. During this period, on December 3, 1997, the employee consulted with his family physician, Dr. S. Slatten, at North Suburban Family Physicians. He complained of neck pain. On that same date an x-ray of his right shoulder was taken. It was read by a radiologist as "normal." The office note from December 3 makes no mention of shoulder complaints, but does state that the employee "is on Daypro for shoulder" and it should help the neck pain. The employee apparently returned to see Dr. Slatten on December 4, now complaining of pain in both shoulders, the right greater than the left. The office note states "no acute trauma but does a lot of pushing, pulling, and lifting at work." Treatment was noted as "will place him on Daypro 600 mg" and home exercises. (Pet. Ex. F.) On December 5, 1997, when he returned to work, the employee was advised that his job was terminated as a result of his absenteeism and poor job performance.<sup>1</sup>

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<sup>1</sup> The sequence of events on December 3 and 4 are not clear. The office notes have entries for both dates, but the entries do not seem to be in the correct order. For example, the entry for December 4 does not recognize that the employee had been prescribed Daypro on the prior date. For purposes of this decision, we assume that each of the events in the office notes occurred on

That same day, the employee contacted Express Personnel Services, a temporary agency that he had obtained work through on several prior occasions. He was given a job, starting the next Monday, December 8, 1997, at Trend Enterprises. The employee worked for Trend Enterprises packaging educational materials until he was terminated on February 5, 1998. The records from Express Services indicate that the employee's work for Trend was cut short as a result of concerns over the employee's attendance. Thereafter the employee continued to look for work, and was offered a job with Nicollet Technologies on approximately February 19, 1998.

Prior to being put to work by Nicollet the employee underwent a pre-employment physical with Dr. Sean Flood, at Columbia Park Medical Group. During the examination with Dr. Flood on February 19, 1998, the employee complained of some tenderness in his right shoulder, some humeral joint stiffness and breakaway bicep weakness. Dr. Flood indicated that the employee was not capable of being employed by Nicollet. Apparently the employee told Dr. Flood that he believed the onset of his shoulder difficulties occurred while working for Tenneco. The employee testified that Dr. Flood advised him that he should notify Tenneco that he had sustained the injury while working for them. On the 20th of February the employee contacted Tenneco and reported the injury. (Resp. Ex. 5, First Report of Injury.)

Dr. Flood also referred the employee to Dr. David Lindgren, an orthopedist at Columbia Park Medical Group. The employee was seen by Dr. Lindgren on February 24, 1998. At that time the employee complained of right shoulder pain. Dr. Lindgren's office notes indicate that the employee "reported injuring this at his prior place of employment in October 1997 when he was pushing stacks of corrugated cardboard. He does not give a specific day of injury. He says he thinks at one time he heard a pop, but it was fairly gradual onset of pain." The report further indicates that the employee stated that, "He mentioned the shoulder to work physician, but the work physician did not actively treat it. About a month later, he said he saw his family physician." On examination Dr. Lindgren noted that the employee had full range of motion but reported pain during certain movements. Dr. Lindgren diagnosed the employee's condition as rotator cuff tendinitis of the right shoulder. He advised the employee to avoid reaching overhead or forward to shoulder height, prescribed Naprosyn and scheduled the employee for a rotator cuff strengthening program through the physical therapy division of the Columbia Park Medical Group. The employee was initially evaluated at the physical therapy department on March 2, 1998. Thereafter, the employee received physical therapy treatment and exercise training.

The employee next saw Dr. Lindgren on March 24, 1998. At that time the employee was feeling a bit better. He was continuing to feel pain when reaching overhead and with restricted rotation. Dr. Lindgren recommended additional physical therapy and continued the employee's restrictions. The employee followed up with Dr. Lindgren on April 14, 1998. At that time the employee was continuing to complain of some pain with certain motions of the shoulder. The employee was given a subacromial injection which provided him with complete relief of pain. The employee again returned to see Dr. Lindgren on April 28, 1998. The doctor's

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either December 3 or 4.

notes from that date indicate that the employee had excellent strength on internal and external rotation and abduction with no pain. Dr. Lindgren recommended that the employee continue his strengthening exercises and released him to regular duty without restrictions. As a result of this release the employee started work for Nicollet Technologies on May 5, 1998.

On September 8, 1998, the employee was seen by Dr. Peter Daly, for an evaluation at the request of the employer and insurer. At that time the employee stated that he had “aching in both shoulders which localized over the anteriolateral shoulder region. He states the right is worse than the left.” The employee advised Dr. Daly that while working for Tenneco in the fall of 1997 he was engaged in push/pull activities and lifting at the waist and chest level. The employee reported that during the first two months of his work at Tenneco he began developing right greater than left shoulder pain. On examination Dr. Daly found a mild amount of tenderness but no crepitus. Dr. Daly’s impression was that the employee’s right shoulder rotator cuff tendinitis had resolved and that the employee had reached maximum medical improvement. With respect to the relationship between the employee’s work activities at Tenneco and his shoulder pain, Dr. Daly made the following comment:

Regarding whether Mr. Senart’s work activities at Tenneco substantially contributed to his development of bilateral shoulder pain, it is my opinion that the work activities at Tenneco would reasonably contribute to overuse type tendinitis involving the shoulders. Assuming Mr. Senart’s history is correct, his work activities at Tenneco did, therefore, substantially contribute to his development of shoulder pain. The condition has resolved and there is no evidence of any permanency relative to this condition.

The employee next sought medical attention for his right shoulder on October 1, 1998, when he returned to see Dr. Lindgren. Dr. Lindgren’s office notes indicate that the employee gave the following history:

Gerald Senart is seen with problems with both shoulders at this time. His rotator cuff tendinitis had pretty much resolved after an injection in April, but at work, he has been doing fairly aggressive activities with the arms. In particular, one task has been to move parts side-to-side from the left to the right, which he does with the arms pretty much outstretched, and this has aggravated both shoulders. He has more problems with the right than the left.

Dr. Lindgren diagnosed “impingement. Stage II, right shoulder. Stage I, left shoulder.” He prescribed Naprosyn and injected the subacromial bursa on the right with Lidocaine. The employee testified that at the October 1 examination, Dr. Lindgren advised him that the primary cause of his shoulder difficulties was the injury at Tenneco and that his work activities at Nicollet were not a cause of his problems. (T. 92, 93, 97.)

The employee returned to the Columbia Park Medical Center on January 8, 1999, where he was seen by Dr. Flood. At that time Dr. Flood advised him that could not treat him since his shoulder problems were not related to his work at Nicollet Technologies and no doctor-patient relationship had been established. He recommended that the employee seek care from his own physician. His notes from that date indicate that he diagnosed an impingement of both the right and left shoulders, greater on the right. He provided the employee with a sample supply of Darvoset for pain. (Pet. Ex. C.)

On February 26, 1999, the employee sought treatment from Dr. J. Craig Paulson, an orthopedic surgeon at St. Croix Orthopaedics. At that time Dr. Paulson examined the employee and reviewed the x-rays taken by Dr. Slatten on December 3, 1997. Based on the employee's complaints of pain, the x-rays and the history given by the employee, Dr. Paulson diagnosed that the employee had rotator cuff tendinitis which was moderate to severe in his right shoulder. He also noted that the December 1997 x-rays "show distinct concavity of the underside of the acromion. There is hypertrophic change at the AC joint with narrowing of the joint and borderline narrowing of the acromiohumeral at the supraspinatus insertion. There is a distinct sclerotic and cystic change." Dr. Paulson indicated that the AC joint had advanced arthrosis. For treatment, Dr. Paulson injected a corticosteroid into the affected area. He discussed several potential options with the employee, including diagnostic arthroscopic evaluation and decompression or open rotator cuff repair, depending upon the arthroscopic examination findings.

Dr. Paulson again examined the employee on March 18, 1999. On the same date, Dr. Paulson's deposition was taken. In his deposition he opined that the employee's work activities as a transfer cart operator for the employer were a substantial contributing cause of the employee's current rotator cuff tendinitis and anterior impingement of both shoulders, right greater than the left. (Pet. Ex. A, pp. 14-15.) He stated that the employee had demonstrated to him the method by which he had pushed the carts. Dr. Paulson testified that the positioning of the hands and arms described by the employee would have been an "ideal way to provoke" rotator cuff tendinitis. (Id. at 18.) Dr. Paulson recommended right shoulder arthroscopic surgery, as well as permanent restrictions against lifting over 75 pounds, lifting above chest level and repetitive motion involving the shoulders. (Id. at 16.) Dr. Paulson was unable to indicate the cause of the arthrosis condition of the acromioclavicular joint. Dr. Paulson stated that arthrosis is a degenerative, "wear and tear" condition commonly referred to as arthritis, which would take years to produce. He testified that the condition was evident in the x-ray taken on December 3, 1997, which he felt had been misread by the radiologist as normal. He opined that the arthrosis preexisted the rotator cuff tendinitis and was a contributing factor, along with the employee's work activities, in creating the employee's rotator cuff tendinitis in October 1997. Dr. Paulson testified that the employee's work activities at Nicollet Technologies were also a contributing factor in the employee's current shoulder difficulties and need for surgery. (Id. at 27.) He further testified that the work activities at Tenneco aggravated the employee's underlying arthritic arthrosis condition. (Id. at 31-32.)

On March 22, 1999, counsel for the employer and insurer wrote to Dr. Daly and provided him with a copy of the December 3, 1997 x-ray taken by Dr. Slatten, Dr. Paulson's chart

notes from February 26, 1999, and a summary of Dr. Paulson's March 18, 1998 deposition. After reviewing these materials, Dr. Daly provided the following comments:

1. In reference to your March 22, 1999, correspondence, you asked whether Mr. Senart experienced pain in the arc of motion during my examination on September 8, 1998. In my opinion, Mr. Senart did not report pain through that arc of motion. This substantiated the lack of an impingement sign. Such lack of pain response would also support the absence of any clinical rotator cuff tendinitis. I, therefore, remain of the opinion that any rotator cuff tendinitis that Mr. Senart had previously was resolved at the time of my evaluation on September 8, 1998.

2. I reviewed the x-rays dated December 3, 1997, of Mr. Senart's right shoulder. This shows type II acromion. He has moderate acromioclavicular degenerative changes. Dr. Paulson apparently reviewed films that were felt to show "advanced" arthrosis by his review.

3. As to whether acromioclavicular joint arthrosis is a substantial contributing factor to rotator cuff tendinitis, it frequently is. I believe Mr. Senart's acromioclavicular joint arthrosis would contribute substantially to his symptoms of rotator cuff tendinitis. It is not uncommon for such acromioclavicular joint arthrosis to develop into rotator cuff tendinitis with or without work activity, specifically at Tenneco.

4. I reviewed the hypothetical in your March 25, 1999, correspondence. The pushing activities involved with working with the "transfer cart" position was reportedly done with the employee's arms in front of him as he pushed. Dr. Paulson has testified that Mr. Senart told him that he would have his palms up close to his shoulders and push forward. I think that either position of the arms would not substantially contribute excessive motions of repetitive stress to the rotator cuff to be a substantially contributing factor in rotator cuff tendinitis. Given the facts outlined in your report, it is my opinion at this time, after reviewing the additional medical records and information, that Mr. Senart's work activities at Tenneco would not have substantially contributed to his rotator cuff tendinitis.

5. With regard to the x-ray taken in December 1997, the radiologist reportedly read it as being normal. I do not feel the x-ray was normal. It did show some moderate degenerative changes of the acromioclavicular joint. I doubt that arthrosis of the acromioclavicular joint developed between December 1997 and the time Dr. Paulson examined him in February 1999. I believe it was preexisting.

6. Regarding why Mr. Senart's symptoms redeveloped again in February 1999 (right rotator cuff tendinitis), it is common for tendinitis-type symptoms to wax and wane depending on activities, and sometimes can develop with or without any specific activities, particularly if there is some preexisting impingement-type anatomy around the tendons, such as with acromioclavicular joint arthrosis. I do not believe any intervening event would need to be present to have symptoms redevelop, as they reportedly did in February 1999.

As a result of the employer and insurer's denial of primary liability for any shoulder injuries, the employee filed a claim petition on March 23, 1998 alleging injuries to both shoulders, left great toe and neck arising from injuries at Tenneco on October 28, 1997, October 29, 1997, November 1, 1997 and December 3, 1997. The employee claimed entitlement to temporary total disability benefits from February 6, 1998, temporary partial disability benefits for various periods, medical benefits and rehabilitation services. The employee's claim came on for hearing before a compensation judge at the Office of Administrative Hearings on April 2, 1999. The compensation judge, in her Findings and Order of May 14, 1999, determined that the employee's work activities at Tenneco were a substantial contributing factor in his developing disabling rotator cuff tendinitis. (Finding 13.) The compensation judge found that the employee had failed to establish that his work activities were restricted due to his shoulder condition from December 2, 1997 through February 19, 1998. As a result, she denied the employee's claims for wage loss benefits during this period. (Finding 15.) The compensation judge, however, did order temporary partial and/or temporary total disability benefits for periods after February 19, 1998. (Order 2.) She also awarded reimbursement to the Minnesota Department of Economic Security for benefits paid during the period February 19 through February 28, 1998, and denied the employee's claims for penalties. (Finding 23; Order 1.)

## 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 (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, "[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

### Causation - Rotator Cuff Tendinitis

The compensation judge determined that the employee's work activities at Tenneco during the brief period of his employment in October and November 1997 were a substantial contributing cause of the employee's right shoulder rotator cuff tendinitis difficulties which were first reported in any medical records in early December 1997. She based her decision primarily on the opinion of Dr. Paulson, the employee's treating orthopedist. Dr. Paulson had opined that even though the employee had arthrosis of the right AC joint which most likely preexisted the employee's work at Tenneco, the work activity described by the employee in pushing the transfer carts was a substantial contributing cause of the rotator cuff tendinitis the employee continued to experience through the date of hearing. The compensation judge specifically indicated that she did not find the opinion of the employer and insurer's medical examiner, Dr. Daly, to be as persuasive as that of Dr. Paulson. (Findings 11, 12, 13.)

On appeal, the employer and insurer contend that the compensation judge's decision is not supported by substantial evidence in the record and is clearly erroneous. It is their contention that the employee's rotator cuff tendinitis was caused solely by his arthritic or arthrosis condition and not by his work activities for Tenneco. In support of their position, the employer and insurer make the following arguments: (1) Dr. Paulson's opinion lacks foundation because there was an error in the hypothetical posed to him during his deposition regarding the length of work of the employee at Tenneco and an error with respect to the doctor's assumptions concerning the positioning of the employee's arms while he was pushing the cart. (2) The compensation judge improperly rejected Dr. Daly's opinion that there was no causal relationship between the work activities and the rotator cuff tendinitis. (3) There is substantial evidence which supports the conclusion that the work activities did not cause the employee's shoulder problems, including (a) the employee never complained of shoulder problems while working at the employer, (b) the employee never had any difficulty in doing his job, (c) the employee knew how to report a work injury, (d) there is no mention of shoulder complaints in Dr. Henry's office notes of October 30 or November 14, 1997, (e) the x-ray taken by Dr. Slatten in early December shows that the employee had a preexisting arthrosis condition, (f) the employee worked only 13 days on the transfer cart position, all the rest of his time having been spent in relatively light duty jobs of either stacking or sorting labels, (g) the amount of force necessary to push a cart was minimal, (h) the underlying arthrosis condition would normally cause periodic flare-ups of rotator cuff tendinitis without any work activities, and (i) the employee's story that the transfer cart work aggravated his shoulder is suspect because when the employee was returning to regular duties after having been released from light duty in late November 1997 he requested return to the transfer cart position rather than to the position of stacker. (T. 153.)

With respect to the question of whether Dr. Paulson's opinion lacked foundation, we note that in his deposition Dr. Paulson was presented with a hypothetical which did presume that the employee had worked for the employer from September of 1989 although he had actually only worked since September of 1997. Normally, this large discrepancy in the amount of time

that the employee was exposed to the work activities which allegedly caused the injury might be significant enough to find that there was a lack of adequate foundation for the doctor's opinion, but in this case that error was not material to Dr. Paulson's opinion and therefore does not prevent the compensation judge from finding that there was adequate foundation for the opinion. We note that the injury in this case was not one caused by multiple minute traumas, commonly referred to as a Gillette injury,<sup>2</sup> but was apparently the result of a specific incident. The employee testified that on one occasion while he was pushing the carts he heard a "pop" and that thereafter his shoulder progressively became worse. He advised Dr. Paulson of this fact. In addition, the employee testified that when he was examined by Dr. Paulson he indicated to him the accurate duration of his work activity for the employer. We note also that Dr. Paulson opined on cross examination that in light of the pushing posture the employee demonstrated to him this injury could have occurred even as the result of a single event. (Pet. Ex. A, deposition of 3-18-99, pp. 18-19.) The compensation judge did not err in concluding there was adequate foundation for Dr. Paulson's opinion. Since there was adequate foundation for Dr. Paulson's opinion, it was not unreasonable for the compensation judge to resolve all causation issues simply by accepting that opinion. Where there is a conflict between two medical experts with respect to causation, it is the compensation judge's responsibility to resolve those differences. Where the opinion upon which the compensation judge relied was based on adequate foundation, that reliance will not be overturned by this court. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). As Dr. Paulson's opinion provides substantial evidence in the record to support the causation finding with respect to the connection between the work at Tenneco and the employee's right rotator cuff tendinitis, that finding is affirmed.

#### Temporary Partial Disability Benefits - December 2, 1997 through February 19, 1998

The compensation judge determined that because the employee was under no physical restrictions due to his shoulder condition during the period from December 2, 1997 up to and including February 19, 1998, he was not entitled to wage loss benefits during that period. She based this factual determination on the lack of any restrictions by a medical doctor until Dr. Flood examined the employee on February 19. The employee appeals from this determination on the basis that Dr. Paulson indicated in March of 1999 that the employee had the rotator cuff tendinitis problems, superimposed on his preexisting arthrosis condition, from at least December of 1997 to the date of hearing. The employee argues that he and his wife testified that he had pain in his right shoulder on a continuous basis after his initial injury in October 1997. As a result, they argue that the employee actually had a physical disability which affected his earning capacity, although there were no formal restrictions stated in any medical report or record which was made prior to the period of restricted employment.

The issue before us is whether the compensation judge's determination is supported by substantial evidence in the record and is not clearly erroneous. In this case, we note that the compensation judge is correct in finding that there were no restrictions issued by a doctor,

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<sup>2</sup> See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

concerning the use of the employee's right shoulder, during the period when he was employed at Trend Enterprises. We realize that the employee complained of right shoulder pain when he saw Dr. Slatten in early December, but Dr. Slatten did not place any restrictions on the employee's ability to work. In addition, we note that the employee was able to work for Trend Enterprises without any difficulties. As a result, we find that the compensation judge's decision is supported by substantial evidence in the record. The employee's claim for temporary partial disability prior to February 19, 1998, when restrictions were imposed by Dr. Flood, is affirmed.

#### Wage Loss Benefits After February 19, 1998

The compensation judge determined that after February 19, 1998, when Dr. Flood issued his work restrictions, the employee was entitled to temporary total or temporary partial disability wage loss benefits. The employer and insurer appeal from this determination on several bases. With respect to the temporary total disability from February 19, 1998 through April 30, 1998, they contend that the employee failed to engage in a diligent job search. After that date, the employer and insurer's position is that the employee had been released to work without any restrictions and that the effect of any injury he had sustained in October of 1997 had subsided. There being no restrictions on the employee's ability to work after that date, they argue that he was not entitled to any wage loss benefits.

The issue before us is whether the compensation judge's determination is supported by substantial evidence in the record and is not clearly erroneous. On a careful review of the compensation judge's decision, it does appear that there may be some discrepancies with respect to certain dates and the evidence in the case. For example, the compensation judge assumed that the employee had worked for Trend Enterprises from December 8, 1997 through March 8, 1998. (Finding 16.) This appears to be incorrect, since the employee testified, and the employment record indicates, that the employee was terminated from Trend Enterprises on February 5, 1998. As a result, the compensation judge's award of temporary partial disability benefits from February 19, 1998 through March 8, 1998 cannot be correct, since the employee was not employed during that period, and temporary partial disability benefits are not available during periods of unemployment. The compensation judge, however, did find that during all periods following December 5, 1997, the employee performed a reasonably diligent job search for alternative employment, based on his credible testimony and the job logs that he produced in evidence. (Finding 21.) As a result, we modify the compensation judge's determination of the award of wage loss benefits for the period February 19, 1998 through March 8, 1998, to be temporary total disability benefits rather than temporary partial disability benefits. With respect to the period following March 8, 1998, the compensation judge awarded temporary total disability benefits until the employee started work for Nicollet Technologies, which he indicated occurred on May 5, 1998. It appears that this award was based on her finding that the employee had engaged in a reasonably diligent search for work in his injured condition. (Id.)

The employer and insurer argue that the compensation judge's reliance on the employee's testimony on his job logs is misplaced and that the employee's job search was inadequate. The question of whether an employee has engaged in a reasonably diligent job search

is a factual issue for resolution by the compensation judge. Credibility determinations are also the province of the compensation judge. In this particular case, we find no basis to reverse the compensation judge's factual determination as it was based on the job logs and the employee's testimony. We find her decision to award temporary total disability benefits during the employee's period of unemployment following February 19, 1998 to be supported by substantial evidence in the record.

With respect to the period of temporary partial disability benefits awarded following the employee's return to work for Nicollet Enterprises on May 5, 1998, the compensation judge found that the employee was subject to ongoing restrictions on his ability to work which affected his earning capacity. She recognized that while the employee was technically released to return to work without restrictions by Dr. Lindgren, the release was based solely on the employee's request that the restrictions be lifted in order for him to earn a living. The compensation judge indicated that she found credible the employee's testimony that he continued to suffer pain and disability as a result of his shoulder injury even though he requested a complete release, realizing that he would not be able to be employed unless he was willing to work without any restrictions. (Finding 18.) The compensation judge therefore found that Dr. Flood's and Dr. Lindgren's restrictions, which has been issued on February 19 and February 24, 1998, were, for all practical purposes, still in effect. She also relied on the fact that Dr. Paulson had indicated that the employee is currently subject to a 75-pound lifting limitation, has restrictions on his ability to lift above shoulder level and should not engage in repetitive motions involving his shoulders. She relied on Dr. Paulson's opinion that those restrictions should have been in effect from at least February 19, 1998 and are permanent unless the employee has surgery on his right shoulder. (Id.)

On appeal, the employer and insurer rely primarily on the evidence that the restrictions imposed by Dr. Flood and Dr. Lindgren were lifted on April 30, 1998, that the employee returned to work for Nicollet Technologies without any particular difficulty and that the compensation judge should not have relied on the employee's testimony concerning the ongoing problems he was having with his shoulder.

As indicated above, the question of whether or not an employee is subject to restrictions is a factual issue. In this case, the compensation judge found the employee's testimony to be credible, and her determination was supported by the actual restrictions issued by Dr. Lindgren and Dr. Paulson's opinion that they were certainly in effect as of February of 1998 and continued to the present. Based on the fact that there is substantial evidence in the record to support the compensation judge's finding that the employee was subject to physical restrictions as a result of his right shoulder injury during the period following February, her award of temporary partial disability benefits after May 5, 1998 based on his actual wages was appropriate. It is affirmed.

#### Intervention Interest

The compensation judge awarded reimbursement to the Minnesota Department of

Economic Security for any benefits paid to the employee during the period February 19, 1998 through February 28, 1998 which were duplicative of any benefits which he would be awarded in this case. (Order 6.) Both the employee and the employer and insurer have petitioned the court for a reversal of that order on the basis that following the hearing the Department of Economic Security apparently withdrew its claim for reimbursement. The employee's brief attaches a letter, dated May 17, 1999, from a representative of the Minnesota Department of Economic Security in which he indicates that the Department has no intervention interest in the matter, despite the Findings and Order awarding benefits. As this letter came after the compensation judge had closed the record and had issued her decision, it is not something which this court can consider. Based on the facts and circumstances and issues presented at the hearing, the compensation judge made the appropriate decision. If the beneficiary of the compensation judge's order believes that it is not entitled to the benefits of that order and refuses to accept them, we believe the matter is resolved and that it is unnecessary to amend or modify the compensation judge's decision, which was appropriate at the time that it was issued.