ROBERT SEPPO, Employee, v. KOLAR BUICK, INC. and W. NAT'L INS. GRP., Employer-Insurer/Appellants, and KOLAR BUICK, INC., Employer, and W. NAT'L INS. GRP., Insurer/Cross-Appellant, and SPECIAL COMP. FUND/UNINSURED.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 11, 2001

No. [REDACTED SSN]

HEADNOTES

CREDIBILITY; CAUSATION - SUBSTANTIAL EVIDENCE. Having carefully reviewed the entire, extensive record in this case, the court concludes there is no basis for reversing the compensation judge's determination of credibility, or his determination that the September 5, 1990 low back injury arose out of and in the course of the employee's work for the employer.

NOTICE OF INJURY - SUBSTANTIAL EVIDENCE. Having accepted the employee's testimony regarding the circumstances surrounding the injury and that the employee promptly reported the injury and told the employer's office manager the facts as the compensation judge found them, the judge's determination that statutory notice was properly given must be affirmed.

CAUSATION - SUBSTANTIAL EVIDENCE. There is substantial evidence to support the findings that the employee sustained permanent and significant injuries to the mid-back (thoracic spine) on February 22, 1991 and May 19, 1993.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee sustained a permanent and significant injury to the low back (lumbar spine) on September 5, 1990.

JOB OFFER - REFUSAL; REHABILITATION - COOPERATION. Substantial evidence supports the compensation judge's findings that the employee cooperated with rehabilitation efforts and did not fail to pursue or refuse suitable employment in the automotive industry.

Affirmed; caption modified, and Order 7 vacated in part.

Determined by Pederson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's findings that the employee was a credible witness, that the employee injured his low back in a work-related incident on September 5, 1990, that the employee gave sufficient notice to the employer of his 1990 injury, that the employee was entitled to wage loss and medical benefits paid for the injuries sustained on

September 5, 1990, July 22, 1991, May 19, 1993, and March 8, 1994, and that the employee did not fail to cooperate with rehabilitation or unreasonably refuse suitable offers of employment. We affirm. The insurer, separately, appeals solely from the inclusion of the Kolars, individually, as parties in the proceeding. All references to the Kolars, individually, are removed.

BACKGROUND

Robert Seppo [the employee] began working as a mechanic for Kolar Buick, Inc., [the employer] in 1969. In 1984, a fire substantially destroyed the employer's premises. The employee was skilled in carpentry and construction work and was asked to help with reconstruction and related remodeling. Thereafter, the employee performed both mechanical work and carpentry/construction work at the direction of the owners of Kolar Buick.

On September 5, 1990, the employee sustained an injury to his low back. Accepting liability for the injury, the employer and insurer paid temporary total disability benefits to October 9, 1990, when the employee returned to work, as well as medical expenses. On July 22, 1991, the employee sustained a work-related injury to his mid-back while loading lumber into a company vehicle at Woodruff Lumber. The employee was off work through August 5, 1991 as a result of the injury. The employer and insurer accepted liability and paid medical and indemnity benefits. On May 19, 1993, the employee reinjured his mid-back while performing work for the employer. Accepting liability for this injury, the employer and insurer paid temporary total disability benefits from May 19 through June 7, 1993, medical expenses and a 2.5 percent permanent partial disability for the thoracic spine.

On March 8, 1994, the employee injured his left shoulder in the employer's shop while removing a wheel from a truck or four-wheel drive vehicle. The employer and insurer admitted liability for the left shoulder injury and paid temporary total disability benefits from March 8, 1994 through November 10, 1996, along with medical expenses. Following the injury, the employee was treated concurrently for both right and left shoulder problems, eventually undergoing surgery for the right shoulder in July 1995 and the left shoulder in January 1996. The employee also received ongoing treatment for the mid and low back during this period of time.

In September 1996, a formal job search was initiated with the assistance of a rehabilitation consultant and a job placement vendor. The employee obtained employment as a tool department clerk at Ace Hardware beginning on November 11, 1996. The employee initially worked full time, eight hours a day, but experienced increasing mid-back pain and low back pain with right leg sciatica. The employee's treating physician, Dr. Silvestrini, reduced the employee to four hours of work per day, gradually increasing to six hours per day. The employer and insurer paid temporary partial disability benefits following the employee's return to work.

On February 14, 1997, the employee filed a claim petition seeking additional permanent partial disability benefits, alleging an injury to the lumbar spine on September 5, 1990 and an injury to both shoulders on March 8, 1994. The employer and insurer admitted a temporary low back injury on September 5, 1990, and admitted a back injury on May 19, 1993. The employer and insurer also admitted the claimed shoulder injuries and paid permanency of 11.64 percent as impairment compensation [IC]. On July 22, 1997, the employee filed an amended petition seeking

payment of permanency for the shoulders as economic recovery compensation [ERC] rather than IC.

Following an October 1, 1997 independent medical report by Dr. Richard Galbraith, the employer and insurer denied primary liability for a right shoulder injury, and claimed permanency had been mistakenly paid for the right shoulder and the thoracic spine. On February 9, 1998, the employer and insurer served a notice of intent to discontinue benefits (NOID), seeking discontinuance of temporary partial disability after January 17, 1998, asserting the employee had reduced his hours of work for nonwork-related reasons. In an Order on Discontinuance filed March 20, 1998, a settlement judge allowed the employer and insurer to reduce the employee's temporary partial disability benefits based on an imputed forty-hour a week wage. The employee filed an Objection to Discontinuance on April 9, 1998.

The matters were consolidated, and were heard by Compensation Judge Bonovetz at the Office of Administrative Hearings on July 28, 1998. Near the end of the hearing, counsel for the employer and insurer advised the court that, based on the employee's testimony at hearing, there appeared to be a conflict of interest between the employer and the insurer regarding coverage for the three back injuries. The compensation judge denied counsel's request for a continuance, and issued a Findings and Order on September 22, 1998, awarding benefits to the employee. The insurer, through separate counsel, appealed. In a decision served and filed April 7, 1999, this court vacated the September 22, 1998 Findings and Order, concluding the compensation judge erred in denying a continuance, and remanded the case to the compensation judge for further development of the record and redetermination of the issues presented.

On November 1, 1999, the employer and insurer filed a NOID seeking discontinuance of temporary partial disability benefits on the basis that the employee had refused suitable job offers from the employer and had voluntarily withdrawn from the relevant labor market by refusing or failing to seek jobs within the automotive field. The NOID was consolidated with the remanded claims for hearing.

The case was heard by Compensation Judge Donald Erickson at the Office of Administrative Hearings on November 11 and 23, 1999.[1] Separate counsel appeared for the employer and insurer, the employer, the insurer, and for the Special Compensation Fund. At the hearing, the employer and insurer denied the September 5, 1990 injury arose out of and in the course of the employee's work for Kolar Buick, and denied the employer and insurer received adequate notice of the 1990 injury. The employer and insurer further denied the employee sustained any permanent or significant work-related injury to the low back or mid-back. They also alleged the employee voluntarily restricted his job search for reasons not related to any work injury, and refused suitable employment within his restrictions. In a Findings and Order, served and filed May 16, 2000, Compensation Judge Erickson readopted most of Judge Bonovetz's findings from the previous findings and order. The judge found the employee credible and accepted the employee's testimony with respect to where and how the September 5, 1990 injury occurred and

[1] Compensation Judge Bonovetz removed himself from the case in an Order of Recusal, served and filed June 28, 1999. The case was then assigned to Compensation Judge Erickson for the consolidated NOID and hearing on remand.

the notice given to the employer and insurer. The compensation judge further concluded the employee was entitled to the benefits paid as a result of the September 5, 1990, February 22, 1991, May 19, 1993 and March 8, 1994 injuries. The judge also determined the employee had cooperated with rehabilitation, had not unreasonably refused or failed to pursue alternative employment, and was entitled to temporary partial disability benefits based on his actual earnings at Ace Hardware. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

1. Credibility; September 5, 1990 Injury

One of the crucial issues in this case was the credibility of the employee. The employer and insurer contend the compensation judge's determination that the employee was a credible witness and the judge's acceptance of the employee's testimony is clearly erroneous and unsupported by substantial evidence. We do not agree.

a. Pre-existing back problems. The employer and insurer contend the employee is not credible because he lied about his "back problems" prior to September 5, 1990. Compensation Judge Erickson reviewed the employee's pre-1990 medical history and specifically concluded there was "no merit in the allegation that the employee hid his previous medical history." (5/16/2000 F&O, finding 30; see also 9/22/98 F&O, finding 9; 5/16/2000 F&O, findings 5, 6, 7, 8.) There is ample evidence to support the compensation judge's determination.

The appellants point in particular to testimony and medical records regarding a spina bifida occulta. However, on September 13, 1990, in a phone interview related to the September 5, 1990 injury, the employee specifically advised a worker's compensation specialist retained by the insurer that he "had back problems as a kid." (Ex. 16; Clark Dep. Ex. 1.) It is apparent from the employee's testimony at the July 28, 1998 hearing, his April 6, 1999 deposition, and the November 1999 hearing, that he did not conceal the fact that in his teens he was advised

he had a spina bifida occulta.[2] The employee did not recall having any symptoms or "back trouble" at that time. When deposed in 1997, the employee initially could not remember why he failed his military physical in 1968 or 1969, but later volunteered that it was because of the spina bifida. (T. Vol. I: 118-19, 173, 184; Ex. 21 at 7, 57; Ex. 22 at 71, 106-07.)

There is little by way of medical records regarding a spina bifida defect. On October 22, 1973, the employee saw Dr. Peter L. Boman at the Duluth Clinic for a severe right-sided lumbar muscle spasm. The employee reported he was told he had spina bifida, and x-rays were taken confirming a "slight" spina bifida occulta defect at S1. Dr. Boman concluded, however, that the employee's condition represented "purely an acute muscle sprain." (Ex. 16.) On July 5, 1994, Dr. Matthew J. Eckman, a physical and rehabilitation specialist, reviewed the employee's x-ray studies, observing that a slight spina bifida occulta had been noted in 1973 at the Duluth Clinic. Dr. Larry Stern, who conducted an independent medical examination [IME] on August 20, 1999, also noted the employee's report of being diagnosed with spina bifida. An MRI scan taken on December 26, 1996, however, showed some lower lumbar facet arthritic changes but no spina bifida defect. No one has ever suggested that the spina bifida occulta, if it exists, was significant or contributed to the employee's back problems in any way.

The appellants also assert the employee falsely denied pre-existing treatment for his back. The medical records in evidence reveal five treatments for "back" problems between 1969 and September 5, 1990. The sole record of any treatment for the low back prior to September 5, 1990, is Dr. Boman's chart note of October 22, 1973. On June 28, 1982, the employee was treated for neck pain with trapezius muscle spasm. On November 11, 1982, the employee left a phone message reporting his neck symptoms were "back," and requesting a muscle relaxant. (Ex. 16.) On August 20 and 27, 1990, the employee received treatment from Richard Fisher, D.C., for neck and upper thoracic pain with hearing loss. (Ex. D.)

The employee testified he simply did not remember any specific "back problems" prior to September 1990, explaining he may have had occasional back pain or a pulled muscle, but nothing that resulted in a loss of time from work or that lasted for any length of time. This is entirely consistent with the medical record. He could not recall seeing Dr. Boman, but stated he would not disagree that he had. (T. Vols. I, II: 81, 119, 184, 187, 260; Ex. 20 at 28, 30; Ex. 22 at 71, 106, 170.) Dr. Richard Galbraith, in his IME report of October 1, 1997, noted the employee had "some back problems in 1973 and 1982" but disregarded them "as they were minor." (Ex. 13.)

The evidence indicates only that the employee had a "slight" developmental defect and very occasional treatment for the "back" prior to the 1990 and 1991 injuries. The compensation judge could have reasonably concluded there was nothing very significant about the employee's pre-existing diagnoses and treatment, and his determination that the employee did not conceal his pre-existing medical history is amply supported by the record.

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[2] Spina bifida occulta is a developmental anomaly in which there is a defect of the vertebral arch without protrusion of the spinal cord or meninges. Dorland's Illustrated Medical Dictionary at 1677 (29th ed. 2000).

b. September 5, 1990 Injury. A First Report of Injury was completed by the employer's office manager, Renee Nordman, on September 7, 1990. The report indicates the employee, a mechanic in the Kolar Buick service department, sustained a back sprain on the 5th of September. The type of accident is described as a "pull" and the object involved is listed as a "car pusher." The job site is described as "Duluth;" a checkmark indicates the injury occurred on the employer's premises. No other information is given about the circumstances of the accident.

During a deposition of the employee taken by counsel for the employer and insurer on July 31, 1997, a brief exchange took place in which the employee stated he was pushing something in the shop but did not remember what happened. He then immediately volunteered that was how the injury was reported, but in fact, he was working construction for Kolar Buick at the time, and was pushing a wheelbarrow when he was injured. This line of questioning was not pursued further. (T. Vol. I: 235; Ex. 22 at 29-30; see Ex. 22 at 110-11.) At the July 28, 1998 hearing before Compensation Judge Bonovetz, the employee testified he was building a house on the dunes at Park Point for the owner's son, Peter Kolar, and the injury occurred while pushing a wheelbarrow up a plank walkway. The tire went down between the planks and he wrenched his low back. (Ex. 22 at 78, 111, 138.) Judge Bonovetz explicitly found the employee to be "a most credible witness" and found the employee did sustain an injury to his low back on September 5, 1990, arising out of and in the course and scope of his employment. (9/22/98 F&O, findings 10, 13, 58.)

At the hearing on remand, the witnesses agreed the employee had been working on Peter Kolar's house through the summer of 1990 and had not been working in the shop. (T. Vols. I, II: 108-09, 504, 506, 526.) The employee testified that on September 5, 1990, he was doing landscaping on the Lake Superior side of Peter Kolar's house. Equipment cannot be driven on the dunes, so a plank walkway had been built. The employee again testified he was injured pushing a wheelbarrow up a sand dune. "I was wheeling topsoil up these planks. They were fairly heavy loads, and you had to run pretty hard at it to get up the hill. One of the planks separated, the tire went down and the wheelbarrow stopped and I didn't." (T. Vol. I, II: 102-105, 645, 647.)

The employee testified he reported the injury the day of the incident or the day after, and that he told Renee Nordman he had been injured pushing a wheelbarrow at Peter Kolar's house. Shortly thereafter, according to the employee, Ms. Nordman came back to him and said they were going to report he was pushing a car rather than a wheelbarrow. The employee sought treatment from Dr. Fisher on September 6, 1990. He testified he told Dr. Fisher the employer was going to report he was pushing a car but in fact he was pushing a wheelbarrow. (T. Vols. I, II: 106-14, 650-51, Dr. Fisher's chart note relates the employee was "Pushing a car up a grade and slipped." (Ex. D.)

Peter Kolar, Renee Nordman and Dr. Fisher testified, in person, at the hearing on November 23, 1999. Peter Kolar is currently a partner in the Kolar dealership. He testified he was married on September 1, 1990 and he and his wife had gone to Madeline Island the next day for a honeymoon. The accommodations proved disappointing and they returned early on September 4th. Mr. Kolar stated he and his wife had the rest of the week off and stayed at the house on Park Point, spending quiet time together. He was "absolutely" certain the employee had not worked at the house on September 5, 1990. (T. Vol. II: 394, 403-04.)

Renee Nordman testified she had no independent recollection of any conversation with the employee regarding the September 5, 1990 injury. Based on the First Report of Injury, she stated the employee had reported the injury on September 7, 1990, and that the employee was using a car pusher when the injury occurred. She had no recollection of the employee telling her about pushing a wheelbarrow at Peter Kolar's house. Ms. Nordman agreed she did not tell the employee "you should change" the first report of injury or the way the accident was reported. (T. Vol. II: 424-26, 497-98, 512-13.)

Dr. Fisher similarly testified he had no recollection of his conversation with the employee on September 6th, and could not remember whether the employee told him that he had injured his back pushing a wheelbarrow. He agreed he would have put such a statement in his records, but "prefaced" his agreement with the statement that in 1990 his notes would have been perfunctory, for his own use and focused on the treatment provided. (T. Vol. II: 467-68, 472-73.)

Compensation Judge Erickson found the employee a credible witness, and accepted the employee's testimony with respect to where and how the September 5, 1990 injury occurred and what he told Ms. Nordman and Dr. Fisher following the injury. (5/16/2000 F&O, findings 15, 16, 17; mem. at 13.) The assessment of witnesses' credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989), citing Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988). It is not the role of this court to make our own evaluation of credibility or the probative value of conflicting testimony. Rather, we must give due weight to the compensation judge's opportunity to observe the witnesses and judge their credibility. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Accordingly, a finding based on the credibility of a witness will not be disturbed on appeal unless such a determination is clearly and manifestly contrary to the evidence.

The employer and insurer argue the employee's testimony is not believable, maintaining the employee "falsely accused" Ms. Nordman and Dr. Fisher "of acting as accomplices in Mr. Seppo's fraud." (Er-Insr Brief at 8.) Relying on the First Report of Injury and Dr. Fisher's chart note, the appellants contend the timing of the employee's "theory" is flawed, arguing the employee saw Dr. Fisher on September 6th, but did not report the injury until September 7th so his story could not be true. However, the First Report of Injury specifically states the date on which notice was received was "9-5-90." The date on which the report was signed is "9-7-90." This is consistent with the employee's testimony.

Having heard the employee's testimony and, at the second hearing, the testimony of the employer and insurer's witnesses, and having observed the witnesses' demeanor, two compensation judges have found the employee to be a "most credible witness." We have carefully reviewed the entire, extensive record in this case, and see no basis for reversing the compensation judge's findings regarding the September 5, 1990 injury. We, accordingly, affirm.

2. Notice of Injury

The employer and insurer also appeal the compensation judge's finding that the employer received sufficient statutory notice of the September 5, 1990 injury. They assert the

employee misrepresented the underlying factual circumstances of his injury, depriving the employer of an opportunity to conduct a timely investigation. Having affirmed the compensation judge's findings that the September 5, 1990 injury occurred at Peter Kolar's house while pushing a wheelbarrow, and that the employee promptly reported the injury and told Ms. Nordman the facts as the compensation judge accepted them, the judge's determination that statutory notice was properly given must also be affirmed.[3]

3. Other Injuries

The employer and insurer further argue that because the employee was not credible, the employee's claim for benefits based on his mid-back injuries, right shoulder injury and left shoulder injury are not compensable. There is simply no basis for this assertion.

The First Report of Injury, Dr. Fisher's records and the employee's testimony have been consistent from the beginning with respect to the employee's July 22, 1991 mid-back (thoracic spine) injury while loading lumber into a company vehicle at Woodruff Lumber. There has never been any real dispute about whether this injury occurred or how it occurred. Although the specific circumstances surrounding the May 19, 1993 injury are less clear, it does appear that the employee did sustain a work-related aggravation to his back on that date.[4] In any event, there is more than sufficient evidence in the record to support the compensation judge's determination that the employee sustained significant and permanent work-related injuries to the mid-back in 1991 and 1993.

The employer and insurer also argue the employee is not entitled to benefits for the right shoulder. In 1998, Compensation Judge Bonovetz found the employee failed to establish a work-related injury to the right shoulder. (9/22/98 F&O, finding 35.) Compensation Judge Erickson readopted this finding and it was not appealed. (6/16/2000 F&O, finding 2.)

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[3] We believe the compensation judge properly applied Mehle v. Oglebay Norton Taconite Co., 57 W.C.D. 336 (W.C.C.A. 1997) to the facts in this case. Moreover, it appears the employer knew the employee was not working in the shop during this period of time, and could have conducted an investigation.

[4] A First Report of Injury was completed for the May 19, 1993 injury by Anthony Strong, the employee's supervisor while working as a mechanic for Kolar Buick. The report indicates only that the injury occurred in the import shop. Dr. Fisher's treatment notes for that date indicate the employee was bending over to work on an engine. Both the employee and Bernie Kolar, one of the owners, testified the employee injured his low back installing cabinets in Mary Kolar's kitchen. Dr. Fisher's notes indicate the injury probably occurred in August 1991 (severe mid-back aggravation while putting base cabinets into place). The employee thought it occurred in 1992 or '93, and testified the May 19, 1993 first report could not be for the kitchen cabinet injury because Mr. Strong would not have filled out a report for work injuries outside the shop. (T. Vol. I: 128-29, 208; Ex. 21 at 24-26, 29, 31-34.)

Finally, the employer and insurer argue that because the employee's testimony was incredible and not believable the employee's claim for a left shoulder injury must fail. However, at the hearing, all three counsel for the employer and the insurer *agreed* the March 8, 1994 left shoulder was not disputed and was compensable. (T. Vol. I: 18, 20, 36, 43, 49, 53.)

4. Low Back Injury

The employer and insurer contend the medical evidence demonstrates the employee's low back injury was not significant and the employee is not entitled to additional compensation as a result of the September 5, 1990 injury. We are not persuaded.

The employee sought chiropractic treatment from Dr. Fisher following the September 5, 1990 injury. Dr. Fisher took the employee off work through October 8, 1990, when he released the employee to return to work with light duty restrictions. The employee continued to receive treatment from Dr. Fisher on a gradually decreasing basis through June 24, 1991. Thereafter, the employee continued to receive periodic treatment as needed from Dr. Fisher for both his low back and mid-back through September 1993. A report of a functional assessment, performed in February 1994, reflects significantly reduced range of motion in the lumbar spine, increased low back tension and pain with flexion and extension, and decreased sensation in the right thigh with some sciatica into the right leg. On September 24, 1994, Dr. Fisher provided a 10.5 percent permanent partial disability rating for the low back.

Following the employee's left shoulder injury on March 8, 1994, the employee began treating with Dr. Thomas E. Kaiser at the Duluth Clinic. Dr. Kaiser noted the employee had problems, other than his left shoulder condition, for which he was receiving treatment and needed restrictions, including chronic back problems. On July 5, 1994, at the request of Dr. Kaiser, the employee was seen by Dr. Matthew Eckman, a physical medicine and rehabilitation specialist at the Duluth Clinic, for an evaluation of his spinal problems. Dr. Eckman diagnosed a chronic lumbar and thoracic strain and recommended physical therapy with reconditioning and work hardening. On October 17, 1994, Dr. Eckman imposed significant restrictions, including no sitting over one-half hour, avoid back stress activities with frequent bending or leaning, and no lifting or carrying over 15 pounds. The employee continued to receive treatment for his thoracic and lumbar spine under the direction of Dr. Eckman through December 6, 1994.

On April 26, 1995, the employee returned to Dr. Fisher with severe mid-thoracic pain and spasm. Dr. Fisher referred the employee to Dr. Skip Silvestrini, a physical medicine and rehabilitation specialist at the Duluth Clinic. The employee was examined by Dr. Silvestrini on May 24, 1995. The doctor diagnosed a thoracic/lumbar strain with post-myofascial pain, recommended a conditioning program, and did not object to periodic chiropractic treatment for muscle tightness. The employee underwent surgery for his right shoulder on July 11, 1995, and for his left shoulder on January 25, 1996. Following the surgeries, the employee received ongoing physical therapy that included treatment for his low and mid-back, under the direction of Dr. Silvestrini. In about September 1996, Dr. Silvestrini provided light work restrictions, including no lifting over 20 pounds on an occasional basis, no standing more than 4 hours, no sitting more than 3 to 5 hours, no pushing, pulling or climbing and no overhead work.

The employee experienced increased back symptoms following his return to work on November 11, 1996 at Ace Hardware, and on December 6, 1996, Dr. Silvestrini limited the employee to four hours of work a day. An MRI scan of the lumbar spine, taken on December 26, 1996, revealed degenerative changes at L3-4 and L4-5 without neural entrapment. By letter report dated January 15, 1997, Dr. Silvestrini provided a permanency rating of 10.5 percent based on the pre-1993 permanency schedule. The employee eventually increased his hours to six per day, but continued to experience low back and right leg problems which Dr. Silvestrini attributed to prolonged standing at work. The employee continued to have periodic exacerbations of his thoracic and low back through the last date of hearing, November 23, 1999.

Compensation Judge Bonovetz found the employee sustained a permanent low back condition as a result of September 5, 1990 injury. Compensation Judge Erickson reached the same conclusion, re-adopting Judge Bonovetz's findings, and specifically finding the employee was entitled to the wage loss and medical benefits paid and to payment for a 10.5 percent permanency for the low back. As discussed above, there is substantial evidence to support the conclusion that the employee sustained a permanent and significant injury to the low back on September 5, 1990, and we, accordingly, affirm.

5. Refusal of Employment; Failure to Cooperate with Rehabilitation

The employer and insurer contend the employee refused suitable offers of employment from the employer, and failed to cooperate with rehabilitation by failing or refusing to pursue jobs in the automotive employment market. Both Judge Bonovetz and Judge Erickson concluded the employee had fully cooperated with rehabilitation and had not unreasonably refused employment. Judge Erickson, accordingly, awarded the employee temporary partial disability benefits based on his actual earnings at Ace Hardware. There is substantial evidence to support the compensation judge's determination.

The employee was assigned a disability case manager in late April 1994, shortly after his March 8, 1994 left shoulder injury. A vocational assessment was completed on June 20, 1994. The vocational evaluator noted the employee completed the ninth grade in school. Testing disclosed a borderline reading level and negligible numerical cognitive skills. The evaluator suggested exploring work in a hardware store environment, and further recommended the employee pursue a GED. In July 1994, the case manager contacted Anthony Strong, the supervisor of the Kolar shop, who stated the employee would not be permitted to return to work in the shop unless he was able to return full-time, unrestricted. The employee remained in medical management, and the file was referred to Barbara Consie-Tekippe, an RN and rehabilitation consultant. The employee continued to have significant difficulties with his shoulders and back, and was unable to return to work during the remainder of 1994 and 1995.

The employee began work on his GED, but had difficulty completing the classes and taking the tests. An evaluation was completed on December 4, 1995 which indicated the employee had learning disabilities affecting reading, writing and arithmetic (dyslexia and dyscalculia). The employee was able to complete his GED, with provisions for special testing, in early 1996.

Beginning in May 1996, Dr. Silvestrini, who was treating the employee's back problems, and Dr. Kaiser, who was treating the employee's shoulders, provided a series of work restrictions. By September 1996, permanent light-duty restrictions had been imposed, including no working with the arms above shoulder level, occasional lifting up to 20 pounds, no standing more than four hours, no sitting over three to five hours, and no pushing, pulling or climbing. It was agreed the employee could not return to work as a mechanic. An active job search was initiated, and on September 16, 1996, the employee began working with Nichols Placement Services. Following a lead provided by the placement vendor, the employee interviewed for and was offered a job as a clerk in the tool department at Ace Hardware on October 31, 1996. Ms. Consie-Tekippe, Mr. Nichols and the insurance claims adjuster approved the job, and the placement file was put on hold. The employee began work at Ace Hardware on November 11, 1996.

Both the placement service records and the testimony of Ms. Consie-Tekippe indicate the employee not only fully cooperated with job search efforts, but did an extraordinary job of looking for work. (T. Vol. II: 551-552, 556; Ex. 28.) The employer and insurer argue, however, that the employee was not interested in working in the automotive field and failed or refused to pursue employment in the automotive employment market. Nothing could be further from the truth. Although the employee advised the placement vendor he was not sure he wanted to remain in the auto industry, the evidence indicates that despite his reservations he followed through and actively pursued job leads in the automotive field. These included a sales position with Economy Garage, and two interviews for a service writer position with Larson Chevrolet. The employee also followed up with auto part service and sales leads, even though he was aware that the jobs were outside his restrictions, a fact that was later confirmed by the placement vendor. In addition, the evidence indicates that auto parts jobs paid less, or at least no more, than he was making at Ace Hardware in 1999. (T. Vols. I, II: 145-46, 191-92, 364, 589; Ex. 19; Ex. 26; Ex. 28.)

The employer and insurer also contend the employee refused job offers from the employer within his restrictions and at an income at least equal to that which he was making when working at Kolar Buick as a mechanic. We disagree. Both the employee and Bernie Kolar agreed that Mr. Kolar offered the employee work as an automobile salesperson.[5] The employee testified the offer was made during the time he was doing a job search, and he turned the offer down. (T. Vol. I: 143-44, 189; Ex. 22 at 129-131.) The employee doubted he could succeed as an auto salesperson, explaining it was a commission job [6] and he did not think he would be good at selling cars, he didn't think he could physically handle the job, and he was concerned about problems because of his dyslexia/dyscalculia. (T. Vol. I: 144, 189-191; Ex. 22 at 96-97, 133, 135-36.)

[5] Bernie Kolar testified he offered the employee a position as an automobile salesperson in 1992 or 1993. (Ex. 23 at 16.) The employee testified that Bernie Kolar offered him a job as a service writer in 1992 or 1993. (T. Vol. I: 192.) In any event, any such offer would have been made while the employee was working full-time for the employer, and prior to the time the employee's back and shoulder problems resulted in significant work restrictions.

[6] The employee also had two interviews with Economy Garages in a commission sales position. The insurer informed the employee that it would not be a suitable position. (Ex. 28.)

Ms. Consie-Tekippe was aware the employer had made an "offer of sorts," but stated no written or verbal offer was conveyed to her.[7] She did not agree that an auto salesperson position was necessarily appropriate for the employee. Ms. Consie-Tekippe observed, in particular, that the employee's learning disability could make the written and mathematical requirements very difficult for him. (T. Vol. II: 552, 563, 565-66, 570-71.) Dana Butler, the employee's last case manager, and Lee Shaefer, a placement specialist, also expressed reservations about the physical appropriateness of the job and whether the employee would be able to actually make substantial earnings as a car salesman. (T. Vol. II: 288, 358, 361). Based on the evidence, the compensation judge reasonably concluded a job as an auto salesperson was not appropriate work for the employee.

There is also no dispute that the employee, Bernie Kolar and Dave Hammer discussed a potential position as a service manager or auto body supervisor with Kolar Buick during the job search period. However, the job was dependent on training and the purchase of another dealership. The purchase was not finalized and no offer for such a position was ever made. (T. Vols. I, II: at 146, 554-555, 576; Ex. 26; Ex. 23 at 18.)

There is substantial evidence to support the compensation judge's findings that the employee cooperated with rehabilitation efforts and did not fail to pursue or refuse suitable employment. We, accordingly, affirm.

6. Dismissal of Kolars, Individually

The insurer, Western National Insurance Group, filed a cross-appeal solely from the inclusion and then dismissal of the Kolars, individually, in this proceeding. On November 10, 1999, Compensation Judge Erickson issued an Order for Consolidation. The order added "Kolars, individually," to the caption, with no explanation. There was no motion or order for joinder of the Kolars, individually.

At the hearing on November 12, 1999, James Wade appeared on behalf of the employer and insurer, Larry Peterson made an appearance on behalf of the insurer, separately, and Rory Foley appeared on behalf of the Special Compensation Fund. Michael Tierney appeared on behalf of Kolar Buick, Inc. When questioned by the compensation judge, Mr. Tierney replied that the Kolars were *not* named as parties individually, and he was appearing solely on behalf of the business, Kolar Buick. Mr. Foley agreed the Kolars, individually, had not been joined. (T. Vol. I: 8, 22.)

We agree that the compensation judge improperly added the Kolars, individually, to the caption of this case, and committed an error of law in dismissing the Kolars, individually, when the Kolars were not joined as parties and were not represented at the hearing. We accordingly, modify the caption to remove Kolars, individually, and vacate that portion of Order 7 dismissing claims against the Kolars, individually.

[7] Apparently, the insurer refused to let Ms. Consie-Tekippe contact the employer directly to discuss a return to work. (T. Vol. II: 552-54, 582.)