EDWARD F. ALBRECHT, Employee, v. INDEPENDENT SCH. DIST. #622 and LIBERTY MUT. INS. CO., Employer-Insurer, and INDEPENDENT SCH. DIST. #622, SELF-INSURED, ADMIN'D BY BERKLEY ADM'RS, Employer/Appellant, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 18, 1998

HEADNOTES

EQUITABLE APPORTIONMENT - SUBSTANTIAL EVIDENCE. Where the employee was injured in 1983, 1985 and 1988, was able to return to work after the first two injuries and several physicians opined that the employee's disability after the 1988 injury was as a result of the combined effect of these injuries, the compensation judge was supported by substantial evidence in finding that the 1985 and 1988 injuries were only responsible.

CONTRIBUTION - INTENT OF COMPENSATION JUDGE. The compensation judge's order of contribution was intended to apply to all benefits paid, including rehabilitation.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Hefte, J.
Compensation Judge: Janice M. Culnane.

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals the compensation judge's apportionment of liability following the employee's injury on February 4, 1988. The self-insured employer also seeks clarification of the compensation judge's order and amended order with respect to reimbursement for rehabilitation and indemnity benefits paid on behalf of or to the employee following his February 4, 1988 injury. We affirm as modified.

BACKGROUND

The employee, Edward Albrecht, was born on March 25, 1929. (T. 19.) He completed the eighth grade, and had worked as a printer and a general laborer. (T. 19-20.) In 1961, he began working as a part time custodian for Independent School District #622, the employer, and later progressed to full time work as a custodian, engineer, and finally head engineer. (T. 20.)

The employee testified that in September 1983, he sustained an injury to his low back while working for the employer. (T. 22.) At the time of the injury, the employer was

insured for workers' compensation liability by Ideal Mutual Insurance Company. (Id.) Liability for this injury was denied by the employer and insurer. (Self-Insured ER Exs. 5, 6.) The employee stated that he treated for this injury with Dr. James T. Young, an orthopedist at Associated Orthopedic Consultants, and Dr. Thomas G. Briggs, at White Bear Family Practice. (T. 22-23; see Lib. Mut. Exs. 7, office note of 10/24/83, and 4, office note of 10/6/83.)

On January 17, 1985, the employee sustained a second injury to his low back while moving snow at the employer. (T. 23; Findings & Order of 10/15/97, stip. 1.) At that time, the employer was insured for workers' compensation liability by Liberty Mutual Insurance Company (Liberty). As a result of this injury, the employee was unable to work from January 22, 1985 to April 20, 1985. During this period, the employee again treated with Drs. Young and Briggs. (See Lib. Mut. Exs. 4, 7.) The employer and insurer admitted liability and paid wage loss benefits and for a 3.25% whole body permanency rating. (T. 23-24; Self-Insured ER Ex. 5, notice of discontinuance dated 8/28/85.)

On October 15, 1985, the employee sustained an additional admitted injury to his low back and right shoulder when he fell into a pit. (T. 25; Findings & Order of 10/15/97, stip. 1.) At that time, the employer continued to be covered for workers' compensation liability by Liberty. As a result of the injury, the employee was paid temporary total disability (TTD) benefits from October 16, 1985 to October 7, 1986. (T. 26; see Self-Insured ER Ex. 7, notice of benefit payment filed 2/16/95.) During this period, the employee treated with Dr. Young, attended physical therapy, was evaluated by the Pilling Pain Clinic and was treated at the Institute for Low Back Care. (T. 26-27; see Lib. Mut. Exs. 5, 7, 9; Self-Insured ER Ex. 9, office notes of 5/15/86, 8/27/86.) The employee also received the assistance of a QRC to facilitate his return to work at the employer. (See Lib. Mut. Ex. 8, letters dated 6/12/86 and 2/27/87.) In a letter dated October 23, 1986, Dr. Young issued a 14% whole body permanency rating related to the employee's low back. (Lib. Mut. Ex. 7, letter dated 10/23/86.)

In June 1987, the employee and Liberty entered into a stipulation for settlement, closing out the employee's claims for TTD, temporary partial disability (TPD), and permanent partial disability (PPD) to the extent of 14% arising out of his injury of October 15, 1985. (Lib. Mut. Ex. 1; Judgment Roll: award on stip. filed 6/17/87.)

On February 4, 1988, the employee sustained another injury to his low back when he slipped and fell on ice while at work. (T. 29; Findings & Order of 10/15/97, stip. 2, findings 6, 7.) At the time of this injury, the employer was self-insured for workers' compensation liability. (Findings and Order of 10/15/97, stip. 2, finding 6.) The employee has been unable to return to work since this injury. (T. 29-30.) The self-insured employer admitted liability and paid TTD benefits from February 8, 1988 to February 1, 1995. (Judgment Roll: Interim Status Report filed 3/18/96; see Self-Insured ER Ex. 1.) The employee treated with Dr. Briggs and was referred to Dr. Young for a second opinion. (Lib. Mut. Ex. 4, office notes of 2/8 and 2/17/88; Self-Insured ER Ex. 9, office note of 2/22/88.) In April 1988, the employee was again assigned a QRC and subsequently performed an unsuccessful job search. (T. 30-31; see Lib. Mut. Ex. 8,

Rehabilitation Plan filed 8/29/88; Judgment Roll: Notice of Rehabilitation Plan Completion filed 7/16/90.)

In a letter dated September 23, 1988, Dr. Young indicated that the employee's injury of February 1988 was a temporary exacerbation of chronic low back degenerative joint disease. He stated that the employee's restrictions were lifting no more than 30 to 40 pounds and Athe usual restrictions of bending, lifting and stooping on a multiple repetitive basis. (Self-Insured ER Ex. 3.)

In early 1989, the employee began treating with Dr. Briggs for symptoms of depression in addition to his low back pain. (Lib. Mut. Ex. 4.) In January 1990, the employee consulted with Dr. John Patrick Cronin, a psychologist, upon a referral by Dr. Briggs. (Liberty Mut. Ex. 6, Dr. Cronin letters of 6/8/90 and 1/28/92.)[1]

On June 12, 1992, the employee filed a claim petition, amended on August 31, 1992, seeking reimbursement of medication and medical mileage expenses. (Judgment Roll: claim petitions filed 6/12/92 and 8/31/92.) The amended claim petition listed 1) 10/15/85 2) 2/24/88 as the dates of injury. (Judgment Roll: claim petition filed 8/31/92) On December 7, 1994, the employee filed another claim petition, adding a claim for permanent total disability benefits from December 1, 1994 and continuing. (Judgment Roll: claim petition filed 12/7/94.) In January 1995, the employer, its insurer Liberty Mutual, and the employee entered into a stipulation for settlement, closing out the employee's claims for reimbursement of depression-related medical expenses related to his October 15, 1985 work injury. (Lib. Mut. Ex. 1, stip. for settlement dated 1/9/95 and award on stip. served and filed 1/23/95.)

The employee was examined by Dr. David W. Boxall on April 27, 1995, at the request of the self-insured employer. With respect to causation, Dr. Boxall stated that the September 1983 incident was the first significant event; the incident of January 1985 was a temporary aggravation of his preexisting condition; the incident of October 1985 was a permanent aggravation of his preexisting condition; and the incident of February 4, 1988 was a temporary aggravation. He apportioned 75% of the employee's disability to the September 1983 injury and 25% to the October 1985 injury. (Self-Insured ER Ex. 2.) Based on Dr. Young's September 23, 1988 and Dr. Boxall's April 27, 1995 reports, the self-insured employer filed a petition for contribution and/or reimbursement against Liberty Mutual on July 3, 1995. (Judgment Roll.)

On July 6, 1995, the employee was examined by Dr. John A. Dowdle, at the request of Liberty Mutual. Dr. Dowdle apportioned the employee's disability as follows: 50% to the employee's underlying preexisting disc disease, 12.5% to the 1983 injury, 12.5% to the 1985 injury, and 25% to the 1988 injury.[2] (Lib. Mut. Ex. 3.) The employee subsequently amended

[1] The employee apparently treated intermittently with Dr. Cronin until April 1996. (See Self-Insured ER Ex. 8, pp. 6-8.)

[2] Dr. Dowdle mentioned the October 1985 but not the January 1985 injury in his report.

his claim petition to reflect injury dates of 1) 9/1983; 2) 10/15/85; 3) 2/24/88; 4) 2/4/89 [sic]. (Judgment Roll: amended claim petition filed 2/16/96.)[3]

On July 31, 1997, the matter came on for hearing before Compensation Judge Janice M. Culnane at the Office of Administrative Hearings. The parties stipulated that the employee was permanently and totally disabled. (Findings & Order of 10/15/97, stip. 3.) At issue was the date that the employee became permanently and totally disabled and the level of contribution that should be attributed to each of the injuries. The compensation judge determined that there was insufficient evidence to support a claim for a February 4, 1989 injury. (Findings & Order of 10/15/97, unappealed finding 9.) She concluded that the employee was permanently and totally disabled as of February 4, 1988, and allocated 50% liability to the October 1985 injury, when the employer was insured by Liberty Mutual, and 50% to the February 4, 1988 injury, when the employer was self-insured. (Findings & Order of 10/15/97, findings 8, 11, 12.) She accordingly ordered Liberty Mutual to reimburse the self-insured employer for 50% of permanent total disability benefits paid to the employee. (Findings & Order of 10/15/97, order 1.) In an amended findings and order, the compensation judge ordered reimbursement of 50% of the permanent total disability and medical benefits paid to the employee, plus statutory interest. (Amended Findings & Order of 11/14/97.) The self-insured employer appeals the compensation judge's determinations with respect to apportionment of liability as it relates to the February 4, 1988 injury and seeks clarification of the extent of its entitlement to reimbursement from Liberty Mutual.

STANDARD OF REVIEW

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

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The compensation judge concluded that Dr. Dowdle addressed only the October 1985 injury when referring to the 1985 injury. (See Findings & Order of 10/15/97, memo at p. 6.)

[3] At the hearing below, the employee withdrew his claim for compensation for the 1983 injury. (T. 10.)

are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

DECISION

Apportionment of Liability

The compensation judge determined that the employee sustained a permanent injury on February 4, 1988, and became permanently and totally disabled on that date. (Findings & Order of 10/15/97, findings 8, 11.) She concluded that the employee's permanent disability was a result of the combined effects of his October 15, 1985 and February 4, 1988 injuries. (Findings and Order of 10/15/97, finding 11.) She apportioned the employee's permanent total disability equally between the two injuries, based on her determination that

> although he was not functioning at his full capacity, he was able to keep his job until the February 4, 1988 slip and fall. This slip and fall was sufficiently significant that when combined with the effects of his injury of October 15, 1985, resulted in permanent and total disability from that day forward.

(Findings & Order of 10/15/97, finding 12, memo at p. 7.)

The self-insured employer appeals, arguing that the compensation judge's determinations were clearly erroneous and not supported by substantial evidence. The self-insured employer argues that the February 4, 1988 injury was temporary in nature and asserts entitlement to 100% reimbursement for all benefits paid after the effects of this injury subsided. In support of its position, the self-insured employer points out that the employee's treating physician, Dr. Young, and its medical expert, Dr. Boxall, opined that the February 1988 injury was a temporary aggravation of the employee's underlying degenerative condition. (Self-Insured ER brief, pp. 8-9.) In the alternative, the self-insured employer asserts that it is liable for Aat most 25% of the benefits based on the report of Liberty Mutual's expert, Dr. Dowdle. (Self-Insured ER brief, p. 10.)

Equitable apportionment is not to be based on any precise formula but on all the facts and circumstances of the case. Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 200, 226 N.W.2d 888, 891, 27 W.C.D. 797, 800 (1975). Factors to be considered in determining equitable apportionment include the nature and severity of the initial injury, the employee's symptoms following the initial injury and up to the occurrence of the second injury, and the nature and severity of the second injury. Id. Where the record might support any number of equitable apportionment determinations, the Worker's Compensation Court of Appeals will not substitute its judgment for the compensation judge's. See Giem v. Robert Giem Trucking, 46 W.C.D. 409, 418 (W.C.C.A. 1992)

In this case, a significant factor was the employee's ability to work before the February 4, 1988 injury and his complete inability to work at all after that injury. Even with vocational rehabilitation assistance after the February 4, 1988 injury, the employee was unable to secure employment as a result of his restrictions. The employee testified that the February 4, 1988 slip and fall was Athe straw that broke the camel's back. (T. 42.) The employee also stated that as of the date of the hearing, he had Anot totally recovered from the February 4, 1988 injury. (T. 43.) Based on this testimony and the employee's inability to work after February 4, 1988, it was not unreasonable for the compensation judge to apportion 50% liability to the October 1985 injury and 50% to the February 1988 injury. As such, her determinations are affirmed.

Benefits Subject to Reimbursement

In her original findings and order, the compensation judge ordered Liberty Mutual to reimburse the self-insured employer Afor a 50 percent apportioned liability for permanent total disability benefits paid to this employee. (Findings & Order of 10/15/97, order 1.) Following a request by the self-insured employer for clarification of the order, the compensation judge amended her findings and order to indicate that the apportionment determination was to apply to past and ongoing liability for permanent total disability and medical benefits paid to the employee. (Amended Findings & Order of 11/14/97, order 1.) In its appeal, the self-insured employer again seeks clarification of the scope of the order for reimbursement.

The self-insured employer argues that the compensation judge should have applied the apportionment determination to all the benefits paid by the self-insured employer related to the February 4, 1988 injury, including rehabilitation and indemnity benefits as claimed in its petition for contribution. The self-insured employer points out that the indemnity payments made were in the form of TTD rather than PTD benefits and contends that all indemnity benefits paid should be recharacterized as permanent total payments. It is also seeking clarification of reimbursement for vocational rehabilitation benefits paid, plus interest.

At oral argument, Liberty Mutual agreed that the 50/50 split related to all temporary total disability and medical benefits paid by the self-insured employer from and after February 4, 1988. Liberty Mutual also had no objection to the imposition of interest back to February 4, 1988. However, Liberty Mutual did not agree to the 50/50 allocation of vocational rehabilitation expenses paid by the self-insured employer and requested a remand on that issue. We disagree.

The compensation judge should have specifically mentioned the rehabilitation expenses in her order as it is clear that the issue was before her. We believe, however, that her failure to mention these expenses was an oversight and that she intended to apply the principles of equitable apportionment to these expenses. She stated that apportionment should apply to all of the benefits paid by the self-insured employer as set forth in the self-insured employer's Exhibit 1. (See Amended Findings & Order of 11/14/97, memo at p. 2.) Exhibit 1 contained charges for rehabilitation services provided to the employee. Liberty Mutual's argument concerning the rehabilitation expenses does not contest their reasonableness. They suggest that some of these

expenses were not causally related to its covered injuries. They acknowledged that the rehabilitation expense issue was before the compensation judge below and that they provided no evidence and made no specific arguments to the compensation judge with respect to allocation of these expenses. Because the insurer had ample opportunity to defend against the rehabilitation expenses listed in Exhibit 1 and the compensation judge's apportionment determination appears to be comprehensive, there is no need to remand for further deliberations by the compensation judge. We conclude that the self-insured employer is entitled to reimbursement of 50% of vocational rehabilitation expenses related to the February 4, 1988 injury (as contained in the self-insured employer's Exhibit 1) plus interest.