DAVID M. LOKKEN, Employee/Appellant, v. ASSOCIATED MILK PRODUCERS and KEMPER NAT'L INS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 13, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employer and insurer's vocational expert testified to the existence of specific part-time jobs with specific employers in the vicinity of the employee's home and full-time work, and the employee was not restricted in the number of hours he could work, the compensation judge's decision was supported by substantial evidence when he found that any loss of earnings by the employee was caused by the employee's voluntary limitation of his hours to less than 47 hours per week, the amount he had worked when he was injured.

TEMPORARY PARTIAL DISABILITY - SCOPE OF DECISION; PRACTICE & PROCEDURE. Where the compensation judge determined that the employee's claims for temporary partial disability would be limited to a specific period, he exceeded his authority when denying TPD for that period to order the employee to give the employer and insurer a credit for overpayment of TPD during an earlier period. The compensation judge's credit is reversed without prejudice.

Affirmed in part and vacated and modified in part.

Determined by Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Catherine A. Dallner

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that the employee had failed to show a loss of earning capacity causally related to the disability resulting from his work-related injury on January 5, 1992, during the periods in controversy. We affirm the denial of temporary partial disability and modify the award of a credit for April 26 to May 18, 1999. We also affirm the credit to the employer and insurer for overpayments of temporary partial disability made between May 19 to July 11, 1999.

BACKGROUND

The employee, David M. Lokken, was born in 1966 and is 34 years old. He was enrolled in special education classes in high school at Dawson, Minnesota and graduated in 1985.

Following high school he worked as a maintenance person at the Hunt Hotel in Montevideo, Minnesota for about six months and then went to work for the employer, American Milk Producers as a general laborer in the cheese department. On January 5, 1992, the employee was lifting a banding machine when he twisted his back and sustained an admitted low back injury.

The parties agree that the employee's weekly wage on the date of injury was $419.31. This figure reflects the fact that the employee had regularly been working overtime hours for the employer prior to the injury in addition to his 40-hour work week at a base rate of $8.25 per hour. The overtime hours averaged slightly over seven hours per week.[1] (Findings 3, 7.)

The employee's treating physician, Dr. Robert E. Heeter, M.D., first released him to return to work on November 3, 1992 at eight hours per day, instead of the four 12-hour shifts which the employee had been working at the time of the injury, to be reassessed in six weeks.[2] The doctor restricted him to 30 pounds lifting and advised him to avoid forward bending and reaching and to avoid pushing and pulling heavy carts. (Exh. H: 11/3/92 chart note.)

On March 2, 1993, Dr. Heeter imposed permanent work restrictions including the 30-pound lifting limitation and the avoidance of forward bending, with the employee to "try to change position frequently, to sit, stand, and move about during his 8-hour work day." Dr. Heeter also indicated that the employee had reached MMI and had a 7 percent permanent partial disability rating. (T. 125-130; Exh. H: 3/2/93 chart note; Judgment Roll.) On April 30, 1993, the employer advised the employee by letter that no work was available meeting the employee's restrictions, and the employee was terminated by the employer. (Exh. E.)[3]

Subsequent to termination by the employer, the employee was provided with rehabilitation assistance in seeking work in the Dawson, Minnesota area, but the employee was unable to find work. In 1994 the employee decided to move closer to the Twin Cities area in order to improve his chances of finding employment. The employee found and began work at a job for the Young America Corporation in May 1994 and rehabilitation assistance was discontinued shortly thereafter. The employee worked in the scanning department where his task was to scan the bar codes on grocery store coupons. This was a full-time job paying $6.25 per hour. The employee was physically able to perform this job and worked for this employer until March 1996 when the scanning department was closed and he was terminated. Temporary partial disability

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[1] The wage records on which the weekly wage was calculated were not in evidence. However, $8.25 x 40 hours = $330.00. Subtracting this figure from $419.30 leaves $89.30 attributable to overtime work, paid at $12.375 per hour, or one and one-half times the base rate. Dividing $89.30 by $12.375 reveals that the employee had averaged just over 7.2 overtime hours per week.

[2] The employee was apparently paid temporary total disability from September 8, 1992 through November 20, 1992. (8/12/99 NOID.)

[3] The employee was paid temporary total disability from April 30, 1993 through June 27, 1993. (8/12/99 NOID.)

compensation was paid by the employer and insurer during this employment. (T. 132-134; Exh. F; Judgment Roll.)

After a two month job search, the employee found seasonal work as a groundskeeper at the Island View Golf Course during the months that the course was open. The job paid $7.25 per hour. The employee was laid off during the winter months and then rehired in the spring of 1997. The employee was laid off by this employer in July 1997. (T. 134-137; Exh. O.) While employed at Island View, the employee was paid temporary partial disability benefits. (8/12/99 NOID.)

In September 1995, the employee had filed a rehabilitation request seeking consideration of retraining. The employer and insurer disagreed with the request and the issue of rehabilitation was considered at an administrative conference on September 19, 1996 at the Department of Labor and Industry. As of the date of the conference the employee was seeking rehabilitation services to assist him in finding replacement employment due to an impending seasonal layoff from his job with the Island View Golf Course. The employee was awarded a rehabilitation consultation and subsequently the insurer approved initiation of vocational placement services from QRC Debra A. Bourgeois. Rehabilitation services started on January 13, 1998. (Judgment Roll; Exh. P.)

On February 3, 1998, the employee started working at a full-time garden tool assembly position he had found on his own with Arctic Fox in Watertown, Minnesota, at $7.00 per hour. The job involved putting a plastic knob onto a shaft and tightening it with an air gun. The employee continued in this job until June 1998 when this employer shut down. (T. 137-8; Exhs O, P.) While at Arctic Fox, the employee was paid temporary partial disability benefits. (8/12/99 NOID.)

With the help of his QRC, the employee then found a part-time job as a meat department stocker at Byerly's food store in Chanhassen, Minnesota. The job, which started in early July 1998, initially offered 20 to 24 hours work per week and paid $8.45 per hour. The employee's QRC hoped that this job would eventually become a full-time position after the employee had completed his probationary period and qualified for union membership. However, the insurer objected to the part-time nature of the job and told the QRC that the goal of rehabilitation should be to return the employee to full time work. (T. 52, 65-66.) As a result, the employee quit this employment after starting a full-time job as a metal grinder with Sherping Systems in Winsted, Minnesota on October 14, 1998. (T. 51-53, 140-142.)

The job at Sherping Systems involved using a grinder to smooth welds on stainless steel tanks. The job started at $9.50 per hour and when the employee moved to working nights a shift differential was also paid, bringing the pay rate to about $10.50 per hour. The employee also obtained overtime hours in this job. While at this employer, the employee made no claim for temporary partial disability benefits because his actual earning exceeded his pre-injury weekly wage. The employee testified that he had physical difficulty with the work. The job frequently required working in awkward positions, including working on his back inside tanks, or from a bent, stooped or twisted position holding a 25-30 pound grinder with arms extended. The employee testified that this aggravated his back symptoms which forced him to take frequent

breaks. The employee's QRC testified that the employee told her that he thought he may have been fired because he had a grand mal seizure while on the job. (T. 54.) The employee continued to work this job until March 8, 1999, when this employer terminated him on the basis that he was "too slow" and "unable to catch on to the job." (T. 53-54, 142-147; Exh. P.)

On March 31, 1999, the employer and insurer filed a retroactive notice of intention to discontinue temporary partial disability compensation as of November 2, 1998, because the employee had returned to work at full wages at Sherping Systems. On April 7, 1999, the employee filed a request for an administrative conference. The insurer refused QRC Bourgeois' request to provide rehabilitation assistance after the employee lost his job at Sherping, and on April 22, 1999 the insurer instructed the QRC to place rehabilitation on hold. (T. 55; Exh. P.)

An administrative conference was held on April 28, 1999 concerning the March 31, 1999 notice of discontinuance. The employee agreed that benefits were not due for the period of the employment with Sherping Systems and the settlement judge found that no temporary partial disability benefits were due after mid-March 1999 as the employee had been unemployed. On May 10, 1999, the employee filed an objection to discontinuance on the basis that the employee had begun working again in April at a wage loss and was entitled to temporary partial disability after the date of his return to work.

The employee had worked briefly for Arctic Fox through a temporary agency called the Work Connection from April 26, 1999 through May 9, 1999 at $8.00 per hour. On May 17, 1999 the employee started a job with Advantage Mailing as a stamper operator, running a machine which affixed postage to bulk mailing envelopes. This job paid at a rate of $7.00 per hour and the employee was physically able to perform the job. The employee submitted his pay stubs to the employer who paid temporary partial disability benefits through July 11.

On May 20, 1999 the employee filed a rehabilitation request seeking rehabilitation services. The employer and insurer responded on June 11, 1999, disagreeing with the request for rehabilitation. On July 30, 1999, a hearing was held before a compensation judge at the Office of Administrative Hearings concerning the objection to discontinuance filed on May 10 and the May 20 rehabilitation request. The compensation judge found that because the employer and insurer were entitled to discontinue temporary partial disability in November 1998 and the employee's claim for temporary partial disability was based on the resumption of work in April 1999, the proper pleading for the employee was a claim petition. She dismissed the objection to discontinuance and ordered the employee to file a claim petition and any discovery demands. She also ordered that the employee's rehabilitation request be consolidated with the claim petition. (Order served and filed 8/10/99.) On August 6, 1999 the employee filed a claim petition seeking further temporary partial disability compensation from April 26, 1999 through May 9, 1999, and continuing from May 16, 1999, as well as penalties against the employer and insurer. The employee also served a discovery demand, seeking the deposition of the employer's claims person. Based on the affidavit of the employee's attorney, attached to the motion to compel discovery, the basis of the employee's claim petition was an alleged underpayment of temporary partial disability benefits after April 26, 1999, because the employer had refused to pay the employee's benefits based upon his actual earnings. The discovery focused on determining the method used by the insurer to calculate the temporary partial disability benefits paid after April 26, 1999. On

August 12, 1999 the employer and insurer filed a notice of intention to discontinue temporary partial disability compensation [NOID], alleging that temporary partial disability benefits paid since the job at Sherping Systems were made by mistake, contending that the employee's established post-injury earning capacity was in excess of his pre-injury wage and that the employee was not entitled to further temporary partial disability compensation. Attached to the NOID was an exhibit showing how the employer and insurer had calculated the employee's temporary partial disability benefits from April 26, 1999 through July 11, 1999.[4] (T. 94-102; Judgment Roll.) There is no evidence that the employee filed an objection to the August 12, 1999 NOID.[5]

The employee started working at Flamingo Wire on August 26, 1999. This job paid $8.50 per hour and involved operating a contact welder to weld pieces of metal to form metal

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[4] The employee's average weekly wage: 419.31 x 2 wks. = 838.62

4/26 - 5/2/99
419.31 - 252.06 = 167.25 x 2/3 = 111.50

5/3 - 5/9/99 worked 48 hrs. x 9.00 = 432.00 no wage loss for 1 wk.

5/17 - 5/30/99: 2 wks.
419.31 x 2 wks. = 838.62 - 651.00 = 187.62 x 2/3 = 125.08
(Wages earned calculated 70 hrs. x 9.00 = 630.00 + 10.5 x 2 hrs. = 21.00 = 651.00)

5/31 - 6/13/99: 1 wk.
(Employee should be working 40 hrs. a week)
838.62 - 720.00 (9.00 x 80 hrs.) = 118.62 x 2/3 = 79.08 x 1.20684 = 103.34

6/14 - 6/27/99: 1 wk.
838.62 - 720.00 (9.00 x 80 hrs.) = 118.62 x 2/3 = 79.08 x 1.20684 = 103.34

6/28 - 7/11/99: 2 wks.

Same calculations as above: Payment for 2 wks: 206.68

[5] The reason for discontinuance stated in the NOID was:

> THE EMPLOYEE WAS PAID UNDER MISTAKE FOR TEMPORARY PARTIAL BENEFITS. THE EMPLOYEE WAS EARNING $10.54 AN HOUR AT SCHERPING AND TEMPORARY PARTIAL WAS CALCULATED AT $9.00 AN HOUR BY MISTAKE. THE EMPLOYEE EARNED IN EXCESS OF HIS AVERAGE WEEKLY WAGE WHILE WORKING AT SCHERPING SYSTEMS. THEREFORE, THE EMPLOYEE HAS ESTABLISHED AN EARNING CAPACITY IN EXCESS OF HIS PRE-INJURY WAGE AND IS NOT ENTITLED TO ONGOING TEMPORARY PARTIAL DISABILITY BENEFITS.

baskets. The employee testified that he had some difficulty with the physical requirements of this job, which required twisting motions of the back. He also stated that he learned how to modify his movements so that he was able to perform the job. The employee was laid off from this job in November 1999. This employer had told the employee he might be hired back after the layoff but this did not occur. Shortly after the layoff, in the latter part of November, the employee was interviewed by Ms. Jane Moncharsh, a vocational expert retained by the employer and insurer in preparation for a hearing scheduled for December 2, 1999. Ms. Moncharsh was present at the hearing but did not testify, as the hearing was continued in order to allow the court to review the insurer's claims file and determine which documents were protected by the attorney-client privilege.[6]

In January 2000 the employee returned to Arctic Fox through the Work Connection. (T. 153-162; Exh. N.) In February 2000 the employee was hired directly by Arctic Fox on a permanent, full-time basis on the night shift at $9.50 per hour, which included a shift differential. The employee's job consisted of bending aluminum poles used in the construction of portable fish houses. He testified that this employer was flexible with respect to allowing the employee to modify his working methods and break schedules to accommodate his restrictions as long as he completed the required number of poles during his shift.

In early October 2000 Arctic Fox discontinued the night shift at the employee's work site and transferred him to day work, paying $9.00 per hour. The employee testified in November 2000, however, that he was due to receive a raise in January 2001. Pay records for this job reveal that the employee has been provided with variable overtime work ranging from one-half to slightly more than two hours per week throughout his employment in this job. (T. 153-162; Exh. N.)

The employee's temporary partial disability claim, claim for penalties, and request for rehabilitation came on for hearing before a compensation judge of the Office of Administrative Hearings on December 2, 1999 and November 16, 2000.[7] For reasons which do not appear in the record the compensation judge deleted the issue regarding temporary partial disability for the period from April 26 through May 9, 1999. (T. 5, 93-94.) The judge, however, did consider the employer and insurer's claim for reimbursement for temporary partial compensation allegedly paid in error for the period from April 26, 1999 through the effective date of the August 12, 1999 notice of intent to discontinue. (T. 6.) The compensation judge found that part-time work was available in the employee's labor market within his restrictions which he could have performed in addition

[6] The second day of hearing before the compensation judge was scheduled for June 27, 2000. The employee and his attorney did not appear for the hearing and it was continued.

[7] There is no indication in the record that the employee ever objected to the notice of intention to discontinue filed on August 12, 1999. His claims were based on his claim petition. As a result, the employee had the burden of going forward with his proof of loss of earning capacity, and the employer and insurer were not limited to the defenses indicated in the August 12, 1999 NOID. When the dispute was ultimately given to the compensation judge to decide in December 2000, the defense raised in the August 12, 1999 NOID was not relied on by the employer and insurer.

to his full-time job, and held that, in light of the employee's failure to seek a second, part-time job to augment the earnings from his full-time job, the employer and insurer had rebutted the presumption that the employee's actual earnings were equivalent to his post-injury earning capacity. The judge therefore denied the employee's temporary partial disability claim and claim for penalties. The judge further determined that the employee was not in need of rehabilitation services "because his loss of earning capacity is not causally related to any disability resulting from his work injury." (Mem. at 9.) The compensation judge ordered the employee's attorney to pay the employer and insurer $872.50 for reasonable expenses, including attorney fees, caused by the attorney's failure to appear for the second day of the hearing on June 27, 2000.[8]

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they "are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Factfindings may not be disturbed, even though this court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

To establish entitlement to temporary partial benefits the employee must show (1) a physical disability, (2) 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). The employee has the burden of establishing a diminution in earning capacity that is causally related to the disability. Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48-49 (Minn. 1988). However, when a disabled employee who is released to return to full-time work finds a full-time job, the earnings from such employment create a presumption of earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960); Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989).

In appropriate circumstances, this presumption can be rebutted with evidence indicating that the employee's ability to earn is different than the post-injury wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 874 (W.C.C.A. 1989); Einberger, 41 W.C.D. at 739. In order to establish an earning capacity different from actual earnings, there must, however, be more

[8] While the employee's attorney appealed this finding and order, he failed to brief the issue and it is deemed waived. Minn. R. 9800.0900, subd. 1.

presented than evidence of a hypothetical job paying a theoretical wage, Saad v. A.J. Spanjers Co., 42 W.C.D. 1184, 1194 (W.C.C.A. 1990); Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989).

The compensation judge made the following findings in determining that the employee was not entitled to temporary partial disability benefits for the period from May 17, 1999 through the date of hearing on December 16, 2000:

> The employee has not sustained his burden of proving by a fair preponderance of the credible evidence that he has suffered a loss of earning capacity causally related to his disability from his work-related personal injury of January 5, 1992. Any loss of earning capacity which the employee has suffered is not causally related to his disability. The employee has failed to demonstrate by a fair preponderance of the credible evidence that any loss of earning capacity he has suffered is causally related to his disability.

(Finding 6.)

> For personal reasons not causally related to his disability from his work-related injury of January 5, 1992, the employee has chosen to limit his hours of work per week to less than he was working on the date of his injury. For reasons personal to the employee and not due to his disability, the employee has not worked the 45 to 50 hours per week that he was working at the time of his injury.

(Finding 8.)

> Jobs are available within the employee's physical restrictions, physical capabilities, skill level, geographic area at Cub Foods, SuperAmerica, Target, Byerly's, home health care agencies and janitorial services with flexible part-time hours to accommodate the employee's child-care restrictions which would place the employee at 45 to 50 hours of work per week (the same number of hours per week that he was working at the time of his injury) and a weekly wage equal to or greater than the employee's average weekly wage as of January 5, 1992 (the date of his work-related injury. Jane Moncharsh, the employment expert who evaluated the employee at the request of the employer and insurer and who testified at the second day of hearing on November 16, 2000, testified credibly regarding her analysis of the relevant labor market and the part-time and full-time jobs available within 20 to 25 miles of the employee's home which meet the employee's physical restrictions, hours available, physical capabilities, transferrable skills and job seeking efforts in the past. The employer and insurer have rebutted the

presumption that the employee's earning capacity is the same as his post injury wage.

(Finding 9.)

On appeal, the employee argues that the compensation judge's factual determinations are clearly erroneous and not supported by the record. (EE's brief at 17.) He contends that the presumption that his actual earnings were equivalent to his earning capacity has not been rebutted by the employer and insurer's evidence. He argues that the employee was working full time at each of the jobs that he held from May 17, 1999 through the date of hearing, working all of the hours available to him, including some overtime, and was willing to work more than 40 hours. The employee contends that he was never advised that he was required to work more than 40 hours, that he cooperated with the rehabilitation assistance provided, and that all rehabilitation efforts were focused on the goal of finding a 40-hour per week job at a wage sufficiently high to eliminate any wage loss. He claims he was never asked to work up to 47.2 hours and that the employer and insurer's position to that effect was first disclosed on the last day of hearing. He also contends that the part-time positions referred to by the employer and insurer's expert were merely hypothetical jobs with theoretical wages. He argued that there was no guarantee that the work would meet the employee's physical restrictions, or that he would be hired. In addition, the employee contended that there was no evidence that the timing and location of the work would fit with the requirements of his regular full-time work or his personal family obligations. In connection with his argument that there is insufficient evidence to support the compensation judge's conclusion, the employee also argues that where an employee is working a full-time, 40-hour per week job, that he has no obligation to look for additional employment, even though his pre-injury weekly wage calculation was based on earnings for hours of work in addition to a 40-hour work week. (EE's brief at 13.)

The general rule when an employee is claiming temporary partial disability benefits but is working fewer hours in his post-injury employment than he did pre-injury is that a compensation judge is to determine, on a case-by-case basis, whether it would be reasonable to require an employee to look for additional work. Nolan v. Sidal Realty Co., slip op. (W.C.C.A. Oct. 20, 1995). In this case, the question for the compensation judge was whether it was reasonable to require the employee to work more than 40 hours per week when he had worked 47 hours per week at the time of his injury. The compensation judge determined that it was reasonable to require the employee to take on additional work. The compensation judge's decision was based on an analysis of the testimony of the employee and the employer and insurer's vocational expert, Ms. Moncharsh. The employee testified about his family responsibilities with his new son and his apparent belief that he was only supposed to be working 40 hours per week, but that he could have worked additional hours if he had chosen to.[9] The employer and insurer's expert testified concerning the availability of additional part-time work with flexible hours which would have accommodated the employee's personal needs and the requirements of his full-time job. The

[9] The employee testified that he could have worked additional hours at a part-time job if he "chose to." (T. 171.) When asked if he had looked for additional part-time work along with his full-time jobs after leaving Sherping Systems, the employee testified "No" and "Well, isn't 40 hours a week enough." (T. 180-81.)

compensation judge felt this testimony was sufficient to convince her that the cause of the employee's loss of earnings was his personal choices and not the limitations caused by his injury. She found that this evidence rebutted the presumption that the employee's actual earnings were equivalent to his earning capacity.

The record supports the compensation judge's findings. The employer and insurer's expert, Ms. Moncharsh, testified that there were specific jobs which would have been available to the employee at Cub Foods, SuperAmerica, Target, Byerly's and as a home health care worker or performing janitorial services during the entire period that the employee was claiming temporary partial disability. (T. 223-31, 244, 257, 263.) Ms. Moncharsh also testified that these part-time employments would have provided the employee with a wage sufficient, given an obligation to work 47 hours per week, to supplement the employee's actual earnings or earnings that he could have made at other specific full-time jobs which were available to the employee, all to the end of completely eliminating any wage differential from his pre-injury weekly wage. This vocational expert, who the compensation judge specifically found to be credible, testified that she was fully aware of the employee's work history, his physical restrictions, the hours that he was available and where he lived and where he worked. The compensation judge found that the vocational expert's testimony was sufficiently detailed so as to satisfy the requirement that specific and not hypothetical jobs at theoretical wages were available to the employee. This is a close case and, while this court may have reached a different factual conclusion, we cannot say that the compensation judge's interpretation of the testimony of the employee and Ms. Moncharsh was clearly erroneous. As a result, the denial of the employee's claim for temporary partial disability is affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

Because we have affirmed the compensation judge's denial of temporary partial disability on the basis that the employee would have had no wage loss had he not chosen to limit his work, we believe that her denial of rehabilitation services was appropriate.

Credit for Overpayment of Benefits - May 17 to July 11, 1999

The employer and insurer made some payments to the employee as temporary partial disability benefits for certain periods between April 26, 1999 and July 11, 1999. They sought a credit for overpayment of benefits during this period. The compensation judge awarded the requested credit.

The compensation judge, for reasons not apparent on the record, separated out the employee's temporary partial disability claim for the period from April 26, 1999 to May 19, 1999 for future hearing. However, the judge awarded a credit for an overpayment of benefits during this period. Since the judge did not consider the employee's temporary partial claim for this period, it was clear error to award a credit for the same period based on overpayment. The credit for overpayment for this period is therefore vacated without prejudice.

For the period from May 19, 1999 through the date of hearing, we have affirmed the compensation judge's denial of temporary partial disability benefits. As a result, the employer and insurer are entitled to a credit for the temporary partial disability benefits paid to the employee for the period May 19 to July 11, 1999.