

JAMES A. HEINE, Employee/Appellant, vs. APPLE AUTOMATIC FOOD SERV. and STATE FARM INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 9, 2001

No. [REDACTED SSN]

HEADNOTES

WEEKLY WAGE. Substantial evidence supports the compensation judge's finding that the employee had not established that his weekly wage included additional cash payments.

TEMPORARY PARTIAL DISABILITY BENEFITS. Substantial evidence supports the compensation judge's finding that the employee had not shown that his loss of earnings after September 1994 was not causally related to his work injury.

Affirmed.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's determination of the employee's weekly wage at the time of his two work-related injuries, and also appeals from the compensation judge's determination that the employee did not prove his entitlement to temporary partial disability benefits between September 18, 1994 and the last day of hearing, December 4, 2000. We affirm.

BACKGROUND

On September 26, 1993 and February 8, 1994, James A. Heine, the employee, was employed by Apple Automatic Food Service, the employer, which was insured for workers' compensation liability in the state of Minnesota by State Farm Insurance Company, the insurer. On those dates, the employee sustained admitted injuries to his neck. The parties also stipulated that he sustained injuries to other body parts on both injury dates. (Finding No. 2.) The employee was born November 3, 1961, and therefore was 32 and 33, respectively, at the time of his injuries.

Prior to working for the employer, the employee worked as a cashier and stock person during high school and later worked as a salesperson for Warner's True Valu. Between 1984 and 1989 or 1990, the employee worked as an overnight cashier and store manager for

SuperAmerica. The employee commenced working for the employer in the early 1990s, working as a route salesperson.

On September 26, 1993, the employee was driving his delivery vehicle when his vehicle was hit from behind at a stoplight. Following this injury, he noted symptoms in his right shoulder, right hip, neck and low back. He underwent medical treatment, and returned to work at a part-time, modified job. By the time of the employee's second injury on February 8, 1994, the employee was working full-time, but continued to work at a modified job, performing duties such as office work, data entry, telephone work and cleaning machines. (T. 42.) At the time of his second injury, he was receiving ongoing medical treatment related to his September 26, 1993 injury and was restricted to lifting no more than ten pounds.

On February 8, 1994, the employee was again injured in a motor vehicle accident while driving a delivery vehicle, after which he noted symptoms in his neck, low back, both hips, right leg, left shoulder; he also noted headaches after this injury. It is unclear from the record as to whether or for how long the employee was entirely restricted from work following this injury.<sup>1</sup> He underwent medical treatment, and returned to work part-time with modified duties, eventually returning to full-time work with the employer. He initially returned to work answering telephones, and then was assigned to a position ordering products for delivery trucks. He later was assigned duties in the coin room, which involved counting vending machine money, keeping track of machine collections, making bank deposits, ordering food items, bookkeeping, and placing light food items into baskets. The employee never returned to his full-time route salesman position after his initial injury in 1993. Since his 1993 work injury, no doctor has released the employee to return to the full range of the duties he performed at the time of his two injuries.

In March 1994, the employer's business was purchased by a new owner. In July or August of 1994, the employee inquired of the employer's new owner as to whether he could invest in and become a partner in the business. The new owner declined the employee's request; the employee resigned in August 1994, reportedly parting on good terms with the owner. In September 1994, the employee started his own vending business with two partners, a husband and wife who were close friends of the employee and with whom he resided. The employee and his partners began their own business, entitled Preferred Service and Sales, Inc. (Preferred). The employee owns 33 percent of the shares of Preferred; one other partner owns 51 percent and the other owns 16 percent. The business of Preferred was servicing and maintaining vending machines, a similar business to that of the employer. In 1994, the business was started with one client. The employee initially worked approximately five hours per week performing duties for Preferred. By 1995, he spent an estimated ten hours per week on Preferred duties. (T. 58.) Between September 1994 and July 1998, the employee also worked for other employers in a part-time basis, in addition to working for Preferred. The employee worked for Little Six, Inc./Mystic Lake as a blackjack dealer, Twin Cities Mack Truck as a delivery driver, and La Societe, selling pull tabs. However, since July 31, 1998, the employee has worked for no other employers, and all of his work efforts have been devoted to Preferred. (Finding No. 17.) According to the employee's

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<sup>1</sup> Findings Nos. 9 and 12 refer to the employee's time off work following his February 8, 1994, injury.

claim itemization, the employee's weekly wages from his various jobs since September 18, 1994, ranged between approximately \$12.00 and \$200.00. (Ee. Ex. B.)

On February 7, 2000, the employee filed a claim petition, claiming entitlement to temporary partial disability benefits from February 28, 1994 to the present and continuing. The employee claimed entitlement to accrued benefits of approximately \$48,000.00, and also claimed entitlement to payment for permanency benefits based upon seven percent permanent partial disability to the body as a whole, relative to the employee's cervical spine. The employer denied liability for the benefits.

On April 21, 2000, at the request of the employer and insurer, Ms. Lynn Hjelmeland conducted a vocational evaluation of the employee. Based upon her evaluation and her review of the employee's medical records, educational background and college transcripts, employment history, and employment records, Ms. Hjelmeland concluded that the employee had not conducted a diligent job search after resigning from employment with the employer, and also concluded that the employee's earnings since 1994 do not reflect his actual earning capacity. She concluded that the employee's retained earning capacity could range between \$10 - \$14 per hour, based upon jobs the employee held before and after working for the employer, and that he could qualify for certain jobs at the \$15 - \$18 per hour level. (Er. Ex. 6.)

On July 5, 2000, Mr. Steven Wasch, qualified rehabilitation consultant (QRC), conducted an initial rehabilitation consultation of the employee. He concluded that the employee could reasonably be expected to benefit from rehabilitation services geared to return him to suitable gainful employment, and found the employee to be a qualified employee for rehabilitation services. The rehabilitation reports in the record document rehabilitation services provided to the employee through November 15, 2000, including medical monitoring, vocational and aptitude testing, and evaluation of retraining programs.

The matter was set for hearing on November 30 and December 4, 2000 to address the employee's claims for permanency benefits and temporary partial disability benefits. The employee's claim for ongoing rehabilitation services was not at issue at the hearing. In Findings and Order served and filed on February 1, 2001, the compensation judge awarded the employee's claim for seven percent permanent partial disability of the body as a whole, payable as impairment compensation. The compensation judge denied the employee's claim for temporary partial disability benefits between September 18, 1994 and December 4, 2000. The compensation judge also determined that the employee earned a weekly wage of \$255.50 on both dates of injury in 1993 and 1994. The employee appeals.

## 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

### Calculation of Weekly Wage

The compensation judge found that the employee earned a weekly wage of \$255.50 at the time of both injuries on September 26, 1993, and February 8, 1994. The parties stipulated that the employee earned the same wage on both dates, but disagreed on the specific amount earned. At issue, then, is whether the compensation judge’s conclusion concerning the employee’s weekly wage is supported by evidence of record and is not clearly erroneous.

The employee does not dispute that he was paid \$255.50 per week by check at the time of his 1993 and 1994 injuries. However, he claims that his actual weekly wage was \$400.00, taking into account the cash payments the employer paid him at the time of both injuries in 1993 and 1994. The employee claims that at the time of his injuries, he received compensation paid by check, in the amount of \$255.50, in addition to a cash payment of \$100.00 per week received directly from the employer, and other cash payments for commissions. In addition, if he worked on service calls during the weekend, he was paid an additional \$100.00 per weekend. If he worked on more than a certain number of service calls he was paid an additional sum. He did not keep a record of the cash he was paid, nor did he initially report these cash payments as income.<sup>2</sup> (T. 32-34.) According to the employee, the employer did not withhold taxes from any of these cash payments.

To document his pre-injury earnings, the employee submitted copies of wage stubs from the employer, Apple Automatic Food Services. He also submitted his amended federal tax returns completed for 1993 and 1994. The employee argues that his 1993 amended tax return documents a weekly wage of \$400.00;<sup>3</sup> this is the sole documentation in the record of the

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<sup>2</sup> The employee submitted into evidence copies of amended returns to be filed with the Internal Revenue Service, for calendar years 1993 and 1994. Those amended returns included additional cash income.

<sup>3</sup> On his amended 1993 tax return, the employee reported an additional \$5,200.00 income, which he claims to have earned during the 34.6 weeks immediately preceding his September 23, 1993 work injury. Following that injury, the employee received no commission payments, as he was not performing route sales. Therefore, the employee claims that this additional income was

employee's wages earned in 1993. There is no breakdown of wages the employee earned prior to his work injury of September 26, 1993. The employee's 1994 wages are documented by his W-2 statement of wages earned in calendar year 1994, his amended tax return and two wage stubs for pay periods ending January 28, 1994 and February 11, 1994. The wage stubs show gross pay of \$255.50 and \$260.00, respectively, but do not state whether the pay periods consisted of one week or two weeks. (Ee. Ex. 2.) The record includes no documentation of cash payments issued by the employer.

When the employer changed ownership in March 1994, the new owner revised the method of wage payment for employees. The new owner began issuing weekly paychecks, with no cash payments. The employee testified that he requested a wage increase from the new owner, in order to maintain the same earning level he previously obtained through a combination of his paychecks and cash. (T. 36-38.) At some point, the employer granted the employee's request for an increase.<sup>4</sup>

The compensation judge found that the employee's testimony concerning his cash payments was not substantiated by any contemporaneous documentation. She acknowledged that on July 23, 2000, the employee completed amended federal individual income tax returns for calendar years 1993 and 1994 (Exhibit N), but noted that although those two returns reported additional income at the rate of \$100.00 per week, the returns did not document the source of that additional income. The compensation judge stated that

no other documentation or itemization shows that the past-under reported income set out on these two amendments was income that came from the employer as opposed to any other source of income the employee may have had, whether from interest, dividends, sale of personal property or any other source. Exhibit N does not contain copies of canceled checks showing that the employee paid the taxes shown as owing on lines 21 of the forms. There are no documents from the Internal Revenue Service in evidence acknowledging the additional tax payments or charging interest for the years between the due dates for the original tax returns and July 23, 2000. The employee's testimony and Exhibit N are not sufficient to substantiate his claim for income of \$100.00 per week paid as cash by the employer in 1993 and 1994. Even if the employee's testimony and Exhibit N were sufficient to support a finding of an

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earned prior to his 1993 injury, and calculates to \$150.00 more per week ( $\$5,200.00 \div 34.6$  weeks). (Ee. Ex. N.)

<sup>4</sup> The employee testified that he believed his wage rate was changed to \$12.50 per hour, plus overtime pay after working either 40 or 48 hours. The employer's owner, Mark Young, testified that he provided the employee with a pay raise by May or June 1994, due to the employee's increased responsibilities and his efficient manner of handling those responsibilities. (T. 193.)

additional \$100.00 per week income, the employee's average weekly wage would be \$355.50 per week and not \$400.00 per week as claimed. The employee's average weekly wage on each of his dates of injury was \$255.50.

(Finding No. 7.)

In her memorandum, the compensation judge also noted that by the time "the employee signed the amended tax returns on July 23, 2000, the six-year statute of limitations on collecting income had run for both the state and federal 1993 tax returns. These amended returns were filled out less than one month before the employee's then-scheduled August 22, 2000 hearing." (Memo., p. 8.) The compensation judge again referred to the lack of related documentation provided by the employee; for example, the employee did not submit copies of checks he sent with his amended returns nor a written response received from the Internal Revenue Service concerning interest and penalties owed.

The employee argues that the compensation judge committed reversible error by considering facts which were not in evidence--a statute of limitations relative to the employee's amended tax returns. The employee argues that even though the compensation judge received the amended tax returns into evidence as Exhibit N, she "apparently took judicial notice of a purported six year statute of limitations for paying tax on unreported wages in concluding that the employee waited to file amendments until after the statute of limitations ran." (Ee. Brief, p. 14.) The employee argues that the compensation judge erred both by taking judicial notice of these facts, and by failing to notify the parties of her judicial notice of those facts, when reaching her conclusion that the income reported on those tax returns count not be included in the employee's weekly wage calculations. We are not persuaded by that argument.

The compensation judge explained the basis for her conclusion that the employee earned a weekly wage on both dates of injury of \$255.50. (Finding No. 7.) The compensation judge points to the lack of documentation of the additional cash income claimed by the employee. While it is true that Finding No. 7 refers to the employee's lack of proof that he paid under-reported tax or interest, that is only one factor listed in the compensation judge's finding. The compensation judge found that the record does not provide any contemporaneous documentation of the source of the additional cash income now claimed by the employee. The compensation judge determined that an "employee's testimony alone is not sufficient and requires corroborating evidence in the form of either documentation or testimony of someone in a position to know about the claimed cash payments, for example, the individual who actually handed the cash to the employee." (Memo. p. 8.) In addition, as to any assessment the compensation judge was making by this conclusion, it is the trier of fact's responsibility to assess the credibility of a witness. Tolzmann v. McCombs-Knutson Associates, 447 N.W.2d 196, 198, 42 W.C.D. 421, 424 (Minn. 1989) citing Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225 (Minn. 1989)). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). Based on the evidence of record, including wage stubs, the compensation judge could reasonably

conclude that the employee earned a weekly wage of \$255.50 at the time of his 1993 and 1994 injuries. Her conclusion is supported by substantial evidence of record and is not clearly erroneous. Therefore, we affirm.

#### Employee's Claim for Temporary Partial Disability Benefits

The compensation judge denied the employee's claim for ongoing temporary partial disability benefits since 1994. 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. § 176.101(2)(b). An employee must show (1) a work-related injury resulting in disability, (2) an ability to work subject to that disability, and (3) an actual loss of earning capacity that is causally related to the work-related disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Krotzer v. Browning-Ferris, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). In order to be eligible for temporary partial benefits, the employee must establish a reduction in earning capacity that 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). "[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). If an employee is released to work on a full time basis but works only part time, temporary benefits may still be available if the part time position is all that the employee is able to obtain because of his disability. See DeNardo v. Divine Redeemer Memorial Hosp., 450 N.W.2d 290, 293, 42 W.C.D. 626, 630-631 (Minn. 1990). Whether the inability to obtain full time employment is the result of the personal injury is generally a question of fact for the compensation judge, and any relevant evidence may be considered, including the nature and extent of the employee's job search. Stauty v. Luigino's, Inc., slip op. (W.C.C.A. Dec. 19, 1994).

The issue resolved by the compensation judge was whether the employee had presented sufficient evidence to show a causal relationship between the effects of his personal injury and his loss of earnings since September 1994. The compensation judge concluded that the employee had not established his entitlement to temporary partial disability benefits since September 1994. It is evident from the compensation judge's findings and order and memorandum that in reaching that conclusion, she thoroughly reviewed the voluminous record in this matter, including medical records, the rehabilitation records prepared by the employee's qualified rehabilitation consultant (QRC), the report and labor market survey prepared by the employer and insurer's vocational expert, the employee's wage and employment records, and the testimony of the employee, the employee's QRC, the employer and insurer's vocational expert, the insurer claims specialist who handled the employee's claim, and the employer's current owner, Mark Young.

The compensation judge concluded that the employee had not proved his entitlement to temporary partial disability benefits for multiple reasons. She found that the

employee had not carried his burden of proving he was restricted to half-time employment for the time span of September 18, 1994, to August 2, 2000. (Finding No. 12.) She also found that the employee resigned from the employer in August 1994 for personal reasons unrelated to restrictions from his work injuries, that he withdrew from the labor market in order to become self-employed and that “[s]ince September 18, 1994, the employee has made no work search for full-time jobs which would have paid him \$255.50 per week or more.” (Findings Nos. 15 and 21.) The compensation judge also concluded that the employee was voluntarily underemployed between September 18, 1994 and the dates of hearing, and that his actual earnings between September 18, 1994, and the dates of hearing were not an accurate measure of his earning capacity, and therefore that he has not carried his burden or proving entitlement to temporary partial disability benefits for that period of time. (Finding No. 20.) As to the specific period of time between August 3, 2000, and the dates of hearing, the compensation judge concluded that although the employee’s physician restricted him to half-time work by August 3, 2000, the employee submitted no wage records or earnings records for the period between August 3 and December 4, 2000, and therefore presented no basis for benefits claimed during this period of time.

The employee argues that the compensation judge erred in finding that no doctor recommended that the employee discontinue his position with the employer in August of 1994. The employee argues that Dr. Engel, his treating physician following his 1994 injury, advised him to find alternative employment (T. 48) and that Dr. Engel’s records document the employee’s increased low back symptoms experienced while he attempted to do the “light duty” work provided by the employer between February 1994 and the employee’s resignation in August 1994.

The employee also argues that he did not resign from his position with the employer for the sole purpose of starting a business, but instead that he started a new job at Mystic Lake casino following his resignation. The employee also testified that one of his partners did all of the physical work related to Preferred in 1994 and 1995, while the employee performed the office and paperwork for the company during that period of time. The employee also argues that he worked at Mystic Lake for nearly one year, but had physical difficulties increasing his hours and quit this job on the advice of Dr. Engel. By July of 1998, the employee worked between 20 and 25 hours per week for Preferred, the maximum number of hours he asserts he could tolerate working.

However, our review of the medical records shows no reference in those records that any doctor suggested or directed the employee to resign his position with the employer in 1994. The record provides substantial evidence to support the compensation judge’s conclusions that the employee was not restricted to half-time employment between September 18, 1994 and August 2, 2000, and that he voluntarily resigned from his position in August 1994, for reasons unrelated to his physical restrictions from his injuries.

The employee argues that since the employee has physical work restrictions related to his work injuries, and since he is working at a wage loss, his post-injury earnings are presumed to be representative of his earning capacity. The employee testified that the Preferred Corporation

valued his time at \$10.00 per hour.<sup>5</sup> He argues that the compensation judge should accept this valuation of his hourly wage, as his ownership in Preferred is analogous to self-employment and, as such, the compensation judge has discretion to determine a “fair estimate” of the wages earned in self-employment. Hildebrandt v. B&C Service, 40 W.C.D. 1156 (W.C.C.A. 1988). The employee also argues that his actual wages from outside part-time employment, together with his \$10.00 per hour earning rate from Preferred, reflect his earning capacity. He also argues that this wage level matches the opinion of the employer’s vocational expert that if the employee is limited to part-time work, his earning capacity ranges from \$9.00 to \$10.00 per hour.

The compensation judge concluded that the employee was voluntarily underemployed and that the employee’s actual earnings between September 18, 1994, and the dates of hearing were not a measure of his earning capacity. She found that

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<sup>5</sup> Preferred did not actually pay the employee this hourly wage, however, as the business income was reinvested into the company. The employee testified as follows:

Q. How were you paid?

A. From?

Q. Preferred Service and Sales.

A. Well, initially I was not paid. And there was no – I mean, I was paying – I was putting more in than it was making. So, I mean, there’s – there’s no way I was paid. But we were assuming that I’d be paid \$10 an hour for the time that I worked. And we never really got to that.

Q. So had the cash been there, you would have paid yourself \$10 an hour; is that what you’re saying?

A. Yes.

Q. At some point, did you increase your hours of work activity for Preferred Service and Sales beyond ten hours per week?

A. Yeah. Steadily, each year, I - tried to grow the business to a point where I felt comfortable. And I believe in 1998 I achieved that to where I could do this and at – in 1999, I should be able to start drawing an income of the \$10 an hour that I put into the company. . . .

(T. 67-68.)

As supported by the opinions of vocational expert Hjelmeland, between September 18, 1994 and the dates of hearing, and on an ongoing basis, the employee had a work history and transferable skills that resulted in an earning capacity of at least his date of injury wage of \$255.50 per week with other employers in the community in jobs that are common and not rare, such as sales or store management. As supported by the opinion vocational expert Hjelmeland, the employee's actual earnings between September 18, 1994 and the dates of hearing were not a measure of his earning capacity. The employee was voluntarily underemployed between September 18, 1994 and the dates of hearing. The employee has not carried the burden of proving entitlement to temporary partial disability benefits between September 18, 1994 and the dates of hearing.

(Finding No. 20.)

The compensation judge relied upon Lynn Hjelmeland's opinion that the employee's earnings since 1994 did not accurately reflect his earning capacity. She contrasted the employee's current earnings with his wages paid for his managerial position at SuperAmerica in the 1980's, \$600.00 per week, and his post-injury work for Mystic Lake at \$14.00 per hour and Mack Trucks for \$10.00 per hour. Ms. Hjelmeland also cited sales positions at Home Depot which the employee could perform due to his background in the hardware business which pay \$15.00 to \$18.00 per hour and which provide potential for management opportunities.

Substantial evidence of record, including Ms. Hjelmeland's opinion, supports the compensation judge's finding that the employee's actual earnings between September 18, 1994, and the dates of hearing were not representative of his earning capacity, and that the employee did not present sufficient evidence to show a causal relationship between the effects of his 1993 and 1994 injuries and his loss of earnings. The compensation judge could reasonably find that the employee was not entitled to temporary partial disability benefits between September 18, 1994 and the dates of hearing. Accordingly, we affirm.<sup>6</sup>

Finally, the employee argues that the denial of temporary partial disability benefits after August 3, 2000, was clearly erroneous. It was on August 3, 2000, that Dr. Barbara Seizert, the employee's treating physician at that time, first restricted the employee to a work week less

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<sup>6</sup> Minn. Stat. § 176.101, subd. 2(b) states, in part, that "temporary partial compensation may not be paid for more than 225 weeks, or after 450 weeks after the date of injury, whichever occurs first." At hearing, the employee argued that he was entitled to payment for two separate and distinct periods of 225 weeks of temporary partial disability benefits. The compensation Judge found that the employee was not entitled to collect 225 weeks of temporary partial disability benefits for each of his two injuries. (Finding No. 10.) Since we have affirmed the denial of temporary partial disability benefits, this issue is moot, and we therefore do not address the issue.

than 40 hours.<sup>7</sup> The employee claims, and the hearing transcript states, that temporary partial disability benefits would be calculated on an annual, calendar year basis.<sup>8</sup> However, the employee argues that as calendar year 2000 was not completed at the time of hearing, the employee's 2000 tax returns as well as Preferred's tax returns were not available to submit into evidence as documentation of actual earnings. The employee argued that the compensation judge had a basis to award temporary partial disability benefits from August 3, 2000, based on Dr. Seizert's 20-hour per week work restriction. We disagree.

One of the issues in dispute at hearing were temporary partial disability benefits claimed between August 3, 2000, and the last hearing date, December 4, 2000. The compensation judge specifically stated in her memorandum that although the employee finally had a restriction to half-time work, "he put into evidence no wage records or earnings records for the time span August 1 through December 4, 2000. In the absence of records showing earnings for this time span, temporary partial disability benefits cannot be awarded." (Memo. p. 9.) "The burden is on the employee to prove by a fair preponderance of the evidence that [he] is entitled to workers' compensation benefits." Fisher v. Saga Corp., 463 N.W.2d 501, 501, 43 W.C.D. 559, 560 (Minn. 1990). The compensation judge denied temporary partial disability benefits for this period of time since there were no wage records in evidence documenting the employee's earnings for this period. Based upon this lack of documentation, the compensation judge did not err by concluding that no basis existed for temporary partial disability benefits during that period of time, and we affirm.

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<sup>7</sup> Between August 3 and November 9, 2000, Dr. Seizert restricted the employee to 20 hours of work per week. On November 9, 2000, she limited the employee to 30 hours of work per week.

<sup>8</sup> The agreement the employee refers to, concerning calculation of temporary partial disability benefits on an annual, calendar year basis, is as follows:

THE COURT: There's been an agreement that for Preferred Service – or, I mean, I will make a determination on a calendar-year basis, it begins in September of '94, so that will be a partial year, but calendar years after that, and whatever the annual earnings I find, I will divide by 52 to get the weekly earnings for purposes of determining whether any temporary partial is due, and calculating temporary partial, if any is due; is that understood?

MS.McCASHIN: Yes, Your Honor.

MR. TIERNEY: Yes, Your Honor.