

KEVIN R. ANDERSON, Employee, v. ADVANSTAR COMMUNICATIONS and USF & G/ST. PAUL COS., Employer-Insurer/Appellants, and MN DEP'T OF LABOR & INDUS./VRU, Intervenor, and DULUTH CLINIC, Intervenor/Medical Provider.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 13, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony and medical and other records, supported the compensation judge's finding that the employee sustained a work-related injury on February 19, 1998.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence, including lay testimony, vocational rehabilitation records and job logs, supported the compensation judge's finding that the employee's job search was reasonably diligent under all the circumstances of the case.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including the testimony and the medical records, supported the finding that additional treatment not yet rendered may result in further medical improvement such that maximum medical improvement was not yet shown to have been reached.

MAXIMUM MEDICAL IMPROVEMENT; RULES CONSTRUED - MINN. R. 5221.0410, SUBP. 3B. In order to invoke the presumption of MMI set forth in Minn. R. 5221.0410, subp. 3B, there must be evidence in the form of *medical reports* showing lack of improvement during a three-month period occurring more than one year after the date of injury, and the employer and insurer must also show service of "*the medical reports* relied upon as establishing maximum medical improvement *under this item.*" Where there are no medical reports in evidence covering a three-month period subsequent to a date one year after the injury, the presumption of MMI under the rule cannot be invoked.

REHABILITATION - ELIGIBILITY. Substantial evidence, including expert medical opinion, supported the finding that the employee has been medically restricted in his work activities for the dates in question.

Affirmed.

Determined by Wheeler, C.J., Pederson, J., and Rykken, J.
Compensation Judge: Gregory A. Bonovetz

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's findings that the employee sustained a work-related injury on February 19, 1998, that he was subject to medical restrictions through the date of hearing and had not reached maximum medical improvement, that he conducted a reasonably diligent job search and did not withdraw from the labor market, and that he was unable to return to work for the employer. We affirm.

BACKGROUND

The employee, Kevin R. Anderson, was born in Superior, Wisconsin in January 1960 and is currently 40 years old. For all time periods relevant to this case he has been a resident of Maple, Wisconsin. He has never married and currently lives with his sister. He graduated from high school in Maple, Wisconsin in 1979. After high school, the employee worked on an assembly line for Jenos, packaging pizzas, and as a dishwasher at the Olympic Training Center. (T.33-35, 83.)

Between 1986 and 1988 the employee took classes at Wisconsin Indianhead Technical Institute in marketing and sales, but did not complete the course work required to graduate. He tried working in sales but was unsuccessful in this work and only held the two sales jobs he tried for about one week each. After leaving the technical institute the employee found work through temporary employment agencies and worked various jobs doing light assembly, dishwashing and janitorial work. (T. 33-37.)

In August 1997 the employee's brother, Tim Anderson, helped the employee to get a job with the employer, Advanstar Communications, his own employer. The employee was hired as a part-time janitorial worker. He began work each day at 4:30 p.m. and was responsible for cleaning one floor of the employer's building, which included vacuuming and sweeping, emptying trash containers and recycling barrels, cleaning bathrooms, and breaking down and removing cardboard boxes. The employee worked twenty-seven and one-half hours per week at a pay rate of \$4.95 per hour. (T. 41-49, 174-178.)

The employee testified that while at work on February 19, 1998 he broke up boxes and placed them in a larger box on a pallet. He raised the pallet with a pallet jack, and as he started to pull on the load to move it he experienced the feeling that he had "strained something or pulled something" in the left side of his body at the level of the belt line. He was able to complete his shift and did not report an injury. (T.49-51.)

The employee continued to have pain over the next several days and on February 25, 1998 he sought medical treatment from Dr. F. W. Budd at Orthopaedic Associates of Duluth, a physician available to him with his Wisconsin Care medical card. The employee complained of low back pain, pain in both buttocks, and pain across the top of the pelvis bilaterally.

Dr. Budd recorded that the onset of the employee's pain had occurred "six weeks¹ ago," when he "was working with a pallet jack and apparently pulled it and felt that he strained his back or whatever at that period of time." Dr. Budd diagnosed a back muscle strain and recommended exercises and analgesic medication, and referred the employee to Dr. James D. Mataczynski, his family physician. (T. 51-53; Exh. C.)

The employee testified that he continued to work in pain at his job for the employer, but did not report an injury because he was afraid he might lose his job. He went to see Dr. Mataczynski on April 6, 1998, where he complained of predominantly left-sided pain in the mid sacral region radiating into the buttocks, which began about two months before. Dr. Mataczynski noted that the employee was tender to palpation at the iliosacral notch on the left side. He diagnosed an iliosacral ligament inflammation and prescribed Feldene. The doctor recommended that the employee undergo physical therapy treatments, but the employee did not have the physical therapy treatments because they were not covered by his Wisconsin Care medical program. (T. 59-61; Exh. D: 4/6/98.)

The employee returned to Dr. Mataczynski on May 7, 1998 for follow-up treatment for his lower back pain. He continued to complain of lower back pain over the sacroiliac joint regions, left greater than right, radiating into the buttocks. Tenderness was present over the sacroiliac joint region. There was a decrease in range of motion on rotation since last seen, but otherwise the employee exhibited an excellent range of motion. Straight leg raising was negative bilaterally. Sacroiliac joint x-rays were obtained which were read as showing bilateral scoliosis but were otherwise negative. Dr. Mataczynski thought that there might be some inflammation in the right sacroiliac joint and diagnosed sacroiliitis. He took the employee off work for two weeks and recommended use of ice and massage to the lower back. (Exh. D: 5/7/98.)

On May 7, 1998 the employee went to the office of his supervisor, Peggy Moen, and told her that he had hurt his back, that he had now reagravated his back, that his back was not improving, and that he needed time off to rest his back. The employee testified that he thought he had told her at that time that he had hurt it using the pallet jack. Ms. Moen, however, testified that the employee did not tell her at that time that his back injury was the result of a work-related incident. She asked for a doctor's statement to support the time off work and the employee telephoned Dr. Mataczynski, who faxed a work release note to the employer. During her testimony, Ms. Moen identified a prescription form, dated May 7, 1998, which stated that the employee should be off work or on light duty work due to sacroiliitis, as the information faxed by the doctor. This form does not mention whether the injury occurred at work. (T. 62-66, 163-168 ; Exh. 7.)

¹ Rather than six *days* before, as would be consistent with the employee's testimony. See T.57.

The employer had no light duty work available within the employee's restrictions. Ms. Moen told the employee to take two weeks off work and to return if he was better at that time. (T. 67-68, 167-169.)

On June 2, 1998, the employee's attorney sent a letter to the employer indicating that the employee's injury had occurred at work in February. A first report of injury was prepared on June 5, 1998. The employer and insurer served a notice of denial of primary liability on June 8, 1998. On June 24, 1998 the employee served and filed a claim petition. (Exhs. A, B, 12, 13.)

Dr. Mataczynski referred the employee to Dr. Peter R. Hindle at the Duluth Clinic's Department of Physical Medicine and Rehabilitation. Dr. Hindle saw the employee on June 23, 1998. The employee reported complaints of lower back discomfort bilaterally and gave the following history:

[his symptoms] started about four and a half months ago in a work related injury while working as a janitor at Advanced Star Communications. He indicates that he was moving some pallets with a hand cart that jacks up back on February 9, 1998, when he was jacking up and pulling on these and felt a pull in his lower back area. He assumed this was just a minor muscle pull and that it would get better within a week or two, so he continued working and did not report the injury. Then, when he was doing a similar activity again on May 5, 1998, he re-aggravated the lower back problem and it got worse. He indicated this time he reported it to his immediate supervisor but apparently it was not written up as a Workman's Comp claim. He indicated the supervisor advised him to take a couple of weeks off and see how it felt. He indicated that the back did not feel any better so he did not return to work. He has not been back to work since May 5. He indicated that when he saw Dr. Mataczynski back after the two-week-period-of-time, he was placed on some light-duty restrictions four hours a day, and these were not compatible with his job, so his employer did not take him back. He has not been able to find any work since that time. He is uncertain as to whether he has been dismissed or laid off, but he did indicate that they have hired someone else to do his job.

Dr. Hindle diagnosed a lumbosacral strain with bilateral sacroiliitis, left greater than right, with some underlying degenerative joint disease of the SI joints. He opined that the lumbosacral strain and sacroiliitis appeared to be directly related to the employee's claimed work injury. He referred the employee for physical therapy and continued him on work restrictions of light work, part-time at four hours per day during the physical therapy. (Exh. D: 6/23/98.)

The employee began working with a QRC through the vocational rehabilitation unit of the Minnesota Department of Labor and Industry in July 1998. The QRC first contacted the employer and verified that they had no modified work within the employee's restrictions, and then met with the employee on July 11, 1998. The employee's job history was reviewed, and the QRC noted that it consisted mostly of janitorial and clean-up positions earning just over minimum wage. (Exh. H: 7/10/98 - 7/11/98.)

The employee underwent eleven sessions of physical therapy between June 29, 1998 and July 24, 1998. The physical therapy did not relieve his pain and the therapist noted that he continued to have objective findings including lower extremity tightness in the hamstrings, dural tension, multiple myofascial hardenings throughout the gluteals and piriformis, and decreased L4-5 and L5-S1 facet mobility. The physical therapist recommended that a brief course of chiropractic treatment be tried. (Exh D: 9/10/98 PT discharge summary.)

The employee returned to Dr. Hindle on July 29, 1998. There had been little change in his symptoms. Straight leg raising was tight bilaterally. The doctor noted a mildly positive Fabere maneuver for SI pain on the left. He diagnosed a continuing bilateral LS strain with bilateral sacroiliitis, work-related, along with some underlying degenerative disease of the SI joints that he believed had likely been aggravated by the employee's work as a janitor. Dr. Hindle noted that because the employee's symptoms had been intractable to physical therapy, the therapist had suggested six sessions of chiropractic treatment. Dr. Hindle agreed with this recommendation and referred the employee to a chiropractor, and the employee underwent six chiropractic treatments with Dane E. Laughlin, D.C., through mid-August 1998. (Exh. D: 7/29/98; Exh E: 8/18/98.)

On September 3, 1998 the employee's QRC reported that he had been in contact with the employee on a weekly basis and that the employee had brought in job logs on September 1, 1998. Because Maple, Wisconsin is a small town with little other business than the local café, the employee looked principally for work in Superior, Wisconsin and Duluth, Minnesota, about twenty-five and thirty-five miles from his home, respectively. The QRC noted that the employee had been funding his job search efforts by selling plasma, but that he had been diligent in his job search despite the lack of funds. The QRC further noted that he had authorized that the employee receive \$150.00 in transportation funds to assist him with car expenses that he was unable to meet. (Exh. H: 9/3/98; T. 84, 88.)

The employee was seen by Dr. Hindle on September 4, 1998, for a recheck of his back. His symptoms had remained about the same and included constant discomfort and stiffness bilaterally in the thoracolumbar area, worse on the left than the right. The employee had been taking only over-the-counter Tylenol, as he could not afford prescription medications. He reported that he had been looking for work but had not found any and was frustrated. Dr. Hindle noted mild to moderate tenderness throughout the employee's L4, 5 and S1 regions, moderate tenderness along the mid pole of left SI joint and mild tenderness on the right. Lumbar mobility was quite limited in forward flexion, extension was reduced by one-third, rotation was tight, and side bending was reduced one-half to the right and one-third to the left. Fabere's maneuver was moderately

positive on the left and mildly positive on the right. Noting that the employee's condition had remained fairly resistant to conservative therapy to date, Dr. Hindle outlined a series of options including more chiropractic or a week's treatment in the Twin Cities with a specialist, Dr. Mark Bookhout. The employee, however, did not have the money to follow through with the treatment in the Twin Cities. Dr. Hindle suggested injection of the left SI but the employee was leery of needles and preferred to hold off on that. Dr. Hindle also suggested, as another alternative, a return to physical therapy for four more weeks. Dr. Hindle noted that an MRI might ultimately be needed to rule out underlying spinal stenosis or disk herniation if the employee's condition remained resistant to treatment. (Exh. D: 9/4/98.)

The employee's QRC arranged for the employee to receive thirty days placement assistance from Nichols Placement Services. The employee misunderstood the date he was supposed to meet with the placement consultant and arrived on the following day, September 11, 1998, so one of the consultant's assistants met with the employee and prepared a placement plan. The employee met with the consultant on September 15, 1998 but had not completed a resume development packet and sample application that he had been given. The employee and the consultant reviewed a job seeking skills manual and placement handbook, and the employee began contacting employers and providing job logs on September 18, 1998. (Exh. H: 10/5/98 report.)

On September 25, 1998 the employee underwent an examination by Dr. Jack Drogst on behalf of the employer and insurer. He reported low back pain radiating into the left flank, left buttock and posterior proximal thigh. Dr. Drogst noted by history a work-related injury on February 19, 1998, aggravated on May 5, 1998, consisting of lumbosacral strain and sprain and left sacroiliac joint inflammation. He opined that, assuming the employee's history to be correct, the work activities for the employer were a substantial contributing factor to the employee's current diagnosis. On examination, Dr. Drogst found no objective findings. In his opinion, the employee had recovered from a temporary injury and now had lumbar pain syndrome without objective findings. He considered the employee capable of full time work without restrictions and in need of no further medical treatment. He opined further that the employee had reached maximum medical improvement (MMI). (Exh. 8.)

On September 30, 1998 the employee contacted the placement consultant to report that he could no longer drive to look for work because of car trouble. The employee testified that his car had first required repair to one axle, and then to the other axle. He had received some money from his QRC to make the first of the repairs, and the car worked for a few months before the second problem arose and he had to junk it entirely. On October 2, 1998 the QRC directed the placement consultant to close his file. During placement efforts, the employee had been furnished with six job leads and had reported eight contacts and eight applications submitted. (Exh. H: 10/5/98 report; T. 84-86.)

The employer and insurer served the employee with notice of maximum medical improvement by mailing the report of Dr. Drogst on October 12, 1998. (Exh. 8.)

The employee was next seen in follow up by Dr. Hindle on October 20, 1998. His condition was noted as essentially unchanged. Dr. Hindle's report states that the referral to a chiropractor had not helped much, that the employee had been unable to afford referral to Dr. Bookhout, and that he had not been able to obtain the physical therapy the doctor had set up, as a result of car problems. Dr. Hindle further noted that the physical therapy he had recommended would now have to wait until the employee had obtained a new Wisconsin medical card. He continued the employee on the same part-time, light-duty restrictions. (Exh. D: 10/20/98.)

When the employee was next seen by Dr. Hindle on November 27, 1998, his symptomology was about the same. The doctor noted that the employee had still not gotten a medical card from the state and was continuing to have trouble getting treatment or medications. He had borrowed money from his mother to pay for some prescribed Naprelan. The employee told the doctor that he had not been able to go in to talk to his vocational rehabilitation consultant or look for work since October 26 due to car trouble, and that while he had previously put in applications at about 100 places looking for light-duty part-time work, he had not been successful. On examination, the doctor noted tenderness and spasm at L4-S1, and the employee's active range of motion was limited in forward flexion and rotations were reduced. Dr. Hindle diagnosed chronic lumbosacral strain with sacroiliitis, piriformis syndrome and some sciatica, much worse on the left side than the right. The doctor again reviewed suggestions for treatment that included the injection of the left SI, physical therapy and an MRI scan of the lumbar spine to rule out any underlying degenerative disc disease or degenerative arthritis. The employee was continued under restrictions of four hours light-duty work per day, with a 20-pound maximum lifting limit. (Exh. D: 11/27/98.)

On December 7, 1998, the employee's QRC reported that working with the employee had been difficult as the employee did not have a phone and was not getting messages left with his mother. The QRC reported on the results of testing completed by the employee, which showed a general learning ability in the 31st percentile. The QRC opined that the employee

. . . is an individual in some very desperate situations. He is financially bankrupt to the point of having to donate plasma to have some income at all . . . For some reason he just doesn't seem to connect up with the mainstream of society, and that seems to limit his ability to establish himself in a long term employment situation. When given instructions, he somehow is unable to follow through with them. For example, this QRC sent an authorization for \$50.00 to the Goodwill Store so that he could get better clothing. The authorization for the clothing was received by him, and he thought it was a letter from a friend of his, and it took him several weeks to follow up on this authorization, and pick up the clothing . . . he appears to be one of those people that is somehow lost in society, and lacks the ability to make the necessary connections that will benefit his financial situation.

(Exh. H: 12/7/98.)

The employee came in to his doctor's office on April 19, 1999 for a recheck and was seen by Dr. Hindle's associate, Dr. Joseph V. Richards, who noted tenderness in the employee's low back and around the SI joint in the paraspinal muscles. Straight leg raising was positive at 45 degrees bilaterally and the employee's hamstring muscles were extremely tight. Dr. Richards limited the employee to sedentary work, with lifting reduced to ten pounds maximum. The employee was instructed to return to see Dr. Hindle. (Exh. D: 4/19/99.)

Dr. Hindle saw the employee on April 23, 1999. The employee reported that he had continued to have car problems and had to junk his car and depend on telephoning for any type of job search. He had written several letters to Wisconsin Care but had been informed that he had not yet been authorized for a Wisconsin Care card. He was in the process of applying for food stamps. Physically, he was experiencing increased pain in the right sacroiliac joint and right groin area. Dr. Hindle reported spasm on both sides of the sciatic notch, and Fabere's maneuver was mildly positive on the left and mild to moderate on the right for SI discomfort. The employee continued to exhibit moderate myofascial pain involving the lower back and thoracolumbar region. Dr. Hindle also limited the employee to sedentary work, part time only, with a need to change positions frequently between sitting and standing, with no climbing, and with bending and squatting limited to occasional. He instructed the employee to let him know as soon as possible if he obtained the Wisconsin Care card, so that physical therapy could be set up for him. The doctor also recommended some anti-inflammatory medications, but the employee told him that he had not even been able to afford over-the-counter Advil, and would not be able to obtain the prescription medicine. Dr. Hindle opined that

This patient needs a structured physical therapy pool program to get him stretched out and then try to work on conditioning/strengthening to build him up. Without this, I doubt that he can even hold down a sedentary level job on any sort of competitive basis, and this would limit him to lifting 10 pounds or less, and I think likely this would be only on a part-time basis initially.

(Exh. D: 4/23/99.)

On May 20, 1999, the employee's QRC reported that he had again met with the employee who now had use of a different car and could again "get around." The employee submitted job logs. The QRC noted that there had been about a seven-week interruption in the employee's job search due to lack of an auto. (Exh. H: 5/20/99.)

The employee found a temporary job stocking shelves for a Wal-Mart store which was remodeling in Superior, Wisconsin. The job began June 5, 1999 and lasted for about five weeks. The employee testified that after this job he continued to look for light-duty work in Duluth

and in Superior but has been hampered in this by lack of funds. As of the date of hearing below, he had not gone back to his doctors because he had no funds with which to pay for treatment. (T. 81-82, 87-92; Exh. J.)

On August 12, 1999 a hearing was held before a compensation judge of the Office of Administrative Hearings to determine, among other issues not appealed, whether the employee had sustained the alleged work injury, whether he had made a diligent search for employment or had instead withdrawn from the labor market, whether he had reached or should be deemed to have reached maximum medical improvement, whether he was entitled to temporary total disability compensation, and whether he is unable to return to work with the employer so as to be entitled to rehabilitation services. Following the hearing, the compensation judge determined that the employee had sustained a work injury on February 19, 1998, that he has medical restrictions precluding a return to his pre-injury employment, that he made a reasonably diligent job search under the circumstances presented, that he has not reached maximum medical improvement, and that he was entitled to temporary total disability compensation for the periods he did not work between the last day worked for the employer and the date of hearing. 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.

Question of law. The issues on appeal in this matter also involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

Work Injury

The employer and insurer appeal from the judge's finding of a February 19, 1998 work injury. They argue that this finding was unsupported by substantial evidence, contending that the employee's testimony should have been disregarded as self-serving and that the circumstances of the employee's initial failure to report the injury as work-related as well as alleged inconsistencies in the history of the injury recorded in medical records render the finding of a work-related injury unreasonable. They rely also on possible inferences from the wording of the employee's application for unemployment benefits shortly after being placed on unpaid medical leave by the employer. They point out that the judge commented on his impression that the employee appeared to be an unsophisticated individual who seemed to have difficulty interacting with society. (Mem. at 11.) They contend that in considering this, the compensation judge "made excuses for the employee's actions and inactions based upon his alleged level of functioning" and improperly applied a lesser burden of proof "because of the level of the employee's sophistication or intelligence." (Er/Ins. Brief at 26.)

The issue of whether the injury alleged by the employee did occur was largely one of credibility. Questions of witness credibility are primarily entrusted to the compensation judge, and this court will not reverse determinations made primarily on that basis, unless clearly erroneous. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989); Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

As to the judge's consideration of the employee's sophistication or intelligence, we note that this factor is often one of relevance to questions of credibility, particularly where different interpretations may be made of the actions of the employee and where, as here, the major arguments raised by the employer and insurer against the credibility of the employee concerned what conduct should have been expected of the employee regarding his reporting of the injury to the employer and the quality of his description of the injury to his physicians. It is axiomatic that an employer takes the employee as it finds him, and the employee's native intelligence, sophistication and other personal traits are proper matters to be considered by the judge in evaluating the weight of the evidence where such evidence deals with the employee's actions or conduct. There was ample evidence regarding the employee's difficulties in dealing with society, both from the judge's observations of the employee's testimony, and from the opinions of the QRC and others, including the employee's supervisor. We here see no basis for concluding that the judge improperly applied a lesser burden of proof in this case. The judge simply considered the employee's intelligence and social skills in determining the weight and significance to be ascribed to the employee's actions.

In this case, the employer and insurer offered no evidence of another source of injury, and no evidence which directly contradicted the occurrence of the injury as alleged by the employee. As is often the case where there are no other witnesses to the occurrence of a work injury, the employee's testimony, supported by the relatively consistent medical history he gave to his physicians from shortly after the alleged injury and thereafter throughout the course of

medical examinations and treatment, and accepted as credible by the compensation judge, provided sufficient evidence to support the judge's finding.

Job Search

The compensation judge found that, in light of the financial difficulties of the employee and his relative geographic isolation during periods without transportation, the employee had conducted a job search which was reasonably diligent under the circumstances. While reasonable minds could reach different conclusions on this issue, we cannot conclude that the compensation judge's finding was clearly erroneous. There was ample evidence concerning the impact of the employee's lack of income or other financial resources subsequent to the injury on his job search activities, both from the employee's testimony and from the medical and vocational records. The compensation judge was entitled to consider this factor in determining what level of job search was reasonable under the circumstances. This was not a case where the employee failed to conduct any job search activities as the job logs in evidence revealed that the employee made numerous job contacts and applications. We cannot say that the job search demonstrated by the employee's testimony and job logs was so limited that it was clearly erroneous for the judge to consider it sufficient under the circumstances presented in this case.

MMI

Maximum medical improvement is the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated based upon reasonable medical probability. Minn. Stat. § 176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition had stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Maximum medical improvement is an issue of ultimate fact to be determined by the compensation judge after considering medical records, medical opinions and other relevant evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). Further, "medical probability does not mean only the opinion of a physician." Hammer, at 529, 41 W.C.D. at 639.

The employer and insurer raise both factual and legal issues on the question of maximum medical improvement. First, the employer and insurer rely factually on the opinion of their medical expert, Dr. Jack Drog, who opined that the employee had reached maximum medical improvement from the work injury by the date of his examination, September 25, 1998. The compensation judge, on the other hand, accepted the opinion of the employee's treating physician, Dr. Peter R. Hindle, that further treatment, which the employee had not yet been able to afford due to the primary liability denial in the case, was needed and would likely result in further improvement. In reaching the factual conclusion that MMI had not been met, the compensation judge reviewed all of the medical reports and records and the testimony of the employee. It is the role of the compensation judge to resolve any differences or conflicts between the medical experts. A compensation judge's finding that one medical expert's opinion is more persuasive than that of

another will not be disturbed by this court unless the opinion relied upon lacks adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). We will not disturb the compensation judge's resolution of this fact issue regarding MMI and it is affirmed.

The second argument raised by the employer and insurer regarding MMI is that, regardless of whether MMI has actually been reached in this case, it must be legally presumed to have been reached pursuant to Minn. R. 5221.0410, subp. 3B, which provides, in pertinent part, that for certain classes of injuries, which include the injuries sustained by the employee in this case:

When more than one year has elapsed since the date of a musculoskeletal injury that falls within any of the above categories, the only factors in determining maximum medical improvement shall be whether a decrease is anticipated in the employee's estimated permanent partial disability rating or a significant improvement is anticipated in the employee's work ability as documented on the report of work ability described in subpart 6. If medical reports show no decrease in the employee's estimated permanent partial disability or no significant improvement in the employee's work ability in any three-month period later than one year after the injury, the employee is presumed to have reached maximum medical improvement. This presumption can only be rebutted by a showing that a decrease in the employee's permanent partial disability rating or significant improvement in the work ability has occurred or is likely to occur beyond this three-month period. The medical reports relied upon as establishing maximum medical improvement under this item must be served on the employee in accordance with item C.

The employer and insurer allege that, as one year past the date of the injury was February 19, 1999, and as more than three months has elapsed since that date without improvement to the employee's condition or disability, the employee must be deemed to have reached maximum medical improvement.

The compensation judge concluded that the above rule presupposes that appropriate treatment has been rendered during the year immediately following a work injury and that the rule has no applicability where recommended medical treatment which may have improved the employee's work ability has not been provided as the result of the employee's lack of funds and the employer and insurer's primary liability denial. We conclude on other grounds that the rule was not applicable in this case, and do not reach the issue of construction and interpretation inherent in the judge's reasoning.

Specifically, we note that the only medical report served on the employee to support the employer and insurer's claim of maximum medical improvement was that of Dr. Drog, served

on October 12, 1998. Both this report and its service date are less than one year following the work injury, and cannot constitute medical reports showing lack of improvement for a three-month period more than one year subsequent to the date of injury. In order to invoke its presumption, the rule requires evidence, in the form of *medical reports* showing lack of improvement during a three-month period occurring more than one year later than the date of injury, and further requires service of “*the medical reports* relied upon as establishing maximum medical improvement *under this item.*” (Emphasis added.) There are, in fact, no medical reports in evidence covering a three-month period subsequent to a date one year after the injury, as the latest medical report in evidence is that of Dr. Hindle made April 23, 1999, a date only about two months after the one-year anniversary of the injury on February 19, 1998. It is clear, then, that the employer and insurer did not, and could not have complied with the service or evidence requirements of Minn. R. 5221.0410, subp. 3B, so as to raise this presumption.

Rehabilitation Services

The employer and insurer’s defense to the employee’s potential entitlement to rehabilitation services is based upon the claim that the employee was capable of a return to full duties in his pre-injury job, consistent with the opinion of their medical expert, Dr. Drog. Since the evidence indicates the employer and insurer have not offered the employee light-duty work within the restrictions recommended by the other physicians in the case, the sole question presented in this context is whether the compensation judge’s finding that the employee was subject to medical restrictions is supported by substantial evidence.

All of the employee’s treating physicians have imposed medical restrictions which have remained in effect since at least May 7, 1998 and through the date of hearing. The issue of medical restrictions was a matter resting on the compensation judge’s choice between the divergent opinions of medical experts, and, as such, will be affirmed by this court unless the opinions relied upon were without adequate foundation. Adequate foundation was present for the medical opinions of the treating physicians, and we, accordingly, affirm. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).