

PAUL L. BLOM, Employee, v. SINGLE SOURCE TRANSP. and RELIANCE INS. CO./CRAWFORD & CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 14, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE; CAUSATION - AGGRAVATION. Despite the absence of expert opinion specifically connecting the employee's ongoing low back condition to his work injury, substantial evidence supported the compensation judge's finding that the employee's work-related low back injury was permanent.

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee's ventral hernia was caused by an incident at work.

JOB OFFER - REFUSAL. Substantial evidence supported the compensation judge's decision that the employee reasonably refused the employer's light-duty job offer because he was not capable of driving to work while using a narcotic pain reliever.

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Substantial evidence supported the compensation judge's award of temporary partial disability benefits based on the employee's actual earnings in his 40-hour per week paid training program, despite his physical ability to work 60 to 70 hours per week as he had pre-injury, where there was no evidence of any actual jobs that would necessarily have paid the employee more, and where a vocational expert testified that the training program was vocationally and economically suitable.

REHABILITATION - ELIGIBILITY. Where the compensation judge's premise for awarding ongoing rehabilitation assistance was faulty, and where the employee's own vocational expert testified that further rehabilitation services were unnecessary, the compensation judge erred in awarding the employee ongoing rehabilitation assistance.

APPEALS - SCOPE OF REVIEW; EVIDENCE - EXPERT MEDICAL OPINION. Where the employer and insurer failed to raise the compensation judge's evidentiary ruling in their notice of appeal, this court had no jurisdiction to consider the issue.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert vocational opinion, supported the compensation judge's decision that the employee's job search was reasonable and necessary under the circumstances.

Affirmed in part and reversed in part.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Danny P. Kelly

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision as to the nature of the employee's work-related May 29, 1999, low back injury, causation of the employee's ventral hernia, the reasonableness of the employee's refusal of light-duty work, the diligence of the employee's job search, the employee's entitlement to temporary partial disability benefits, the employee's entitlement to rehabilitation assistance, and the admissibility of expert deposition testimony. We reverse the award of rehabilitation assistance but affirm the judge's decision on all other issues.

BACKGROUND

The employee was born in 1946 and began working in the transportation industry in about 1969. His experience in that field includes employment as a truck driver, a cab driver, a dispatcher, a shipping office manager, a claims manager, and a terminal manager. In 1996, he began a job as an over-the-road truck driver for Single Source Transportation¹ [the employer], hauling bulk mail to various locations throughout the continental United States. The employee typically worked as a team driver, alternating driving duties with a partner, but he sometimes drove alone. The job was usually "hook and drop," that is, the employee would hook up the trailer and then drop it off at its destination, but he was occasionally required to do some unloading and loading. He was paid by the mile and generally worked 60 to 70 hours a week.

The employee had a significant weight problem for most of his adult life, and, in January of 1999, he underwent gastric bypass surgery to address that condition. At one point prior to his surgery, the employee had weighed as much as 425 pounds; by the time he returned to work in March of 1999, following his surgery, he weighed about 280. The employee was evidently able to perform all of his duties by the time he came back to his job.

On May 29, 1999, the employee was driving for the employer in Nashville, Tennessee, without a partner, when his truck seat back broke, causing him to fall backwards 45 to 60 degrees. He was able to control the truck but felt an immediate sharp, burning pain from his belt line down into his buttocks. He managed to complete the trip but consulted a physician shortly after returning to Minnesota, a few days after the incident. The employee was diagnosed with low back strain and was treated with medication. After about a week and a half off work, he returned to his pre-injury job, which he evidently performed without restrictions through the summer. He

¹ Single Source Transportation is alternately referred to in the record as Ruan Transportation. We could find no explanation for the name discrepancy.

testified, however, that he continued to experience at least minor back symptoms during this period.

The employee testified that, not long after the May 29, 1999, work incident, he noticed a “bump” on or near the incision site from his gastric bypass surgery. He further testified that it was not painful and that he was not concerned about it because he thought it was simply a result of the bypass surgery, just something “to get used to.” A follow-up appointment with his gastric bypass surgeon, originally scheduled for June of 1999, was postponed when the surgeon moved to a different hospital, and the employee did not seek any medical attention for the “bump” until the following fall.

In early September of 1999, the employee experienced increased low back pain while on a solo trip for the employer to New York City. He testified that the pain was severe but that he was able to drive back to Minnesota by skipping required inspections of his truck and by driving without using the clutch. Immediately upon returning home, he sought hospital treatment for his symptoms, and in a September 15, 1999, note, Dr. Steven Winselman, the employee’s usual family physician, indicated that the employee was having great difficulty with movement and that his lower lumbar area was very tender. Dr. Winselman advised the employee to take medication, including Vicodin, a narcotic pain reliever, and referred the employee for an MRI scan. That scan, performed on September 22, 1999, disclosed degenerative changes through much of the employee’s lumbosacral spine, as well as a bulging or herniated disc at L3-4.

On October 6, 1999, the employee was seen by Dr. James Schwender, of the Twin Cities Spine Center, on referral by Dr. Winselman. A “Physical Capacity Evaluation (Work Restriction Evaluation)” completed by Dr. Schwender on that date set activity and lifting restrictions and indicated that the employee could return to light-duty work in two weeks. However, the clinic treatment notes, dictated by Dr. Schwender’s associate, Dr. Scott Marston, state that the employee “should be off work for another two weeks and then may return at his discretion,” noting that “[i]f he is not using any narcotic medications, he may operate a motor vehicle.” The report also indicated that the employee had been advised to try Vioxx, a nonnarcotic medication, because it might be easier on his stomach in view of his bypass surgery. The employee was also referred for physical therapy. QRC Cindy Bushard, the employee’s then newly-provided QRC, attended the appointment with him.

The employee testified that he tried Vioxx, at some point, for a week or so, but that he went back to Vicodin because the Vioxx did not relieve his symptoms. Just when he tried Vioxx, and when he resumed use of Vicodin, is not entirely clear from the record.

In October of 1999, the employee accompanied his wife to see his gastric bypass surgeon, as she was considering the surgery for herself. At that appointment, the employee mentioned the “bump” by his bypass incision scar, and the surgeon determined that the employee had a hernia. The employee then followed up with Dr. Jorge Rodriguez, who diagnosed a large ventral hernia and scheduled the employee for surgery, which was performed on November 4, 1999. Dr. Rodriguez eventually testified that the work incident in which the employee’s seat back broke was a substantial contributing cause of the hernia. Dr. Ronald Vessey, the employer and

insurer's examiner, disagreed, reporting that the hernia was a "not unexpected outcome" of the employee's gastric bypass procedure, unrelated to the May 1999 incident.

On October 26, 1999, prior to the employee's hernia operation, the employer wrote to the employee as follows:

This letter is to inform you of a light duty position that is available to you at our St. Cloud, MN location. The duties will consist of answering phones and basic office functions which fall within the restrictions imposed on 10/6/99 by Dr. Schwender. A copy of these restrictions is attached.

Please respond to me within 7 days with your intension [sic] to accept or reject the light duty position.

Shortly after receiving the offer, the employee contacted QRC Bushard, explaining that he did not feel able to drive the 64 miles to the employer's facility in St. Cloud, from his home in Isanti, while taking the narcotic pain reliever Vicodin. QRC Bushard indicated that she would inform the employer. No alternative transportation arrangements were investigated, and, within a few days, QRC Bushard transferred to a different job with the insurer, in Michigan. While contesting the employee's right to further rehabilitation services, the employer and insurer assigned him another rehabilitation provider, a QRC intern. The employee, who had requested a different QRC, declined to work with the intern, and, because the employer would not agree to the employee's chosen QRC, little more was done in terms of providing the employee with rehabilitation assistance.

The employee was unable to work following his hernia surgery until late December or early January of 2000, and Dr. Schwender kept him off work, due to his back symptoms, until January 11, 2000. In the meantime, in December of 1999, the employer terminated the employee from his job, backdating the termination to October 15, 1999, the date on which the employee's leave under the Family and Medical Leave Act [FMLA] expired.² The employee testified that he was not notified of his termination until January.

Beginning in January of 2000, the employee sought other employment using the internet, his local job center, and newspaper advertisements. He testified that he looked for openings and submitted resumes and job applications Mondays through Thursdays and used Fridays to follow up on his applications. On May 4, 2000, the employee was offered a training position, as a small business customer service representative, by U. S. West, now known as Qwest. The employee accepted the position and began the training program in July 2000, earning \$15.50 an hour for a 40-hour week. The employee had no assurance of continued employment upon completion of the training, which was expected to last up to seventeen weeks. The training site was located in St. Paul, 45 miles from the employee's home.

² The employee was notified on September 20, 1999, that he was eligible for FMLA leave through December 13, 1999. However, the employer later recalculated, apparently taking into account leave taken by the employee for his gastric bypass surgery earlier that year.

The matter initially came on for hearing before a compensation judge on May 16, 2000, as the result of numerous pleadings, including several medical requests, a rehabilitation request, a claim petition, an objection to discontinuance, and a notice of intention to discontinue benefits. Numerous issues were disputed, and three days were ultimately required for hearing. The extensive record includes the testimony of the employee, his wife, QRC Bushard, and vocational experts John Hjelmeland and Obie Kipper; the deposition testimony of Drs. Jorge Rodriguez and Ronald Vessey; the employee's job search records; the employee's rehabilitation records; the employee's medical records; the report of Dr. Paul Wicklund, one of the employer and insurer's independent examiners; correspondence between counsel; and the employee's personnel file from the employer. On the third day of hearing, September 11, 2000, the employer and insurer sought to introduce the deposition of Dr. Wicklund. The compensation judge declined to allow the deposition into evidence as it had been taken without court order.

In a decision issued on November 13, 2000, the compensation judge ruled in the employee's favor on virtually all contested issues, finding, in relevant part, that the employee had sustained a permanent low back injury as a result of the May 29, 1999, incident in which his truck seat back had broken; that the employee's hernia was also causally related to that incident; that the employee had reasonably refused the employer's October 1999 job offer; that the employee had conducted a reasonably diligent job search from January 2000 through July 10, 2000, when he commenced his training program with Qwest, entitling him to temporary total disability benefits during that period; that the employee was entitled to temporary partial disability benefits based on his actual earnings while in the Qwest training program; that the employee had been entitled to his choice of QRC in December of 1999; and that the employee was entitled to ongoing rehabilitation assistance. The employer and insurer appeal.

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

Nature of the Employee's Low Back Injury

With regard to the nature and extent of the employee's May 29, 1999, low back injury, the compensation judge found as follows:

25. At hearing, the employee credibly testified that he has permanent physical restrictions as a result of the May 29, 1999 personal injury to the low back. Additionally, the employee credibly testified that he has been told to avoid bouncing in a truck all day and to pursue another career. As a result of the May 29, 1999 personal injury the employee has altered his activities of daily living and his hobbies. The employee continues to suffer low back symptomology. The employee has stopped motorcycle riding, mall walking, and notices a lack of endurance.

26. The employee has established by a preponderance of the evidence that he sustained a personal injury on May 29, 1999, permanent in nature, arising out of and in the course of his employment with the employer. The May 29, 1999 personal injury has resulted in continued low back symptomology, permanent physical restrictions and a recommendation not to return to work at his preinjury occupation.

On appeal, the employer and insurer contend that the employee had fully recovered from his work injury by September 1, 1999, as reported by Dr. Wicklund, who indicated that the employee's work injury was merely a temporary strain, superimposed on nonwork-related degenerative disc disease caused by longstanding obesity. The employer and insurer further argue that their contention to this effect is supported by the employee's own testimony, in that the employee indicated that he was able to perform all of his usual work duties, without restriction, through the summer of 1999. We agree that this evidence, if accepted by the compensation judge, would have supported the conclusion that the employee's work-related low back injury was merely temporary. However, after review of the entire record, we cannot conclude that the judge's decision to the contrary is unsupported by evidence that a reasonable mind could accept as adequate.

We note initially that we could find no expert opinion, in the record, specifically indicating that the employee's May 29, 1999, low back injury is permanent, and the employee cites none in his brief.³ However, treatment notes suggest that the employee's treating physicians were proceeding on the premise that the employee's continuing low back complaints were work-

³ At hearing, the employee attempted to introduce a narrative report by Dr. Schwender, addressing the issue of causation. However, the compensation judge rejected the report as untimely.

related.⁴ Moreover, despite his longstanding weight problem, there is no evidence whatsoever that the employee ever had any back symptoms or treatment of any kind prior to the 1999 work incident, and he testified that his symptoms never completely abated thereafter. Finally, the compensation judge found that the employee had reached maximum medical improvement effective May 4, 2000, a finding undisputed on appeal, and it is evident from the employee's medical records that the employee has ongoing restrictions related to his back condition. In other words, the condition is permanent.

“Whether the employment [aggravated a preexisting condition] is a question of fact, not law, and a finding on this point . . . based on any medical testimony or, in the commoner afflictions . . . based on the [trier of fact's] expert knowledge even without medical testimony, will not be disturbed on appeal.” Bender v. Dongo Tool Co., 509 N.W.2d 366, 367, 49 W.C.D. 511, 513 (Minn. 1993). Because the record in this case minimally but adequately supports the judge's finding that the May 29, 1999, incident resulted in a permanent injury to the employee's low back, we affirm his decision on this issue.

Hernia

The compensation judge concluded that the employee's ventral hernia was substantially caused by the May 1999 incident at work. In so finding, the compensation judge expressly accepted the causation opinion of Dr. Rodriguez, noting also, in his memorandum, that the employee's testimony was accepted “in its entirety as credible.”

On appeal, the employer and insurer argue that the judge erred in accepting the opinion of Dr. Rodriguez, because the doctor's conclusion was based “primarily” on the employee's report that the employee had noticed the “bump” soon after the work incident. In making this argument, the employer and insurer rely on a Minnesota Supreme Court case in which the court stated that “[t]he self-reporting of a plaintiff's medical history in preparation for litigation, without additional independent confirmation, is inherently unreliable.” Goeb v. Tharaldson, 615 N.W.2d 800, 816 (Minn. 2000). We reject the employer and insurer's arguments on this issue.

Because Goeb is a civil case, not a workers' compensation case, its applicability is debatable to begin with, and the issues in Goeb were in any event entirely different than those now before us on appeal. Just as importantly, Dr. Rodriguez did not base his opinion solely on the

⁴ If not related to the specific May 29, 1999, injury, then to the employee's truck driving job in general. As indicated in an October 6, 1999, report, the employee was told by Drs. Schwender and Marston “that being a truck driver puts him at an occupational hazard for this type of degenerative changes.” Also, in a December 10, 1999, office note, Dr. Schwender indicated that it would be reasonable to keep the employee off work another month “as he continues to recover from his injury” (emphasis added). The employee was ultimately advised to avoid “total body vibrations,” i.e., truck driving. The employer's vocational expert indicated that a prohibition on “total body vibrations” would not preclude truck driving, but the compensation judge reasonably rejected his testimony on that point.

employee's report as to when he noticed the "bump." Rather, the doctor testified that it was apparent to him, from his examination and observation during surgery, that the hernia was caused by trauma rather than the employee's gastric bypass, contrary to Dr. Vessey's testimony on the issue.

The employer and insurer make much of the fact that the employee never reported the "bump" to any physician until the fall of 1999, and that physicians who examined him for his back condition had never noted the presence of the hernia. However, the employee testified that the hernia was not painful, and Dr. Rodriguez testified in detail as to why the hernia was work-related and how other physicians might have missed it. It is also apparent from the record that Dr. Rodriguez has substantial experience dealing with this kind of hernia. Therefore, while there is also evidence to the contrary, the judge's finding of primary liability for the employee's hernia is well supported by the record, including adequately-founded expert opinion, and we affirm that decision. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Reasonable Refusal - The Employer's October 1999 Job Offer

It is essentially undisputed that the employee was physically capable of performing the job duties listed in the employer's October 26, 1999, job offer. He testified, however, that he was unable to drive the 64 miles from his home to the employer's office because he was taking Vicodin, a narcotic pain reliever. The compensation judge concluded that the employee had "reasonably refused the light duty job offer of October 26, 1999" as it was "beyond [the employee's] physical ability to drive safely while taking narcotic medication." The employer and insurer contend that the judge erred in characterizing the employee's refusal as reasonable, arguing that there is no substantial evidence that the employee was taking Vicodin at the time of the offer, that the employee was in any event prohibited from driving on Vicodin only until he was familiar with its effects, as indicated in the drug information sheet, and that, because the employee admitted to other driving while taking Vicodin, he was fully able to drive to work. We are not persuaded.

As indicated earlier, the record is somewhat ambiguous as to when the employee stopped taking Vicodin in order to try the nonnarcotic Vioxx. He testified, however, that he was taking Vicodin at the time of the employer's job offer. Dr. Marston's treatment report of October 6, 1999, indicates that the employee could operate a motor vehicle if he was not taking narcotics, and a November 10, 1999, rehabilitation record states that the employee had noticed some cognitive difficulties, including decreased attention span, from using Vicodin. The fact that the employee may have done some driving around his home and perhaps occasionally to the Twin Cities for treatment does not mean that he could reasonably have been expected to travel 64 miles, twice a day, five days a week, to work. We also note that even Dr. Vessey, the employer and insurer's examiner, indicated at several points in his deposition testimony that he would not advise driving for a patient taking Vicodin. Finally, despite the testimony of the employer and insurer's vocational expert, the compensation judge could reasonably have concluded that it was not the employee's responsibility to look into alternate transportation or to see if his doctor could find a substitute pain reliever that would allow him to drive. The employee did, after all, have rehabilitation assistance at the time, and QRC Bushard did not pursue any of these alternatives. Finally, the judge may have been influenced by an employer e-mail indicating a desire to terminate

the employee shortly before the job offer was made,⁵ by the fact that the offer contained no information about either hours or pay, and by the fact that the offer was made only a week or so before the employee was scheduled to undergo hernia surgery. In any event, because the record easily supports the judge's decision that the employee reasonably refused the employer and insurer's job offer, we affirm it.

Temporary Total Disability - Job Search

The employer and insurer paid the employee temporary total disability benefits through about December 7, 1999, and the compensation judge awarded additional total disability benefits to July 10, 2000, the date the employee began the paid Qwest training program. The employer and insurer appeal, contending that substantial evidence does not support the judge's decision that the employee conducted a reasonably diligent job search so as to entitle him to benefits. This argument has no merit.

We note initially that the employee was not released to work until January 11, 2000, in part because of his hernia surgery, in part because of his low back symptoms. Thereafter, the employee looked for work by using the internet, the resources of a local work center, and the newspaper. There may well have been aspects of the employee's employment search that were not ideal, but he was hampered in part by a lack of funds and by the fact that his computer was old

⁵ An internal employer e-mail dated October 25, 1999, the day prior to the job offer, reads as follows:

Paul Blom has not contacted us for a couple weeks, not since he talked to Darla about a hernia that was related to his stomach stapling surgery from earlier this year. We hate to loose [sic] drivers but everyone at our terminal agrees that to loose [sic] Paul would probably be a blessing in the long run. He creates lots of work comp related problems for us...new seats with different air ride spec's... different trucks with better ride...partners that are about the same "size" because he requires it cold in the truck because of his body weight...he says he is strictly allergic to smoke and wants nobody using his truck on weekends for fear they will smoke in it and cause him an asthma attach, he tends to try and preach religion to his partners...he is somebody that may just cost us a lot of money some day. He is smart and knows his rights and unfortunately he uses this knowledge to make it hard to work with him.

At hearing, based on this and other internal employer communications, the employee contended that the October 26, 1999, job offer was not made in good faith. The compensation judge quoted these communications in his findings but made no specific determination as to the good faith of the offer.

and slow.⁶ The employer and insurer's vocational expert testified that the employee's job search was not reasonable or diligent in part because the employee did not spend enough time on it, because he pursued the wrong kinds of jobs, and because he failed to follow up on his applications in a timely manner. However, the employee's vocational expert disagreed, testifying that the employee's employment search was in fact reasonable. Considering the record as a whole, we find no grounds to reverse this particularly factual determination by the judge, at least for the period through May 4, 2000, when the employee was offered the Qwest training position.⁷

For the period after May 4, 2000, through mid July, when the training program began, the evidence may be less compelling, in that the employee apparently looked only for temporary and/or part-time work.⁸ However, the compensation judge could reasonably conclude that the employee's job search after May 4, 2000, was sufficient in view of the employee's anticipated commencement of paid training in July. Therefore, we affirm the judge's award of temporary total disability benefits in its entirety.

Earning Capacity/Temporary Partial Disability Benefits

In his pre-injury over-the-road truck driving job for the employer, the employee was paid by the mile and typically worked 60 to 70 hours a week, earning a weekly wage of \$891.04. During his training program with Qwest, the employee earned \$15.50 an hour for a 40-hour week, or \$620.00 a week. The compensation judge determined that the employee was entitled to temporary partial disability benefits based on his pay from Qwest, concluding that the employer and insurer had not rebutted the presumption of earning capacity raised by the employee's actual earnings. See, e.g., Roberts v. Motor Cargo, 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960).

The employer and insurer argue that the employee's wages from Qwest were not representative of his earning capacity because the employee intentionally limited himself to a 40-hour work week when he was physically capable of working 60 to 70 hours, as he had before the

⁶ The employee was not receiving either wage loss benefits or mileage payments for his job search. While he printed out quite a bit of job search information, he testified that he began making notes by hand, on scratch paper, when he learned how expensive cartridges were for his computer printer.

⁷ The employer and insurer also argue that, because the employee unreasonably refused to work with the QRC intern they provided, he should be held to job search standards applicable to workers with rehabilitation assistance. We think, however, that the judge's decision is affirmable either way. There was no rehabilitation plan in effect to specify job search requirements.

⁸ The employee testified that he looked for temporary and/or part-time work after receiving the offer from Qwest; the employer's vocational expert testified that the employee indicated to him that he stopped looking for work after the offer. A June 20, 2000, letter from the employee's local work force center indicates that he had agreed to remain available for any temporary jobs referred to him prior to his commencement of training.

injury. As such, the employer and insurer argue, the employee's earning capacity should be calculated by multiplying his hourly wage at Qwest, \$15.50, by 60 or 70 hours, which would result in imputed weekly earnings of \$930.00 - \$1,085.00, exceeding his pre-injury wage. The employer and insurer also contend, based on the testimony of their vocational expert, that the Qwest traineeship was not vocationally appropriate in view of testing conducted by that expert, the employee's transferrable skills from the transportation industry, and the fact that the employee was not guaranteed continued employment after completion of training. We are not persuaded by any of these arguments.

The employer and insurer's expert, Keith Hjelmeland, did testify that the Qwest customer service training position was not a vocationally appropriate choice for the employee because he lacked the aptitude for that kind of work and because he was not guaranteed employment, even assuming he could complete the training. In fact, Mr. Hjelmeland believed that the employee should have rejected the Qwest offer of \$15.50 an hour, full time, in favor of continued, unpaid job search. However, on the last day of hearing, Obie Kipper, the employee's vocational expert, testified that the employee had in fact passed the training and had secured a union job with Qwest that provided full benefits, which substantially undercuts the importance of Mr. Hjelmeland's concerns about the employee's ability to succeed in securing a position upon completion of his training. Moreover, even without the evidence indicating that the employee had gone on to obtain a job with Qwest, the compensation judge was free to conclude that it was reasonable for the employee to participate in the paid training program, as he had not been offered any other work, despite five months of job search. An employee who is not working or receiving workers' compensation benefits cannot reasonably be expected to turn down work in favor of a continued full-time job search.

We also reject the employer and insurer's contention that the employee's earning capacity should be calculated by multiplying the \$15.50 hourly Qwest wage by the 60 to 70 hours the employee had worked per week prior to the injury. We acknowledge that the employee has no physical prohibition against working that number of hours. However, there is no evidence in the record of any specific jobs, or combination of jobs, that the employee could reasonably obtain, to bring him up to a 60 to 70 hour work week at a salary exceeding his pay from Qwest. The labor market survey conducted by an associate of Mr. Hjelmeland identified no jobs that would necessarily pay the employee more than he earned from the Qwest training program; only one of the listings indicated the availability of overtime, and the specific amount of overtime was not noted. Furthermore, the hourly wage of that job was substantially less than the employee earned in the Qwest traineeship. Some of the surveyed jobs had a top-end salary higher than the employee's \$15.50 an hour from Qwest, but there is no evidence that the employee could reasonably expect pay in the high end of the salary range, and the employee testified that he would receive a raise from Qwest upon completion of training.

There is also no evidence in the record to indicate the availability of any specific part-time positions that the employee could obtain to supplement his earnings from Qwest. It should be noted here that the employee's work for Qwest entails a 90-mile round-trip commute from the employee's home in Isanti to St. Paul, substantially extending the employee's work day. In contrast, the employee's pre-injury job as an over-the-road trucker almost certainly entailed

little or no commuting time; rather, the employee was paid for the miles he drove. This is another factor that may bear on whether the employee can reasonably be expected to look for another position to supplement his hours.

The record in this matter clearly supports the conclusion that the employee has a work-related disability, that he is able to work subject to that disability, and that he has a loss of earning capacity causally related to that disability. See Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). His treating physicians have restricted him from returning to work as a truck driver, vocational expert Kipper testified that the Qwest traineeship was representative of the employee's earning capacity, and there is no evidence in the record of any specific jobs that would have paid the employee more, to start, than he earned from Qwest. As such, the compensation judge's award of temporary partial disability benefits through the last day of hearing, based on the employee's earnings from Qwest, is affirmed.

Rehabilitation Assistance

"Rehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability." Minn. Stat. § 176.102, subd. 1(b). Pursuant to Minn. R. 5220.0100, subp. 22, an employee is qualified for rehabilitation assistance if, because of the effects of the work-related injury, the employee

- A. is permanently precluded or is likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the employee held at the time of injury;
- B. cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer; and
- C. can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services, considering the treating physician's opinion of the employee's work ability.

In the present case, the compensation judge found as follows:

- 46. The employee has established by a preponderance of the evidence entitlement to ongoing rehabilitation services pursuant to Minn. Stat. § 176.102. The employee is presently in a training program and requires rehabilitation assistance in securing a permanent job within his physical restrictions upon completion of the training program or termination of the training program.

The employer and insurer argue that the compensation judge erred in finding the employee eligible for continuing rehabilitation assistance and, under the circumstances, we agree.

Testimony by Mr. Kipper and an e-mail from the employee to Mr. Kipper establishes that, by September 11, 2000, the third day of hearing, the employee had in fact completed the training program and had obtained a full-time union customer service job with Qwest, including benefits.⁹ As such, the premise for the compensation judge's rehabilitation award is faulty. Moreover, Mr. Kipper, the employee's own employment expert, testified that the employee had no need for any further rehabilitation services because his current employment with Qwest is "fine." In other words, there is no evidence that the employee requires rehabilitation services to assist him in returning to suitable employment; the record indicates that his current job is in fact appropriate for him. Therefore, while the employee might well have been eligible for rehabilitation prior to the last day of hearing, the current record does not support the judge's award of ongoing services, and we reverse. Of course, nothing in this decision precludes the employee from claiming additional assistance should the need arise, and the employer and insurer are free to provide rehabilitation services voluntarily should they continue to maintain that the employee's job at Qwest is not reasonably representative of his earning capacity.

Dr. Wicklund's Deposition

In their brief, the employer and insurer contend that the compensation judge erred in excluding Dr. Wicklund's deposition from evidence. However, the employer and insurer failed to raise this issue in their notice of appeal. As such, we have no authority to consider the judge's ruling.¹⁰ Minn. Stat. § 176.421, subd. 6 ("On an appeal taken under this section, the workers' compensation court of appeal's review is limited to the issues raised by the parties in the notice of appeal . . .").

⁹ The employee in fact acknowledges this at one point in his brief, but, curiously, argues otherwise in the section dealing with entitlement to rehabilitation assistance.

¹⁰ The compensation judge did not address this evidentiary issue in his findings and order, but it was nevertheless the appellants' responsibility to raise the issue in their notice of appeal, and they failed to do so.