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Really, Self-Serving Testimony is Enough? What can you do?

Dahlgren v. Johnson Carpet Tile & Linoleum Company, Integrity Mutual, W.C.C.A., March 14, 2016

Michael Dahlgren worked in the commercial flooring trade installing vinyl, carpet, and specialty flooring. He performed this work for over 20 years. The employee was able to prove, that this work caused a lumbar spine injury culminating in 2013, even though the MRI scan appeared to show only mild to moderate degenerative disc changes at multiple levels. Following his injury, the employee was allegedly unable to return to his pre-injury occupation, and instead, obtained a part-time job at the Home Depot. This subsequent employment, was at a substantial wage loss. The employee testified at the hearing, that because of pain complaints, he was simply unable to work more than 5 to 6 hours per day. Interestingly enough, the employee's treating doctors, while giving him restrictions, did not provide any hourly-based restriction. Moreover, the independent medical examiner did not provide any hourly-based restrictions. At the time of the hearing, it appears as though no doctor was restricting the employee's ability to work full-time hours. It appears as though the only evidence on the amount of hours the employee could or could not work, were the employee's own self-serving statements, that if he worked more than 5 to 6 hours a day, it increased his low back pain. The Compensation Judge, Jerome Arnold, awarded temporary partial disability benefits based solely on that testimony.

The employer and insurer appealed the Compensation Judge's award of temporary partial disability, arguing, that because there was no hourly-based restriction, the employee should not receive temporary partial disability benefits. Essentially, since the employee was released to return to work with no hourly limitation, solely self-serving testimony to collect wage loss benefits, should not be enough.

In affirming the Judge and rejecting the employers and insurers argument, the W.C.C.A. stated that the employee's own testimony about his ability to work <u>is evidence</u> that the Judge <u>may accept</u>. In this case, the Judge accepted the employee's self-serving testimony that he was unable to work more than 5 or 6 hours a shift due to low back pain and, therefore, was entitled to benefits.

Quite frankly, these are the types of cases that keep me up at night. How can any Judge adopt self-serving testimony over actual medical testimony? If the employee's treating doctor, and the IME doctor, both feel that the employee can work more hours, why should an employee's statement that he cannot, hold more weight than the

medical evidence? Short answer: It should not. How can you convince a Compensation Judge of that fact?

If you have a case where an employee is, in your opinion, voluntarily under-employing himself or herself by working less hours than the treating doctor allows what can you do about it?

Here are some suggestions I have found useful in successfully litigating these types of cases:

- Have your independent medical examiner address the issue of "hurt versus harm." What that means is that while additional hours may cause the employee to "hurt" (have symptoms) that does not mean that those additional hours are actually causing any additional "harm" (any additional injury to the affected body part). I have even had the independent medical examiner specifically indicate that working more hours, especially if those hours are within an employee's restrictions, are actually helpful, and are simply a form of additional work hardening, or therapy. Especially, in a case of arthritis, or degenerative disc disease, having an independent medical examiner, or even the treating physician, state that activity, keeping in shape, keep moving, are all beneficial to someone with degenerative disc disease, might have been helpful in the above-referenced case. You need to take away a Compensation Judge's perception, that pain means further injury.

- Find out the employee's exact work schedule for the time frame that he or she is working part-time. Assign surveillance, to follow the employee after his or her shift is over. If an employee says he or she can only work five hours per day, have the surveillance team follow the employee for at least 3 to 4 hours after work, for several days in a row. If you can establish, activity after the employee leaves work, that will go a long way towards proving that the employee could in fact credibly work more hours. In the above-referenced case, the Judge apparently relied on the employee's "credible" testimony that after 5 to 6 hours per work, his pain level would be too high to allow additional work activity. Perhaps, if the employer and insurer had obtained surveillance of the employee leaving work, and even running errands, going to a grocery store, or even performing any activity, may have shown the Judge, there was no reason the employee could not perform additional light duty work. As an example, I recently litigated a case successfully, where an employee testified she could only work 7 hours per day, I had surveillance of the employee for two hours after work, every day for four days. During that time, she ran numerous errands, getting in and out of a vehicle, going grocery shopping, going to a liquor store, going to a dollar store. None of the surveillance activities were that substantial, however, neither was her light-duty job. Her light-duty job was to sit at a desk and place labels on folders. I argued to the Compensation Judge, that if the employee can drive a Ford F150 truck, and run errands for two hours after work every day, there was absolutely no reason why she could not stay at work for an additional hour in place labels on folders. This argument was successful, and the Judge completely denied the temporary partial disability claim.

- During your recorded statement, try to find out directly from the employee, exactly what they do after their assigned shift is over. For example, do they go home and make dinner, do they run errands after work, do they perform any household chores, do they engage in any hobbies, do they go home and use a

personal computer/IPad, do they make phone calls? If you can try and document exactly what the employee is doing after work hours, you may be able to show a Compensation Judge down the road, that those tasks, are really no more strenuous than another hour or two of the light-duty work being offered by the employer.

In conclusion, if the *Dahlgren* case is going to be used in the future, by employee's attorneys to argue that self-serving testimony by the employee is enough to support a temporary partial disability claim, we must be prepared to defend that argument. We have to do what we can to ensure that the self-serving testimony is not deemed credible.

If you would like to review the entire W.C.C.A. *Dahlgren* Decision, **Click Here.**

If you have any specific questions regarding temporary partial disability claims, or any other matters, please do not hesitate to contact the attorneys at Brown & Carlson, P.A.

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2016 WL 1437296 (Minn.Work.Comp.Ct.App.)

Workers' Compensation Court of Appeals

MICHAEL J. DAHLGREN, EMPLOYEE/RESPONDENT v. JOHNSON CARPET TILE & LINOLEUM CO. AND INTEGRIT...
Workers' Compensation Court of Appeals March 14, 2016 *(Approx. 9 pages)*

MICHAEL J. **DAHLGREN**, EMPLOYEE/RESPONDENT

v.

JOHNSON CARPET TILE & **LINOLEUM** CO. AND INTEGRITY MUT. INS. CO., EMPLOYER-INSURER/APPELLANTS

No. WC15-5849
March 14, 2016

HEADNOTES

*1 TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony found credible by the compensation judge, supports the compensation judge's award of temporary partial disability benefits.

CAUSATION - SUBSTANTIAL EVIDENCE; CAUSATION - MEDICAL TREATMENT. Substantial evidence, including expert medical opinion, supports the compensation judge's determination that the employee's March 2013 work injury is a substantial contributing factor to the employee's current disability and need for surgery.

Compensation Judge: Jerome G. Arnold

Determined by:

Manuel J. Cervantes, Judge

David A. Stofferahn, Judge

Deborah K. Sundquist, Judge
Attorneys: Gustaf C. Layman, Petersen, Sage, Graves, Layman, & Moe, P.A., Duluth, Minnesota, for the Respondent. Kristen L. Ohlsen, Aafedt, Forde, Gray, Monson & Hager, P.A., Minneapolis, Minnesota, for the Appellants.
Affirmed.

OPINION

Manuel J. Cervantes
Judge

The employer and insurer appeal the compensation judge's award of temporary partial disability benefits and the judge's reliance on the orthopedic physician's medical expert opinion. Substantial evidence, including the expert medical opinion based on adequate factual foundation, supports the compensation judge's decision. We affirm.

BACKGROUND

The employee began working in the commercial flooring trade in 1993, installing vinyl, **carpet**, and specialty flooring. He began working in the employer's commercial division in 2007. The employee testified the work was physically demanding and required him to work on his knees, and, most of the time, he worked bent over. Over the course of his employment, the employee sustained occasional back strain/sprains, but experienced no long-lasting symptoms or disability.

SELECTED TOPICS

Proceedings to Secure Compensation

Objective Medical Evidence of Workers' Compensation Claimant Disability

Secondary Sources

APPENDIX IV GUIDANCE AND TECHNICAL ASSISTANCE MAT

ADA Compliance Guide Appendix IV

...Under the Americans with Disabilities Act of 1990 (the "ADA"), an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given ...

Sufficiency of expert evidence establish causal relation betwe accident and physical conditior death

135 A.L.R. 516 (Originally published in 1941)

...The present annotation, as its title indicates, is concerned with questions relating to the sufficiency of expert testimony (usually, if not invariably, medical testimony) to establish the causal relat...

APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIO TITLE 29 CODE OF FEDERAL REGULATIONS

Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II

...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...

See More Secondary Sources

Briefs

Brief for American Internationa Inc. and CNA as Amici Curiae i Support of the Petition for Writ (Certiorari

2005 WL 3438370
GENERAL CONSTRUCTION **COMPANY**, et al., Petitioners, **v.** Robert CASTRO, et al., Respondents.
Supreme Court of the United States
Dec. 09, 2005

...FN1. All parties have consented to the filing of this amicus curiae brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici and its...

Brief of International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as Amicus Curiae

1974 WL 185751
Dwight GEDULDIG, Appellant, **v.** Carolyn AIELLO, Individually and on Behalf of All Others Similarly Situated, Appellees, Dwight Geduldig, Appellant, **v.** Augustina D. Armendariz, et al., Individually and on Behalf of All Other Women Similarly Situated, Appellees.
Supreme Court of the United States
Mar. 15, 1974

...The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE, is an international labor organization composed of employees of manufacturers of electronic produc...

On March 18, 2013, the employee was on his knees, pulling up a glued-down **carpet** when he felt a pop in his low back. The employee's pain worsened over the next several days, and on March 22, 2013, the employee was seen by his primary care physician, Dr. Timothy LaMaster. The doctor diagnosed a low back strain and took the employee off work. The employee returned to Dr. LaMaster on March 28, 2013, reporting worsening back pain. The doctor noted moderately diminished lumbar range of motion and negative straight leg raising. The employee was referred for physical therapy and remained off work.

Physical therapy commenced on April 10, 2013, at Lake Superior Physical Therapy. On examination, the therapist noted decreased lumbar lordosis, limitation of extension and flexion, and tenderness in the left buttock (gluteal muscle). Manual therapy and therapeutic exercises were provided. On April 22, 2013, the employee returned to Dr. LaMaster reporting his pain was no better and was now radiating down the left leg with occasional numbness in the back (posterior) of the leg. Physical therapy was continued and the employee remained off work. On May 7, 2013, the physical therapist noted residual low back pain and numbness (paresthesia) in the left buttocks and posterior thigh. On May 8, 2013, Dr. LaMaster noted no abnormalities upon inspection, palpation, or range of motion of the low back. The employee continued to report numbness and weakness on the left side, and because of a lack of progress with therapy, the doctor referred the employee for an MRI scan. The employee was released to return to work on May 13, 2013, with restrictions of no lifting, bending, crouching, twisting, kneeling, climbing, or reaching. The doctor permitted desk work, with frequent breaks for movement as needed.

*2 The employee returned to work with the employer on May 14, 2013, doing primarily sedentary desk duty. He worked one day and part of another, then opted not to return to work. Carol Anderson, a qualified rehabilitation consultant (QRC), initiated rehabilitation services on May 14, 2013, at the request of the claims adjuster. The QRC concluded the employee was eligible for rehabilitation assistance and prepared an R-2 with the goal of a return to work with the employer.

An MRI scan of the lumbar spine was performed at Essentia Health-Duluth Clinic on May 23, 2013. The radiologist read the scan as showing mild to moderate disc arthritis at L1-2, L4-5, and L5-S1, without spinal canal narrowing or lateral recess or foraminal stenosis.

The employee last participated in physical therapy at Lake Superior on May 29, 2013. The therapist noted the employee's pain and inflammation had subsided, but the employee reported he was having an anxiety attack and wanted to be discharged. On June 4, 2013, the employee, accompanied by his QRC, was seen by Dr. LaMaster. The employee reported his pain was better and had improved overall. Dr. LaMaster noted a "normal" MRI scan and a normal examination, and released the employee to return to light-duty work with a 20 pound lifting restriction and minimal bending/twisting/squatting for up to one hour per day total.

By letter dated June 7, 2013, the employer offered the employee a position within the restrictions provided by Dr. LaMaster. The employee was to report for work on June 11, 2013, but did not do so. In an unappealed finding, the compensation judge found the employee's failure to accept the job offer was unreasonable. (Finding 17.)

On June 12, 2013, the employee returned to Dr. LaMaster reporting he went walking on Sunday and slipped, pulling a muscle and worsening his back pain. The doctor prescribed tramadol, an opioid pain medicine, and advised the employee to continue his home exercises and gradually increase his activity. The employee was seen by Toni Roberts, PA-C, at Dr. LaMaster's office on June 26, 2013. The employee reported persistent pain in the left low back radiating into his left buttock that waxed and waned. On examination, tenderness on palpation of the lumbar spine, paraspinous muscle tightness and tenderness on the left side, and decreased flexion were noted.

On July 7, 2013, at the request of Dr. LaMaster, the employee was seen by Dr. Brian Konowalchuk at Essentia Health Occupational Medicine for chronic low back and radiating left leg pain. The employee reported progressively worsening symptoms since the March 2013 injury. Dr. Konowalchuk read the May 23, 2013, MRI scan as showing mild disc desiccation in the lower lumbar spine and an L5-S1 annular tear without evident neural foraminal compromise. On examination, the doctor noted some stiffness in the lumbar spine and mild tenderness in the lumbar paraspinal musculature. Dr. Konowalchuk recommended conservative treatment including a strengthening program and over-the-counter medications. The doctor observed the employee had elected to

move on to new employment, and discussed the employee's limitations in the presence of the QRC so appropriate job search and transition activities could be initiated. Dr. Konowalchuk provided light-duty restrictions of lifting up to 20 pounds with frequent lifting and carrying up to 10 pounds, and referred the employee to the SpineX rehabilitation program.

*3 Participation in the SpineX program commenced on July 19, 2013. The employee reported persistent low back pain, primarily in the left lower lumbar area and left buttock area. He rated lifting, carrying, standing, sitting, bending, and reaching as his most difficult functional activities. The employee returned to Dr. Konowalchuk on August 20, 2013, reporting continued low back discomfort, with some muscle spasming and occasional numbness and pain in the left leg. The doctor assessed chronic low back pain with a possible acute L5-S1 annular tear. The doctor noted the employee was anxious and concerned about his long-term work function and was not motivated towards maintaining the same employment. The employee was continued in the SpineX program, was prescribed a TENS unit, and his light-duty restrictions remained in place.

The employee completed the SpineX program on September 16, 2013. The employee gained strength and his lumbar range of motion improved, but he experienced little change in his pain levels. The therapist noted an ability to lift 30 to 35 pounds without increased pain but that the employee's standing tolerance was still limited by pain to 10 minutes. The employee followed-up with Dr. Konowalchuk on September 23, 2013. The employee's MRI scan was reviewed again. Dr. Konowalchuk noted degenerative changes at L5-S1 and at L4-5 with an annular tear at the L4-5 level as well. The employee's physical examination was ""benign." The employee maintained he could not return to vigorous activity and could not do 8 hours of "that work." The doctor assessed chronic low back pain exacerbated by activity and prolonged sitting and/or heavy work activity. He observed the employee was ready to move forward with closure on his previous job and into a new job, and assigned permanent medium-duty restrictions of lifting up to 50 pounds and frequent lifting and carrying up to 25 pounds. He believed the employee's symptoms had plateaued and were unlikely to significantly change in the immediate or near future, and concluded the employee had reached maximum medical improvement (MMI).

The employee thereafter initiated a search for alternative work on his own. About that same time, the insurer advised the employee that QRC services would not be approved until after an independent medical examination was performed.

The employee was examined by Dr. David Carlson, an orthopedic surgeon, on October 31, 2013, at the request of the employer and insurer. The doctor reviewed the employee's treatment records and medical reports, took a history from the employee, and performed a physical examination. The doctor read the May 23, 2013, MRI scan report and characterized the scan as showing some ""generalized arthritis" with otherwise negative findings. By report dated November 12, 2013, Dr. Carlson opined the employee sustained a lumbosacral musculo-ligamentous strain on March 18, 2013, that resolved by June 4, 2013, upon completion of his first course of physical therapy. The doctor found no objective examination or diagnostic findings of any ongoing problems or conditions related to the work injury. In Dr. Carlson's opinion, the employee's subjective complaints were related to the natural age-related progression of pre-existing degenerative lumbar spine findings noted on the employee's MRI scan. The doctor further opined the employee was capable of working without restrictions or limitations.

*4 On November 8, 2013, the employee returned to Dr. Konowalchuk reporting persistent low back pain. He reported he was doing handyman-type work but could tolerate only about five hours per day. Although the employee expressed frustration with his back pain, the doctor advised continued conservative management.

On about December 19, 2013, the employee received an offer from Home Depot for a part-time quality control/inventory position. The employee began working at Home Depot on January 6, 2014, initially working four hour shifts for 20 hours per week.

On March 10, 2014, the employee returned to Dr. LaMaster stating "we have to figure out how to fix [my] back." (Pet. Ex. A.) The employee stated he was scheduled for 8 hour shifts at Home Depot but could only work five hours. The employee described a muscle in the left low back that got firm and hard and sent shooting pain into the left buttock and thigh along with posterior numbness in the left leg and thigh. The employee was referred to a pain management clinic at Duluth Clinic Spine Program, where he was seen by Dr. Zach Beresford on March 21, 2014. The employee stated his back and left leg symptoms

limited him, and he was able to work only five hour shifts at Home Depot. On examination the doctor noted some tenderness to palpation in the lumbar midline at approximately L5 and over the L5-S1 facet joint, and pain greater on the left with extension and rotation to the right. Dr. Beresford reviewed the May 23, 2013, MRI scan which he read as revealing some mild degenerative changes, most significantly a bit of left-sided L5-S1 disc bulge and an annular tear. The doctor assessed recalcitrant left-sided low back pain with some component of muscle spasm. He believed there was likely some underlying trigger and was most suspicious of the annular tear at L5-S1.

Between April 4 and June 6, 2014, Dr. Beresford provided a series of injections at various lumbar spine levels between L3-4 and L5-S1 with little prolonged relief. The doctor assessed lumbosacral spondylosis and facet joint syndrome, and on June 25, 2014, performed a radiofrequency neurotomy of the left L3 and L4 medial branches and the primary dorsal ramus of L5 in the hopes of more long-term relief.

On November 25, 2014, the employee was seen in the St. Luke's emergency department after being sent home by the employer. The employee was concerned that his left leg was getting progressively weaker and it was affecting his gait. A repeat MRI scan was ordered. The December 3, 2014, lumbar spine scan, performed at St. Luke's CDI Duluth, revealed an annular tear at L4-5 on the left with extrusion and moderate compression on the undersurface of the left L4 nerve root ganglion, and a left-sided disc protrusion at L5-S1 with mild mass effect on the ventral thecal sac, slight elevation of the S1 nerve root, and mild mass effect on the undersurface of the left L5 nerve root ganglion.

On December 8, 2014, the employee was seen by Dr. Marshall Watson at St. Luke's Neurosurgery Associates. The employee stated his primary concern was left-sided low back pain as well as some left leg weakness and numbness, and intermittent pain and tingling in the left leg. Dr. Watson reviewed the December 3, 2014, MRI scan, interpreting it as showing a left-sided annular tear at L4-5 with a disc bulge and some L5 nerve root compression. On examination, there was no spinous process or SI tenderness, but some mildly positive straight leg raising. Dr. Watson's assessment was lumbar disc degeneration, and he suggested a left L4-5 hemilaminectomy and discectomy.

*5 On March 25, 2015, the employee was seen by Dr. Mark Gregerson, an orthopedic surgeon, for an independent medical examination at the request of his attorney. The employee's chief complaints were left-sided low back pain associated with pain and numbness radiating into the left leg. He reported increased back and leg pain with lifting, bending, and twisting activities, or prolonged sitting. Dr. Gregerson reviewed the employee's medical records and reports, including the November 12, 2013, report of Dr. Carlson. The doctor observed that the May 23, 2013, MRI scan report showed mild to moderate disc degenerative change at L1-2, L4-5, and L5-S1, and that notes from Dr. Konowalchuk mentioned an L5-S1 annular tear on the 2013 study. The December 3, 2014, MRI scan report showed an L4-5 annular tear with extrusion and moderate compression on the left L4 nerve root and a left disc protrusion at L5-S1 putting pressure on the left S1 nerve root as well.

Dr. Gregerson's physical examination of the employee revealed notable tenderness to palpation along the spinous process of L5, back and leg pain with flexion to and past knee level, and low back pain with flexion and rotation to the right. Dr. Gregerson diagnosed a left lateral L4-5 disc herniation with neurological impingement matching the employee's clinical symptoms. It was his opinion that the March 18, 2013, work injury was a substantial contributing factor to the employee's current condition and need for treatment. Dr. Gregerson further opined the proposed laminectomy and discectomy surgery was reasonable and necessary. Work restrictions of avoidance of heavy repetitive lifting, bending, and twisting activities were recommended until the employee successfully completed surgery and rehabilitation.

On March 26, 2015, the employee was seen for a repeat independent medical examination by Dr. Carlson. By report dated April 8, 2015, Dr. Carlson again opined the employee's work injury had resolved and was not a substantial contributing factor to his current condition. He observed that when seen by Dr. Konowalchuk on September 23, 2013, the employee's subjective complaints and physical examination were "benign." His range of motion was excellent, he had improved strength tolerance, and had no documented findings of spasm or neurologic deficits. Dr. Carlson additionally stated that, regardless of causation, the treatment the employee had received to date was reasonable and necessary. Given the fact the employee now had radicular findings on examination and objective findings on the MRI scan, all of which in his opinion were new,

he believed that a decompression at L4-5 and possibly at L5-S1 was indicated, but was not related to the work injury.

On June 9, 2014, the employee filed a petition for temporary benefits and the payment of medical expenses. The case was heard by a compensation judge on May 15, 2015. The judge found that (1) the employee unreasonably refused a suitable job offer and denied recommencement of temporary total disability benefits; (2) the employee was entitled to temporary partial disability benefits commencing December 30, 2013, through the date of hearing; (3) the employee was entitled to rehabilitation services; and (4) approval of the proposed surgery was appropriate as reasonable, necessary, and causally related to the employee's work injury.

***6** The employer and insurer appeal from the award of temporary partial disability benefits and the judge's determination that the employee's March 18, 2013 work injury is a substantial contributing cause of the employee's current condition and the need for surgery.

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. Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of 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. Temporary Partial Disability

Temporary partial disability benefits are payable while an employee is working but is earning less than the employee's weekly wage at the time of the injury, and the reduced wage the employee is able to earn in the employee's partially disabled condition is due to the injury. The mere fact the employee is not earning what he earned pre-injury does not automatically establish entitlement to temporary partial disability benefits. Krotzer v. Browning Ferris, 459 N.W.2d 509, 512, 43 W.C.D. 254, 259 (Minn. 1990); see Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976).

When an injured employee who is released to return to work obtains only part-time work, the employee may be eligible for temporary partial disability benefits if he can show that part-time work is all he is able to obtain as a result of his disability. See, e.g., DeNardo v. Divine Redeemer Memorial Hosp., 450 N.W.2d 290, 293, 42 W.C.D. 626, 631-32 (Minn. 1990). In this case, the appellants maintain it was the employee's personal choice to work on a part-time basis at Home Depot, and that his reduction in earnings was not causally related to the March 18, 2013, work injury.

The employer and insurer argue the employee's circumstances in this case are similar to those of the employee in Anderson v. Wherley Moving & Storage, Inc., No. WC10-5091 (W.C.C.A. Oct. 14, 2010). In Anderson, the employee was released to return to full-time light-duty work following his injury. The employee returned to college shortly after the work injury, pursuing a business degree, and admitted he did not look for full-time employment, testifying that because of school he was not able to work a full 40-hour week.

***7** In this case, the employer and insurer assert that no physician has limited the number of hours or days per week the employee can work, and contend the employee provided no objective evidence that it was medically prudent to work less than eight hours a day. The employer and insurer maintain the employee's reasons for working part-time were personal, that is, that a full-time job would not put him in a better financial position and his desire to avoid paying for medical insurance.

Dr. Konowalchuk imposed permanent, medium-duty work restrictions on the employee on September 23, 2013, following completion of the SpineX rehabilitation program. The discharge summary from the program indicated the employee was able to lift 30 to 35 pounds and his standing tolerance was limited by pain to 10 minutes. The employee consistently reported to his treating physicians and to his QRC an inability to work more than five or six hours at a time, and expressed his frustration with his continuing pain and disability. The records indicate, and the employee testified, that he attempted to work up to eight hours on occasion, but had considerable difficulty doing so, and was very limited physically as to what he could do the next day or two afterward.

The extent of an employee's physical restrictions is a question of fact for the compensation judge's determination after considering all of the evidence. Formal restrictions from a physician documenting all of an employee's physical limitations are not required. An employee's testimony alone may constitute sufficient evidence to support a compensation judge's finding that the employee has a disability that restricts or limits his ability to perform work. See, e.g., Brening v. Roto-Press, Inc., 306 Minn. 562, 237 N.W.2d 383, 28 W.C.D. 225 (1975); [1] Middlestead v. Range Reg'l Health Servs., 75 W.C.D. 73 (W.C.C.A. 2015). The compensation judge found credible the employee's testimony that his back condition generally did not allow him to complete more than five hour shifts, and that the employee's limitations were consistent with the present recommendation for surgery. (Mem. at 8.) Assessment of a witness's credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 834-35, 42 W.C.D. 220, 225 (Minn. 1989). This court must give due weight to the opportunity of the compensation judge to judge credibility. It is not the role of the WCCA to make its own evaluation of the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). The record adequately supports the compensation judge's credibility assessment.

The employer and insurer additionally argue the employee admitted that since starting work at Home Depot he has not looked for full-time work and failed to pursue a potential full-time job at Home Depot. The appellants maintain the compensation judge failed to consider the employee's complete lack of job search efforts since beginning work at Home Depot and temporary partial disability benefits should, accordingly, have been denied.

*8 Working less than full-time may or may not be reasonable under the particular facts of a case. In deciding this issue, the compensation judge may consider any relevant evidence on the issue, including the nature of the employee's disability, and the nature and extent of the employee's job search. A reasonable and diligent job search is not a legal prerequisite to an award of temporary partial disability benefits, but is evidence which the compensation judge may consider in determining whether the employee's wage loss is causally related to the work injury. Nolan v. Sidal Realty Co., 53 W.C.D. 388 (W.C.C.A. 1995); see Hawkins v. Univ. of Minn., No. WC07-192 (W.C.C.A. Apr. 22, 2008). The judge accepted the employee's testimony that he is unable to work more than five or six hours a shift due to his low back condition. The employee testified he continued to look for higher-paying employment within his limitations, without the benefit of rehabilitation assistance, after starting work at Home Depot. The QRC testified the Home Depot employment fairly represented the employee's current earning capacity. The lack of a specific finding regarding the employee's job search after beginning work at Home Depot is not, on these facts, a basis for reversal of the compensation judge's award of temporary partial disability benefits. We affirm the judge's award of temporary partial disability benefits.

2. Substantial Contributing Factor

The employer and insurer argue the compensation judge erred in accepting Dr. Gregerson's opinion that the employee's work injury is a substantial contributing factor to the employee's current disability and need for surgery. The appellants maintain that Dr. Gregerson's opinion is in direct conflict with objective medical evidence and the opinions of the employee's treating physicians, as well as the opinion of Dr. Carlson, lacks foundation, and is manifestly contrary to the evidence.

The employer and insurer argue the employee's May 23, 2013, MRI scan showed nothing more than some "generalized arthritis" but otherwise negative findings, as interpreted by Dr. Carlson. The employee had a repeat MRI scan on December 4, 2014, which the appellants contend was significantly different from the previous scan, with new

findings unrelated to the work injury. Dr. Gregerson, they assert, did not offer any explanation regarding the differences between the MRI scans or the cause of the employee's worsened condition.

Dr. Gregerson took a history from the employee, conducted a physical examination, and reviewed the employee's treatment records and MRI reports. He observed that Dr. Konowalchuk's notes mentioned an L5-S1 annular tear on the 2013 study. The employee's medical records reflect that Dr. Konowalchuk assessed chronic low back pain with a possible acute L5-S1 annular tear, with an annular tear at the L4-5 level as well. Dr. Beresford similarly reviewed the May 2013 MRI scan, and concluded there were degenerative changes that included a left-sided annular bulge and annular tear at L5-S1 which he believed might be an underlying trigger of the employee's left-sided low back pain.

*9 An expert medical opinion does not lack foundation because the doctor fails to explain the mechanism of injury or the underlying reasons for his opinion. The presence or absence of such detail goes to the weight a compensation judge may give the opinion. What is required, under the facts of the case when considered as a whole, is a competent medical witness's opinion that the injury causally contributed to the disabling condition. See, e.g., Goss v. Ford Motor Co., 55 W.C.D. 316 (W.C.C.A. 1996).

The compensation judge found Dr. Gregerson's opinion consistent with the medical record and corroborated by the credible testimony of the employee. He further noted that, although Dr. Carlson, the appellant's expert, opined the employee's need for surgery was not causally related to the employee's work injury, the doctor agreed that the proposed surgery was reasonable and necessary treatment. Given the record as a whole, the compensation judge could reasonably conclude that the work injury of March 18, 2013, was a substantial contributing factor in causing or aggravating the employee's low back condition. There is substantial evidence to support the compensation judge's determination and we affirm.

Footnotes

1 In Brening, the supreme court stated, "The employee was familiar with the physical demands of the position. She was also the person most familiar with the severity of her symptoms and the limitations her back placed upon her physical activities. In such a case, her testimony alone is a sufficient basis for the commission's finding of temporary total disability." Brening at 385, 28 W.C.D. at 226.

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