MICHAEL A. JOHNSON, Employee/Appellant, v. FINGERHUT CORP. and WAUSAU INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 24, 2000

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - IMPUTED WAGE. Substantial evidence supports the compensation judge's finding that the employee's temporary partial disability benefits should be based upon an imputed wage where the employee did not cooperate with rehabilitation services, did not make a diligent job search, and a labor market survey indicated work was available within the employee's restrictions.

EVIDENCE - RES JUDICATA. Where this court had indicated in an earlier decision that there was no evidence that additional hours available for the employee with his current employer, collateral estoppel did not bar the compensation judge's finding on remand that the employee's current employer probably had additional hours available for the employee since the issue was not directly litigated and there was additional explanation of the compensation judge's inferences from the evidence.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Wilson, J.
Compensation Judge: Jennifer Patterson

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals the compensation judge's denial of temporary partial disability benefits for various periods of time. We affirm.

BACKGROUND

On January 14, 1988, Michael Johnson, the employee, sustained an admitted low back injury while working as a cutter for Fingerhut Corporation, the employer, which was insured on that date for workers' compensation liability by Wausau Insurance Company, the insurer. Born on May 12, 1959, the employee was 28 at the time of his injury and earned an average weekly wage of $460.68. The employer and insurer paid temporary total disability for various periods of time between the injury date and August 1989, and continue to pay ongoing temporary partial disability benefits at various rates. The employer and insurer also provided rehabilitation assistance to the employee through October 31, 1998.

By March 1989, the employee was diagnosed as having traumatic L5 spondylolysis with resultant left sided foraminal encroachment upon the exiting L5 nerve root and a bulging disc at the L4-5 level without frank nerve root compression. On September 14, 1989, the employee filed a claim petition alleging entitlement to economic recovery compensation based upon a rating of 19 percent permanent partial disability of the body as a whole; the employer and insurer had commenced payment of economic recovery benefits based upon a 14 percent permanency rating. In February 1990, the parties entered into a stipulation for settlement whereby the employee was compensated for a 17 percent permanent partial disability of the body as a whole with a closeout of claims to the extent of 19 percent.

Dr. Sunny Kim originally recommended surgery to the employee, as early as 1988, and again in 1990, but the employee chose to forego surgery. By 1991, Dr. Richard Strand determined that he was no longer a surgical candidate, and recommended cortisone shots, which the employee also declined. Dr. John Cragg, orthopedic surgeon, has been the employee's treating physician since 1989. In October 1992, Dr. Cragg recommended restrictions of no repetitive lumbar bending, no lifting greater than 10 to 15 pounds more than 6 to 8 times an hour, and no prolonged sitting more than 4 hours in an 8 hour period, with frequent breaks. In June 1993, Dr. Cragg indicated that these restrictions should continue indefinitely. On November 18, 1993, the employee began working at a light duty position 4 hours per day at Gunderson Motors as a light mechanic in its service department. The employee usually worked four hours per day, five days per week with Gunderson Motors, working under the physical work restrictions assigned by Dr. Cragg. At that time, and since, Dr. Cragg restricted the employee to eight hours per day within physical work restrictions, or four hours per day of regular duty work. In March 1994, Dr. Cragg noted that the employee was having difficulty working more than 4 hours per day and reiterated that the employee could either work 4 hours per day regular duty or 8 hours with restrictions.

By 1995, the employee’s medical treatment consisted of appointments with Dr. John Cragg once or twice each year for check-ups and renewal of medication. In January 1995, the employee underwent a functional capacities evaluation at Rum River Therapy Center, which resulted in recommendations that the employee avoid vibration tasks, ladder/stair climbing, and bending backwards; that he rarely perform twisting and balance tasks; that he perform seated repetitive foot movements with upper extremity support; that he alternate sitting, standing and walking and utilize a lumbar roll when seated; that he limit driving to 45 minutes at a time ; and that he continue working 4 hours per day at the medium work demand level within the above restrictions, gradually increasing to six to eight hours over approximately four to six weeks. Also in January 1995, the employee's QRC performed an on-site job analysis of the employee's position at Gunderson Motors. The QRC concluded that the employee was performing a wide variety of duties, within and outside of his restrictions, and that Gunderson Motors did not have more than 4 hours of work available per day that the employee could perform within his physical work restrictions.

On January 27, 1995, the employer and insurer filed a petition to discontinue the employee's temporary partial disability benefits. The employer and insurer alleged that even though Gunderson Motors had work available for the employee at an increased hourly rate of pay,

the employee refused to attempt to increase his hours.[1] A hearing was held on April 25, 1995, and May 11, 1995. In a Findings and Order served and filed June 26, 1995, the compensation judge found the employee continued to have significant limitations on his ability to perform physical work activity as a result of his 1988 work injury, that the employee should not increase his work beyond the 20 hours per week which he was working at Gunderson Motors because some of the work duties exceeded his restrictions, and that Gunderson Motors did not have more hours of work available which the employee could safely perform. The compensation judge denied the employer and insurer's petition to discontinue. This decision was not appealed.

Following that hearing in 1995, the employee continued to work at Gunderson Motors and began receiving additional rehabilitation assistance from placement specialist Trudy Peterson, who worked with Gunderson Motors to identify job duties within the employee's restrictions which he could perform more than 4 hours per day on a regular basis. In early 1996, the employee's job title was revised to "shop helper" and his hours were increased from 4 hours to 7 hours per shift. A typical day for the employee consisted of 4 hours of light mechanic's work, a two-hour lunch break to allow the employee time to rest, and 3 hours of general duties including cleaning floors, emptying trash cans, and general clean-up activities. By 1997, Gunderson Motors' owner observed the employee's cleaning work, noted that the employee was not as efficient when performing his non-mechanic duties during afternoons and, as a result, reduced the employee's hours back to 4 hours per day as of June 4, 1997.

On September 30, 1997, the employee filed a medical request to change physicians. A commissioner's representative at the Department of Labor and Industry granted that request by decision and order served and filed on November 21, 1997. On December 8, 1997, the employer and insurer appealed from that decision, and requested a formal hearing. The employer and insurer also filed a petition to discontinue temporary partial disability benefits, arguing that the employee's benefits should be calculated based on imputed earnings from an 8 hour shift. The employer and insurer argued that the employee volitionally reduced his hours at Gunderson Motors and therefore that his earnings were not the actual measure of his earning capacity. Both the medical and discontinuance matters were consolidated for hearing. At the hearing held on April 10, 1998, the parties agreed that the employee was able to work 8 hours per day within his restrictions. The employee argued that his benefits should continue to be based on only 4 hours per shift because Gunderson Motors did not have light-duty work available for him more than 4 hours per day. The compensation judge found that the employee's temporary partial disability benefits should be based on an imputed earning capacity of 7 hours per day (his previous work hours at Gunderson Motors) and also found that the employee had not shown a good reason for changing health care providers.

In her Findings and Order served and filed on May 21, 1998, the compensation judge found that

[1] The employer and insurer previously filed a Notice of Intention to Discontinue Benefits (NOID) on April 29, 1993, a Petition to Discontinue on July 27, 1993, and a NOID on May 12, 1994, each based upon alleged noncooperation with rehabilitation and failure to conduct a diligent job search. Each was resolved either by administrative decision or by a settlement agreement between the parties.

> As set out in the employee's treatment records in evidence, he considered the change in job title from "light mechanic" to shop helper" to be a demotion even though his hours went up and his pay per hour remained the same. The employee preferred mechanic job duties to janitorial job duties. When asked to perform job duties that the employee considered to be beneath his capabilities, he performed them slowly and inefficiently. He dragged a floor mop behind him instead of pushing it in front of him when asked to mop floors. By early 1997, [the employer] noticed that the employee was not very efficient as a worker when he worked 7 hours per shift. . . . At the April 10, 1998 hearing the employee testified that his difficulties with the afternoon hours at Gunderson Motors were not physical difficulties but rather were a kind of mental stress from having time spans when he did not have an assigned task to perform.

(Finding No. 16, Findings and Order, May 21, 1998)

The employee appealed from the compensation judge's denial of the employee's request to change physicians, and from the judge's finding that the employee's temporary partial disability benefits should be based on an imputed earning capacity of seven hours per day. In a decision served and filed January 25, 1999, the Workers' Compensation Court of Appeals affirmed the compensation judge's denial of the employee's request to change treating physicians. The court remanded the temporary partial disability issue to the Office of Administrative Hearings, for consideration of whether the employee's job search and cooperation with rehabilitation efforts after June 4, 1997, had established that the employee's wage loss was causally related to his work injury, and if so, on what date the employee had reestablished his entitlement to temporary partial disability benefits.

On remand, this matter was again heard before a compensation judge on August 6, 1999. By agreement of parties, the issues were expanded to include a claim for temporary partial disability benefits from April 11, 1998 forward. The parties stipulated that between April 10, 1998, and August 6, 1999, the employee's back condition remained essentially the same and his restrictions did not change. The parties also stipulated that no medical issues were in dispute. At that hearing, a compensation judge considered the employee's claim for temporary partial disability benefits for four different time spans, June 4 through 25, 1997; June 25, 1997 through April 10, 1998; April 11, 1998 through October 31, 1998; and October 31, 1998 until the date of hearing, August 6, 1999.

In Findings and Order served and filed September 30, 1999, the compensation judge denied the employee's claim entirely for temporary partial disability benefits between June 4-25, 1997, finding that the employee made no diligent search for additional work during that time period. For the time span between June 25, 1997, and April 10, 1998, the compensation judge again determined that the employee's temporary partial disability benefits were to be based on an imputed wage based upon seven hours of employment, finding that his reduction of work hours

by fifteen hours per week "was not causally related to restrictions placed upon his activities by the permanent work injury to his low back." (Finding No. 9.) The compensation judge further explained that for this time span the employee's earning capacity was seven times his hourly pay at Gunderson Motors, and not his actual earnings of four times his hourly pay, because he lost the afternoon hours for reasons unrelated to his low back and did not make a diligent search for work and cooperate with rehabilitation. (Memorandum, p. 11.)

The compensation judge also determined that the employee's earning capacity between April 11, 1998 and April 6, 1999 (date of hearing) is to be based on eight times his hourly wage earned with his current employer. (Finding No. 17.) The compensation judge reviewed testimony by placement vendor John Ramus and the employee, in addition to the employee's job logs and Mr. Ramus' rehabilitation records, and determined that between April 11 and October 31, 1988, the employee did not cooperate with rehabilitation assistance nor make a diligent job search. The compensation judge stated that:

> Even though placement vendor Ramus testified that the employee cooperated with him in the sense of maintaining communication, the number of job leads the employee ruled out, added to his self-imposed limits on the cities he would consider, support the conclusion that the employee did not cooperate with efforts to rehabilitate himself between April 10, 1998 and October 30, 1998 when formal rehabilitation assistance was suspended.

The compensation judge also determined that although the employee received no rehabilitation assistance after October 31, 1998, the employee previously had been instructed in and had retained strong job-seeking skills, but made no diligent job search between October 31, 1998, and the hearing held on August 6, 1999. The compensation judge found that:

> By self restricting the cities he would look in and the kind of jobs he would consider even within his limitations, by making too few in person contacts after job leads for current openings rather than simply sending a resume or leaving a phone message, and by refusing to follow up on second part-time jobs, the employee made a non-diligent job search and did not cooperate with efforts to rehabilitate himself between November 1, 1998 and August 6, 1999.

(Finding No. 16.) As a result of these determinations, the judge further ordered that the employer and insurer shall have a credit for any overpayment of temporary partial disability benefits paid between April 11, 1998 and August 6, 1999, to be recovered as provided as by Minn. Stat. § 176.179. (Order No. 4.) The employee appeals.

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A.) 1993).

DECISION

Temporary Partial Disability Claim

The compensation judge denied the employee's claim for temporary partial disability benefits for three weeks in 1997, and thereafter ordered that temporary partial disability benefits be based upon an imputed earnings level. The primary basis for the compensation judge's findings was that the employee's reduction in earnings was not causally related to the employee's 1988 work-related injury, but instead resulted from the employee's lack of a diligent job search for additional work and his noncooperation with rehabilitation assistance.

Temporary partial benefits are payable while an employee is employed, "earning less than [his] weekly wage at the time of injury, and the reduced wage the employee is able to earn in [his] partially disabled condition is due to the injury." Minn. Stat. Sec. 176.101, subd. 2(b) (1992). An employee must show (1) a physical disability, (2) an ability to work subject to the disability, and (3) an actual loss of earning capacity that is causally related to the disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101. In order to be eligible for temporary partial benefits, the employee must establish a reduction in earning capacity which is causally related to the work injury. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48 (Minn. 1988). Where a disabled employee is released to work on a full-time basis but works only at a part-time job, the employee may still be eligible for temporary partial disability benefits if any wage loss is causally related to the personal injury. Nolan v. Sidal Realty Co., 53 W.C.D. 388

(W.C.C.A. 1995). Working less than full-time may or may not be reasonable under the particular facts of a case. See e.g., Fisher v. Corn Belt Meats, 52 W.C.D. 687 (W.C.C.A. 1995), summarily aff'd (Minn. June 30, 1995), cited in Nolan, supra.

"[T]emporary partial benefit awards are generally based on post-injury wages because post-injury wages are presumptively representative of an employee's reduced earning capacity. In appropriate circumstances, however, this presumption can be rebutted with evidence indicating that employee's ability to earn is different than the post-injury wage." Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citation omitted).

It is evident from the compensation judge's Findings and Order and Memorandum that she thoroughly reviewed the voluminous record in this matter, including the rehabilitation records prepared by the vocational professionals, the job logs and job diary prepared by the employee, the report and labor market survey prepared by the employer and insurer's vocational expert, and testimony by the employee, representatives from Gunderson Motors and John Ramus, QRC. Based on the record in its entirety, it was reasonable for the compensation judge to conclude that the employee was not entitled to temporary partial disability benefits for the time span from June 5 through June 25, 1997, because the employee did not make a diligent job search for work during those weeks, and that this lack of diligent job search demonstrated that the reduction in work hours was unrelated to his work injury. As of June 4, 1997, the employee's hours at Gunderson Motors were reduced from seven to four hours per day. The employee reported this change in his work status to his QRC, who advised him to reopen his job search. The compensation judge noted that the employee had been in job search for a number of years, prior to working for Gunderson Motors, and that the employee made no job contacts with potential employers during this approximately three-week period of time, even though his QRC advised him to reopen his job search. Substantial evidence of record supports the compensation judge's denial of benefits for this three-week period of time, and we affirm.

The compensation judge next analyzed the time period between June 25, 1997 and April 10, 1998. On June 25, 1997, a new Job Placement Plan and Agreement (JPPA) was signed by the employee, his QRC, and a representative of the employer and insurer. That JPPA provided that the employee look either for a single full-time job or a second part-time job to augment his Gunderson Motors work, with a preference for full-time work. The JPPA specified that the employee's job search was to be performed on a part-time basis in the afternoons, three to four hours per day, within a 50-mile radius of the employee's home. The compensation judge reviewed the evidence of record concerning the employee's participation with rehabilitation during this period of time and determined that the employee's lack of diligence in job search and lack of cooperation with rehabilitation both support the conclusion that the employee's reduction of work hours at Gunderson Motors between June 25, 1997 and April 10, 1998, was not causally related to restrictions related to his work injury.

The compensation judge therefore determined that the employee's earning capacity between June 25, 1997 and April 10, 1998 was seven times his hourly pay at Gunderson Motors, as opposed to his actual earnings of four times his hourly pay. Again, the compensation judge

found that the employee's reduction of hours was not causally related to his low back injury, and that he neither made a diligent job search for work nor cooperated with rehabilitation during that period of time. However, the compensation judge also denied the employer and insurer's claim that the employee's earning capacity should be based upon eight times his hourly pay for this period of time, finding that there was no vocational testimony "that the employee could have found a second four hour per shift job had he made a diligent search for one." (Memorandum, p. 11.) Instead, the compensation judge assigned an imputed wage rate to the employee, based upon the seven hours per day that he had worked at Gunderson Motors from early 1996 until June 4, 1997.

It was reasonable for the compensation judge to conclude that the reduction of the employee's hours during this period of time was not causally related to his work injury. The compensation judge found that:

> Placement vendor Peterson's records for the time span June 25, 1997 through April 10, 1998, as well as the employee's job logs, document the employee on numerous occasions refusing to follow up on job leads within both the vocational and geographic parameters of his JPPA and only with reluctance following up on others (see, for example: June 23, 1997 Peterson report documenting employee's mistrust; July 25, 1997 Peterson report referencing the employee's failure to submit job logs; August 28, 1997 report where employee refused to consider jobs in North Branch and Isanti; November 24, 1997 and December 24, 1997 Peterson reports where employee did not follow up on job lead with limitations because the job would have been temporary to start, with a possibility of permanent work resulting; February 20, 1998 Peterson Report where employee did not apply at Blue Water in Mora because "they would not hire him because everyone in town knows he has been on workers' comp"; March 19, 1998 where employee ruled out 15 hour per week janitorial job at a medical facility because it was part-time).

The compensation judge also referred to the employee's job logs in evidence, which were several hundred pages long but documented "not only actual contacts with potential employers but also many other kinds of events such as: doctor's appointments, driving to the drug store, going to the post office, disputes with coemployee's at Gunderson Motors, and entries documenting increased low back symptoms after driving or working." (Finding No. 10.) The compensation judge also found that "[a]pproximately one-third to one-half of the entries in the employee's job logs do not document either contacts with potential employers or contacts with his QRC and placement vendor. Approximately half of the remaining entries document contacts with his QRC and placement vendor and not potential employers." (Finding No. 10.) The evidence of record substantially supports the compensation judge's conclusion that the employee's reduction of work hours at Gunderson Motors between June 4, 1997 and April 10, 1998 was not causally related to the employee's work injury, and accordingly we affirm.

As to the period of time between April 11, 1998 and the hearing held on August 6, 1999, the compensation judge found that the employee's earning capacity was based on full-time work, forty times his hourly wage earned at Gunderson Motors. The compensation judge again referred to the employee's self-limitations while searching for additional employment. The compensation judge found that the employee's "pattern of reluctance and noncooperation continued." (Finding No. 11.) For example, the employee informed his placement vendor that he would only look for work in Cambridge, Mora, Hinckley, Milaca and Pine City and none of the other municipalities within 50 miles of his home, including North Branch, Rush City and others. The compensation judge also found that the employee continued to rule out temporary, part-time and seasonal jobs. For example, the employee advised vocational expert Jan Lowe that he did not want work at the casino in Hinckley "because he thinks a job there could end with little or no notice." The compensation judge also found that the employee did not follow up with job leads on occasion because in his own opinion those jobs were beyond his restrictions.

The compensation judge also relied upon the report of vocational expert Jan Lowe, with the attached labor market survey, to determine that the employee retains the ability to perform full-time work in the competitive labor market at a number of different occupations located within 50 miles of his home. For example, Jan Lowe's report and QRC Larry Mansfield's testimony indicate that the employee's physical work restrictions would allow him to perform selective jobs in the restaurant business even though the employee's job search had not been expanded to include restaurant work. The compensation judge further found that the "labor market survey together with the testimony of QRC Mansfield about the restaurant business constitute more than a theoretical possibility of a different position for the employee and, in fact, set out actual work available within 50 miles of the employee's home that is within his restrictions." (Finding No. 13.)

The compensation judge further analyzed the employee's job search between November 1, 1998 and August 9, 1999, when the employee did not have available to him the services of a QRC or placement vendor. The compensation judge again referred to the employee's job logs, and found that the employee continued to self limit his job search not only in terms of geographic location but also in terms of the kind of work he would consider, and that he rules out second part-time jobs, seasonal work, temporary jobs or self-employment, even if those jobs might turn into permanent employment. In her memorandum, the compensation judge explained that even though the employee had no services of a QRC since October 31, 1998, "the employee had been instructed in job seeking skills a number of times, knew how to contact the Department of Economic Security for job openings, read newspapers for job leads, and knew how to contact businesses and ask about work." (Memo., p. 11) The compensation judge stated that "[g]iven his pattern of resistance to rehabilitation efforts, it does not seem likely that continuing to work with this QRC and placement vendor would have made a difference in the employee's job search" after October 31, 998.

On factual matters such as this one, although we are not to look only at the evidence that supports the compensation judge's findings, see Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239, it is the task of this court not to assess the substantiality of evidence that would have

supported a contrary decision but instead to assess the substantiality of evidence supporting the decision of the judge. As we have indicated above in our standard of review, supportive evidence is substantial if it is, in light of the record as a whole, “evidence that a reasonable mind might accept as adequate,” granting "due weight to the opportunity of the Compensation Judge to evaluate the credibility of witnesses appearing before the judge." Id., 358 N.W.2d at 59-60, 37 W.C.D. at 239-40. Moreover, as we have also indicated above, "where the 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." Id., 358 N.W.2d at 60, 37 W.C.D. at 240. We are “not to substitute [our] view of the evidence for that adopted by the compensation judge if the compensation judge’s finding are supported by evidence that a reasonable mind might accept as adequate.” Id. "The point is not whether [the appellate court] might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate." Redgate v. Sroga's Standard Service, 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The compensation judge evaluated whether the employee was making a good faith effort to participate in a rehabilitation plan, see Bauer v. Winco-Energex, 42 W.C.D. 762 (1989), and found that he was not. Based upon the evidence of record, it was reasonable for the compensation judge to conclude that the employee’s actual wages did not accurately represent his earning capacity. Because the compensation judge’s determinations are supported by substantial evidence of record and reflect reasonable inferences drawn from the evidence of record, we affirm the compensation judge’s finding that after April 19, 1998, the employee was entitled to temporary partial disability benefits based on an imputed 40-per-week wage.

Collateral Estoppel Issue

The employee asserts that the principle of collateral estoppel precludes the compensation judge from finding there is additional work available at Gunderson Motors, in view of the Workers’ Compensation Court of Appeals’ footnote in its decision of January 25, 1999, that no evidence was presented that additional work beyond four hours at Gunderson Motors was available to the employee (as of the hearing on April 10, 1998). The employee argues that at the second hearing held on August 6, 1999, there was no new or additional testimony from Gunderson Motors, or a QRC, that such work was available to the employee.

The doctrine of “[c]ollateral estoppel precludes the relitigation of a right, question, or fact distinctly put in issue and directly determined in a prior adjudication.” Coughlin v. Radosevich, 372 N.W.2d 817, 918 (Minn. Ct. App. 1985). At the first hearing on April 10, 1998, the parties addressed whether work was available to the employee at Gunderson Motors beyond his current four hours per day. This factor was not an issue directly litigated, but was considered in conjunction with the overall issue of whether employee’s loss of 15 hours per week resulted from his work-related injury. The compensation judge found, in her Findings and Order served and filed May 21, 1998, that as of June 4, 1997, “[a]s supported by the testimony of Lyle Peterson and Brad Gunderson, if the employee had been a willing and efficient worker afternoons [sic],

Gunderson Motors would have continued to make available to him three hours of work after lunch." (Finding No. 19, Findings & Order, May 21, 1998.)

In its decision of January 25, 1999, this court stated in a footnote that "[t]here is no evidence in the record that the afternoon hours at Gunderson Motors remained available to the employee." Johnson v. Fingerhut Corp., slip op. (W.C.C.A. January 25, 1999). That footnote followed a summary of testimony by placement vendor Trudy Peterson concerning the cutback of employee's daily work hours from seven to four. On remand, after the second hearing held on August 6, 1999, the compensation judge analyzed the employee's job search and cooperation with rehabilitation to determine whether the employee's wage loss was causally related to his work injury. In her Findings and Order served and filed September 30, 1999, the compensation judge referred to the possibility of the employee again working additional hours for his current employer, Gunderson Motors. The compensation judge found that from June 4, 1997 on, "Gunderson Motors had turnover of personnel for jobs with duties within the employee's restrictions," (Finding No. 6) based upon testimony at the April 10, 1998, hearing by the employee, Lyle Peterson and Brad Gunderson, and based upon the employee's job logs and vocational records in evidence. The compensation judge concluded that:

> By June 1997, the employee had worked for Gunderson Motors for nearly four years and by August 1999, he had worked for Gunderson Motors for nearly six years. In spite of this long term employment relationship involving part-time work, from June 4, 1997 on the employee did not seek additional work duties which probably would have been available to him, if not on the exact day he offered to perform them, within a reasonably short time in the future, from the employer most likely to give him additional work to do - - Gunderson Motors.

(Finding No. 6, Findings & Order, Sept. 30, 1999.)

Even though no additional testimony was presented by representatives of Gunderson Motors at the second hearing, the compensation judge adequately explained the basis for the inference she made based on the totality of evidence of record. The judge stated that additional work duties would "probably have been available" to the employee, and drew that inference based upon vocational and rehabilitation records and testimony in evidence. The compensation judge inferred that there was a probability of work available at Gunderson Motors. This was a reasonable inference to make, based upon the record as a whole, and was not dispositive of the ultimate issue in dispute. We hold that the compensation judge is not collaterally estopped from making the determination that she did in Finding No. 6. The compensation judge's statement is phrased so as to suggest a probability of available work, with no limitation as to times available; in contrast, the footnote refers specifically to "the afternoon hours at Gunderson Motors." The footnote language does not exclude the probability outlined by the compensation judge, and therefore does not render the compensation judge to be collaterally estopped from making that statement in Finding No. 6.