GWEN M. FREDRICKSON-ELLISON, Employee, v. HEALTH SYS. MINN./METHODIST HOSP., SELF-INSURED, Employer/Appellant, and DOUGLAS CNTY. HOSP. and CLOQUET CMTY. HOSP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 9, 2000

No. [REDACTED SSN]

HEADNOTES

APPEALS - SCOPE OF REVIEW. Where it was neither litigated nor listed as an issue in the judge's Findings and Order nor identified as a defense in the employer's Notice of Appeal, the question of whether or not the employee had withdrawn from the labor market by moving to a smaller town following her work injury was not an issue within the court's scope of review on appeal.

JOB OFFER - PHYSICAL SUITABILITY; JOB OFFER - DISTANCE TO WORK. Where the employee's restrictions included a restriction against sitting more than two hours a day, including driving time, and the employee testified that her commute to work took over forty-five minutes each way, and where the employee did not have the benefit of rehabilitation assistance and it was clear that the judge found this fact significant, the compensation judge's conclusion that the job offered by the employer was not physically suitable was not clearly erroneous and unsupported by substantial evidence.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Where the employee was without rehabilitation assistance but nevertheless found employment within about six weeks, the compensation judge's conclusion that the employee's job search efforts were adequate to support an award of temporary total disability benefits was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the employee offered no evidence of a specific job search during the six-week period at issue.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE; EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Where the jobs offered by the employer were not within the employee's restrictions, and where, without job placement assistance, the employee found light duty work within her considerable restrictions, and where there was no evidence of any other specific jobs available to the employee, substantial evidence supported the compensation judge's conclusion that the employee's actual wages at her job represented her earning capacity and that the employee was entitled to temporary partial disability benefits based on those wages.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the judge credited the employee's testimony relative to her pain and its effect on her activities of daily living, and where that testimony was supported by the deposition testimony of five doctors, the compensation judge's conclusion that the employee was temporarily totally disabled was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that no doctor had removed the

employee from work and the fact that the employee did not conduct any search for employment during the period at issue.

Affirmed.

Determined by Pederson, J., Johnson, J. and Wheeler, C. J.
Compensation Judge: John E. Jansen

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the compensation judge's award of temporary total and temporary partial disability benefits. We affirm.

BACKGROUND

On September 14, 1992, Gwen Fredrickson-Ellison sustained an injury to her lower back in the course of her employment as a surgical technician with Methodist Hospital. On the date of her injury, Ms. Fredrickson-Ellison [the employee] was twenty-eight years old and was earning a weekly wage of $484.40. Methodist Hospital [the employer] was then self-insured against workers' compensation liability, administered by Berkley Administrators [Berkley]. The employer accepted liability for the injury and commenced payment of various workers' compensation benefits, including the costs of a combined laminectomy/discectomy at L5-S1 with posterior transverse process fusion on March 2, 1994. The surgery was performed by neurosurgeon Dr. Andrew Smith and orthopedist Dr. Mark Gregerson.

Following surgery, the employee was provided with the rehabilitation assistance of QRC Clint Courtney. She experienced relief of her back and leg pain and returned to limited duty work with the employer on about April 9, 1994. The employee gradually increased her workload from four hours a day initially to six hours a day on June 20, 1994. On June 24, 1994, however, the employee elected to resign her position with the employer and to relocate to Herman, Minnesota.[1] On July 20, 1994, the employee and a partner opened a retail clothing store in Herman. Because the employee decided to pursue employment outside of the Twin Cities area, QRC Courtney closed his file. The employee's injury-related condition improved, and she operated her retail establishment for about fifteen months before her back one day suddenly gave way with an audible crack while she was seated at a table. She immediately experienced symptoms of low back and radicular right leg pain similar to what she had experienced prior to her surgery on March 2, 1994.

[1] Herman, Minnesota, is a town located approximately 40 miles west of Alexandria, in west central Minnesota.

On November 24, 1995, the employee was seen by orthopedist Dr. Garry Banks on referral from Dr. Smith, complaining of considerable low back and right leg pain.[2] Dr. Banks diagnosed an L5-S1 pseudoarthrosis, or failure of fusion, with probable discogenic back pain. After a period of conservative treatment proved apparently ineffective, the employee underwent, on February 19, 1996, an anterior lumbar fusion from L5 to S1 with posterior instrumentation, using a pedicle screw and rod device. On February 24, 1996, the employee was discharged to the Trevilla Nursing Home where she commenced physical rehabilitation. Two days later, she reported to Dr. Banks that she had been nearing complete resolution of her leg pain following surgery but that prior to her discharge from the hospital she had received an intramuscular injection that had resulted in excruciating pain in her right buttock region, which had persisted thereafter and had radiated from the right buttock down into the posterior thigh, anterior calf, and dorsum of the right foot. The employee ceased physical therapy March 26, 1996.

On March 28, 1996, the employee's attorney sent a letter to Berkley, requesting reinstatement of rehabilitation assistance with Mr. Courtney. In a response dated April 8, 1996, the claims examiner denied the employee's request, indicating that when the employee recovered from her surgical procedure the employer would be able to provide a suitable job to her within her restrictions. Therefore, rehabilitation benefits would not be voluntarily provided.

On July 15, 1996, the employee reported to Dr. Banks that she had almost complete relief of her back pain most days, with some mild low back aching occasionally. She did not complain of right lower extremity or right buttock pain at that time. Dr. Banks released the employee to work four hours per day with a fifteen-pound lifting restriction, no bending or twisting, and no more than a thirty-minute travel time to work. On August 19, 1996, the employer offered the employee a temporary light-duty position in its benefits department, alphabetizing on a large mailing project. The job was located at the employer's St. Louis Park premises, and the employer indicated that it "physically meets all of your current restrictions given by Dr. Banks on 7/15/96."

On October 14, 1996, the employee returned to work at the position offered by the employer, having arranged to live with her sister-in-law at the Gaultier apartments in St. Paul. The employee worked at the job for three days before concluding that the commute from St. Paul to St. Louis Park was exacerbating her back and leg pain. On October 21, 1996, the employee telephoned Dr. Deborah Dittberner, her family doctor, to obtain a work excuse secondary to severe pain. Three days later the employee was seen at the Alexandria Clinic by family nurse practitioner Connie Gratias, complaining of radicular pain and muscle spasm. Ms. Gratias, after consulting with one of the other clinic physicians, ordered injections of Demerol and Vistaril and prescribed Vicodin and Flexeril tablets. The employee visited Dr. Banks on October 30, 1996, and reported that her major concern was ongoing discomfort in the right buttock and intermittently in the posterior thigh and lateral calf, which occurred with sitting for more than about thirty minutes. Dr. Banks attributed the right buttock and leg discomfort to "some element of irritation of the right

[2] The employee has not received, nor has she claimed, entitlement to wage loss benefits from June 25, 1994 through November 23, 1995. The self-insured employer recommenced payment of temporary total disability benefits to the employee on November 24, 1995.

sciatic muscle," but he concluded that the employee was at maximum medical improvement. He again recommended no sitting for more than two hours per day total, "including the time sitting driving to and from work."

In a letter dated November 5, 1996, the employer again offered employment to the employee for a position purportedly meeting the restrictions provided by Dr. Banks on October 30, 1996. The offer was for the same position in the employer's benefits department located in St. Louis Park, but on a full-time basis. The employee did not accept this offer of employment, contending that the commute from St. Paul to the St. Louis Park location exceeded her sitting restrictions as set by Dr. Banks.

On January 4, 1997, the employee began work at Park Manufacturing, an assembly plant located three blocks from her home in Herman, Minnesota. She categorized the work as very light, with the flexibility to alternate between sitting and standing. On January 28, 1997, the employee returned to Dr. Banks, reporting resolution of most of her pre-operative pain. She did, however, report intermittent aching at the upper end of her fusion and also noted some interscapular pain. She continued to use a TENS unit on her right leg intermittently. The doctor concluded that the employee had a solid fusion at L5-S1 but also that "[s]he may have an element of pain related to fibromyalgia."

On February 26, 1997, the employee was seen at the Alexandria Clinic with regard to increased back pain. She was unable to stand upright or to sit, and the entire examination was conducted while she stood next to the exam table, with her elbow resting on the table for support. She was given medication and was advised to follow up with Dr. Banks. On March 11, 1997, the employee reported to Dr. Banks with constant pain in her right leg radiating into the lateral calf and ankle regions. Dr. Banks altered the employee's restrictions to reflect a release to work eight hours per day, but only four days per week. The employee reported that her condition continued to deteriorate, and by June 30, 1997, she left Park Manufacturing. The employee has not worked since July 1, 1997, nor has she searched for alternative employment.

During the first six-month period in 1997, the employee reported not only exacerbations of her low back and right leg radicular pain but also spasms across her ribs that traveled up into her shoulder blades and into the back of her neck. On July 1, 1997, Dr. Banks noted that "many of her symptoms do seem very suggestive of possible development of an element of fibromyalgia," and he recommended a referral to the Fibromyalgia Clinic Program at Abbot-Northwestern Hospital. In a letter to the employee's attorney dated September 2, 1997, nurse practitioner Gratias addressed the employee's ongoing and increasing pain. She noted that the employee's constant back and leg pain significantly interferes with the employee's ability to sleep. "This sleep interference and the trauma of the ongoing pain has led to the development of pains in her shoulders, arms and hands, and a working diagnosis of Fibromyalgia." She again recommended that the employee be evaluated at the Abbott-Northwestern Fibromyalgia Clinic, and this was concurred in by Dr. Dittberner and Dr. Banks. Throughout the remainder of 1997, the employee made numerous visits to the Alexandria Clinic and Douglas County Hospital because

of exacerbating chronic pain requiring injections of narcotic medications and prescriptions for pain relievers.

On October 29, 1997, the employee filed a Claim Petition with the Department of Labor and Industry, seeking intermittent temporary total and temporary partial disability benefits continuing from November 13, 1996, as well as approval of an evaluation at the Fibromyalgia Clinic as recommended by Dr. Banks. The employer denied the employee's claims for additional benefits, contending that they had had, and continued to have, suitable work available for the employee within her restrictions; that the employee had reached maximum medical improvement; and that the employee was not entitled to the proposed medical treatment at Abbott-Northwestern Hospital.

The employee continued to report to the Alexandria Clinic and Douglas County Hospital, where she was hospitalized on two occasions during the spring of 1998. The employee was provided with epidural steroid injections, physical therapy, and repeated injections of narcotic medications. On May 27, 1998, Dr. Dittberner referred the employee to Dr. Samuel Yue at the Bethesda Pain Center. Dr. Yue concurred in the diagnosis of fibromyalgia and related the employee's persistent right sciatica-like pain to muscle-related dysfunction of the quadratus lumborum, iliopsoas, and gluteus group of muscles.

The employee was examined at the request of the self-insured employer by neurologist Dr. Daniel Randa on February 6, 1997, and February 9, 1998. In deposition testimony taken prior to hearing on May 19, 1999, Dr. Randa opined that the employee had no findings on physical examination or neurodiagnostic imaging that would preclude her from resuming full employment within the restrictions outlined by Dr. Banks. He did not believe that there was an organic basis for the employee's persistent right lower extremity pain or that she met the diagnostic criteria for fibromyalgia.

The matter came on for hearing on June 15, 1999, before Compensation Judge John E. Jansen. In a Findings and Order issued August 27, 1999, the compensation judge determined that the jobs offered by the employer in 1996 and again shortly before hearing exceeded the restrictions of the employee's treating physicians, specifically relative to sitting and driving. The judge further concluded that, particularly considering the employee's lack of any rehabilitation/job search assistance, the employee's job search efforts, when she was capable of attempting to work, had been adequate, and that, when she found employment, her actual earnings constituted a fair measure of her earning capacity. He awarded temporary total disability benefits to the employee for the period of November 14, 1996, through January 3, 1997; temporary partial disability benefits from January 4, 1997, through June 30, 1997; and temporary total disability benefits from July 1, 1997, to the date of hearing. The self-insured employer appeals.[3]

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[3] The self-insured employer also appealed from the following: the judge's finding that the employee sustained a consequential injury to the sciatic nerve and his award of impairment compensation related thereto; a determination that the employee is afflicted with chronic pain syndrome and fibromyalgia caused or substantially contributed to by her work-related injury; the judge's award of all medical care and treatment claimed by the employee; the judge's

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

Withdrawal From the Labor Market

The employer's appeal is premised chiefly on the contention that the employee is not eligible for temporary total or temporary partial disability benefits because she removed herself from the labor market when she voluntarily quit her job with the employer and moved to Herman, Minnesota. The employer argues that the employee's move from the Twin Cities area to Herman removed the employee from a large labor market to a market with a reduced likelihood of employment. Cf. Paine v. Beek's Pizza, 323 N.W.2d 812, 35 W.C.D. 199 (Minn. 1982); Herrly v. Walser Buick, slip op. (W.C.C.A. July 15, 1988). "Whether an employee has removed himself from the labor market is a question of fact, the resolution of which will not be disturbed on appeal unless manifestly contrary to the evidence." Schroeder v. Highway Servs., 403 N.W.2d 237, 238, 39 W.C.D. 723, 725 (Minn. 1987). Reasonable minds can differ as to whether an employee's move to a different geographic area constitutes a withdrawal from the labor market. In its brief, the employer contends that there is no indication that the compensation judge considered "what role the Employee's voluntary removal from the metropolitan area played, and continues to play, in the Employee's inability or unwillingness to work." The employer argues that it had appropriate work within Dr. Banks' restrictions available at all times for the employee, had the employee not

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determination that the employee has not attained maximum medical improvement as to all medical conditions related to the injury of September 14, 1992; and the judge's findings relative to attorney fees, costs, and interest. Any issues with regard to these awards and findings, however, were not addressed in the self-insured employer's brief and therefore will not be addressed by this court: Minn. R. 9800.0900, subp. 1; see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992) (issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court).

removed herself from the job market. It argues that the only reason the employee's return to work was unsuccessful was because of the employee's commute between Herman and the metro area. This commute existed, the employer argues, because the employee had voluntarily moved to Herman. The employee asserts, however, that this court is without jurisdiction to rule on this issue because the employer did not properly raise the issue at the compensation hearing or in its notice of appeal. We agree.

We have carefully reviewed the transcript of the proceedings before the compensation judge, as well as the employer's Notice of Appeal, and we can discern no reference to a defense that the employee has withdrawn from the labor market. In Finding 2 of the Findings and Order, the compensation judge set forth six specific issues of law and fact submitted to him for his decision. The issue of withdrawal from the labor market was not listed by the judge, nor did the judge issue any findings relative to this alleged issue. The jurisdiction of the Workers' Compensation Court of Appeals is "limited to the issues raised by the parties in the notice of appeal or by a cross-appeal." Minn. Stat. § 176.421, subd. 6; Bradford v. Bureau of Engraving, 459 N.W.2d 697, 698, 43 W.C.D. 279, 280 (Minn. 1990). Moreover, an appealing party's brief on appeal may address only issues raised in that party's notice of appeal. Minn. R. 9800.0900, subp. 1. Because withdrawal from the labor market requires a specific factual analysis not performed by or requested of the judge, and because this court may not consider matters not contained within the record before the compensation judge, there is no basis for a review by this court.[4]

Suitability of Job Offer

Minn. Stat. § 176.101, subd. 3f, provides that an employee may not receive temporary total disability benefits if the employer offers a light duty job consistent with the employee's plan of rehabilitation or within the employee's physical restrictions. Generally, an injured employee must accept such a position and make a good faith effort to perform or risk discontinuance of temporary total disability benefits. See Olson v. Quality Pork Processors, slip op. (W.C.C.A. Nov. 21, 1996), citing Witt v. Durkee Mfg., slip op. (W.C.C.A. June 30, 1986). At Finding 7, the compensation judge found that, "[d]uring relevant periods, the employer has not made any suitable job offer to the employee, as the job(s) offered exceeded the restrictions of the

[4] Even if this court considered the issue of withdrawal from the labor market, the record contains no evidence suggesting that employment opportunities were so significantly diminished in the employment community chosen by the employee as to constitute such a withdrawal. See Paine v. Beek's Pizza, 323 N.W.2d 812, 35 W.C.D. 199 (Minn. 1982). In fact, when she relocated to Herman, Minnesota, in 1994, the employee created her own employment opportunity, had an employment plan, and did not seek benefits as a result of her move. There is no evidence in the record suggesting that the employee sought to be subsidized by her employer for her choice of residence. The employee operated her own retail establishment for fifteen months. Following her second fusion surgery, she found light duty work within three blocks of her home. Moreover, a voluntary move to an area of lesser employment opportunities and lower wages does not automatically constitute a withdrawal from the labor market. Giles v. State, Dep't of Transp., 59 W.C.D. 1, 9 (W.C.C.A. 1999).

employee's treating physicians, specifically relative to sitting/driving." The employer contends that the positions offered to the employee were identified as suitable employment by Dr. Randa and by certified rehabilitation counselor and job placement specialist Jan Lowe and that even Dr. Banks agreed that the positions were within the physical restrictions of the employee except for the commute. In light of this evidence, the employer argues, the employee made less than a "good faith" effort to accept or perform suitable employment offered by the employer right up to the time of trial. The employer argues that the employee was released to work with restrictions on July 15, 1996, but did not return to work until October 14, 1996, and then, after only three days on the job, removed herself from the job, contending that it did not conform to restrictions issued by Dr. Banks.[5] The employer argues that it offered suitable work again by letter dated November 5, 1996, but that the employee did not respond until December 10, 1996, and subsequently refused the offer. Although the employee contends that it was her commute from St. Paul to the St. Louis Park location that rendered the job outside of her physical limitations, the employer argues that it was the employee's three-hour commute to the metro area at the beginning of the week and her three-hour commute back to Herman, Minnesota, at the end of the week that caused the job to fall outside Dr. Banks' restrictions, that it was the distance the employee had to travel, not the job, that was the issue. We are not persuaded.

At the time of the employer's offers in 1996, the employee was physically restricted from lifting more than fifteen pounds, from bending and twisting more than three hours a day, and from sitting more than two hours a day, including driving time. The employee testified that the commute from St. Paul to St. Louis Park took forty-five to fifty minutes each way. This caused her to exceed the two-hour sitting/driving limitation imposed by Dr. Banks and resulted in exacerbations in her back and right leg pain. Although not specifically stated in the doctor's office notes, the employee testified that "Dr. Banks felt very strongly that this was not within my restrictions." In his office note of October 30, 1996, Dr. Banks commented on the employee's continued difficulty with sitting, and he recommended a trial of a TENS unit for her right buttock pain. He also suggested that she be allowed to change positions every thirty minutes. In subsequent deposition testimony, Dr. Banks agreed that the job was not within the employee's restrictions, and this was also concurred in by QRC Courtney.[6] We note further that the employee did not have the benefit of rehabilitation assistance during the period in question, and it is clear that the compensation judge found this lack of rehabilitation assistance to be significant.

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[5] Dr. Dittberner, of the Alexandria Clinic, following a telephone call on October 21, 1996, excused the employee from working on Monday, October 21, 1996, but deferred to Dr. Banks for the remainder of the week. Dr. Banks, who saw the employee on October 30, 1996, did not remove the employee from work, but indicated she had reached maximum medical improvement.

[6] At hearing, the employee did not contend that the job offer was unsuitable because it was not within a reasonable distance of her home. See Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981); see also Volner v. Cub Foods, 41 W.C.D. 319 (W.C.C.A. 1988). She contended that it was unsuitable because it was not within her restriction against sitting more than two hours a day.

Whether a particular job is physically suitable for an employee is a question of fact. See Nelson v. Dahlen Transp., Inc., 43 W.C.D. 479, 484-85 (W.C.C.A. 1990). In his memorandum, the compensation judge stated that "the employee testified very credibly as to the reality of her pain and discomfort." Assessment of the credibility of a witness is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 41 W.C.D. 79 (Minn. 1988). Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). Substantial evidence supports the judge's conclusion that a suitable job offer was not made to the employee by the employer. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Temporary Total Disability - November 14, 1996, to January 4, 1997

At Finding 8, the compensation judge stated, "[D]uring relevant periods when she was capable of attempting to work, the employee's job search efforts were adequate . . . particularly considering the lack of any rehabilitation/job search assistance being provided to her by the self-insured employer." The employer contends that the compensation judge's finding that the employee's job search efforts were adequate is not supported by evidence that a reasonable mind might accept as adequate. The employer argues that during the period November 14, 1996, to January 4, 1997, the employee was released to return to work with restrictions and that when she saw Dr. Banks on October 30, 1996, she had not appeared to be temporarily totally disabled or unable to perform the job duties outlined by the employer's job offer. The employer argues that Dr. Banks' notes do not indicate that her pain was intractable, excruciating, or unremitting. Nor is there any evidence in the record, the employer argues, to suggest that the employee was taken off work by her treating physicians. We are not persuaded.

Generally, in order to be entitled to temporary total disability benefits, an employee must, if she is able to work within her restrictions, engage in a reasonably diligent job search. Redgate, 421 N.W.2d at 733, 40 W.C.D. at 954. A diligent job search is a search that is reasonable in light of all the facts and circumstances of the case, including the rehabilitation assistance provided to the employee. Id. at 734, 40 W.C.D. at 956; see also Noll v. Ceco Corp., 42 W.C.D. 553 (W.C.C.A. 1989). Whether an employee has engaged in a reasonably diligent job search is a question of fact for determination by the compensation judge. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989).

Following the employee's second fusion surgery in February 1996, and prior to the job offers extended by the employer in 1996, the employee requested rehabilitation assistance. The employee's request was denied. The employer subsequently offered the employee the temporary job in its benefits department. The employee testified that she attempted to work at this job but was unable to continue because of exacerbations to her back condition and leg pain caused by the commute from St. Paul to St. Louis Park. On her own, the employee found a job at Park Manufacturing in Herman, Minnesota, commencing on January 4, 1997. While the employee did not offer evidence of a specific job search during the period of November 14, 1996, and January 3, 1997, we conclude that substantial evidence supports the compensation judge's determination that

the employee's job search efforts were adequate in view of her obtaining employment by early January. Particularly in light of the employee's lack of rehabilitation assistance and the fact that she obtained employment within approximately six weeks, we conclude that it was not unreasonable for the compensation judge to award temporary total disability benefits for the period November 14, 1996, to January 4, 1997. We affirm the award.

Temporary Partial Disability - January 4, 1997, to July 1, 1997

Also at Finding 8, the compensation judge determined that the employee's "actual earnings constituted a fair measure of her earning capacity." Having determined that the jobs offered to the employee exceeded her restrictions, and considering the lack of rehabilitation assistance provided to the employee, the compensation judge awarded temporary partial disability benefits from January 4, 1997, through June 30, 1997, based upon the employee's earnings at Park Manufacturing. Generally, an employee's actual earnings are presumptively representative of her earning capacity. French v. Minn. Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1985). In appropriate circumstances, however, this presumption may be rebutted with evidence indicating that the employee's ability to earn is different from the post-injury wage. Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989). The employer argues that the earning capacity presumption was rebutted in this case by the job offers from the employer, that the employee voluntarily chose to be underemployed when she rejected those offers. We disagree.

The compensation judge's analysis was grounded in a review of the job offers extended to the employee and the rehabilitation assistance provided to her. We have affirmed the judge's determination that the jobs offered by the employer were not within the employee's restrictions. On her own, without job placement assistance, the employee found light duty work within her considerable restrictions, three blocks from her home. Other than the temporary jobs found unsuitable by the compensation judge, there was no evidence of any specific jobs available to the employee. Shortly after the employee started the job at Park Manufacturing, Dr. Banks commented that an element of the employee's pain may be related to fibromyalgia. The employee testified that while working full time she experienced exacerbations of her back and leg pain and eventually pain and spasm across her ribs and into her shoulders. By March 1997, Dr. Banks altered the employee's work restrictions, and ultimately, by July 1997, he recommended an evaluation at the Fibromyalgia Clinic at Abbott Northwestern Hospital. The employee ceased working on June 30, 1997.

"Determinations of earning capacity are factual in nature." Einberger, at 737. Thus, it is up to the compensation judge to determine the employee's earning capacity. Noll, at 557. We conclude there is substantial evidence of record to support the compensation judge's decision that the employee's actual earnings accurately reflected her earning capacity. Accordingly, we affirm the award of temporary partial disability benefits from January 4, 1997, to July 1, 1997.

Temporary Total Disability - July 1, 1997, to June 15, 1999

At Finding 9, the compensation judge awarded temporary total disability benefits from July 1, 1997, through the date of the hearing, June 15, 1999, "and continuing thereafter as her disability and the Minnesota Workers' Compensation Law shall warrant." In a memorandum attached to his Findings and Order, the compensation judge credited the employee's testimony relative to her pain and its effect on her activities of daily living, noting that her position was adequately supported by other evidence and testimony in the record, including specifically the deposition testimony of five treating and/or consulting doctors. The compensation judge found the opinions of these five doctors to be more persuasive than the opinions of the employer's examiners. The employer contends again that the employee rejected suitable employment that has always been available to her throughout the period in question. Further, the employer argues, no doctor removed the employee from work on July 1, 1997, the employee is capable of work within restrictions, and the employee testified that she did not conduct any search for employment after July 1, 1997. Therefore, the employer argues, the employee is not entitled to temporary total disability benefits continuing from July 1, 1997, as claimed. We do not agree.

The compensation judge determined that the employee sustained a consequential injury to the sciatic nerve in her right hip while undergoing treatment for her September 14, 1992, work-related injury. He also determined that the employee suffers from chronic pain syndrome and fibromyalgia related to that injury and that, as of the date of the hearing, the employee had not reached maximum medical improvement with regard to all medical conditions stemming from that injury. Dr. Dittberner and Dr. Yue, whose opinions the compensation judge found persuasive, both opined that the employee was totally disabled from employment. The employee testified to frequent exacerbations and flare-ups. The employer's vocational expert, Jan Lowe, agreed that an employee's ability to show up regularly for work as scheduled is a significant component of competitive employment.

We conclude that implicit in the judge's Findings 8 and 9 is the determination that, during the period of July 1, 1997, to the date of hearing, the employee was medically incapable of working, based on the opinions of the treating medical providers. The judge's award of temporary total disability benefits in this case is not premised on an assessment of the employee's job search efforts, which may bring into question an issue of labor market and employment opportunities, but is based on medical disability. The judge specifically indicated that he found the employee's testimony relative to her pain and disabling discomfort to be credible. That credibility conclusion was clearly within the judge's discretion. He also specifically adopted the opinions of the employee's treating doctors, including Drs. Dittberner and Yue, who opined that the employee was totally disabled. The judge also concluded that the employee requires treatment for her chronic pain syndrome and fibromyalgia and that she has not yet achieved maximum medical improvement from all conditions related to the injury of September 14, 1992. We conclude that there is substantial evidence of record to support the compensation judge's decision that the employee was medically disabled from employment subsequent to July 1, 1997. Accordingly, we affirm the award of temporary total disability benefits during that period. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.