OLGA BILOTTA, Employee, v. PIZZA HUT and KEMPER NAT'L INS. CO., Employer-Insurer/Appellants, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 17, 1998

HEADNOTES

PERMANENT PARTIAL DISABILITY - SCHEDULES. Minn. Stat. § 176.105, subd. (1)(c) (1993), a codification of the decision in Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990) is not applicable where objective medical evidence of the employee's injuries meets the requirements of the disability schedules found in the Minnesota Rules. The compensation judge's permanent partial disability rating per Weber is modified to the specific rating set forth in the Minnesota Rules, Disability Schedules.

PERMANENT PARTIAL DISABILITY - SCHEDULES. Certain permanent partial disability ratings under the disability schedules modified where there is a lack of substantial evidence to support a permanent partial disability rating under the disability schedules.

PERMANENT PARTIAL DISABILITY - APPORTIONMENT. Where the evidence indicates that employee sustained injuries in 1983, 1988 and 1990 to her spine or back causally related to a specific permanency rating for these injuries; and the employee, as a result of a 1995 work injury sustained injuries to different specific levels of the employee's spine with separate PPD ratings, substantial evidence supports a denial of apportionment of the employee's permanent partial disability.

MEDICAL TREATMENT AND EXPENSE - REASONABLE AND NECESSARY. Substantial evidence supports an award of medical expenses of the employee's treating doctor as rendered in connection with the treatment, supervision or management of the employee's claimed compensable injuries where one part of the employee's claimed work injuries was denied in the findings.

PRACTICE AND PROCEDURE. Where the employee did not appeal, under Minn. R. 9800.0900, she cannot raise issues for the first time in her appeal brief and such issues will not be considered by this court in this appeal.

Affirmed in part, vacated in part, and modified in part.

Determined by Hefte, J., Wilson, J., and Johnson, J.
Compensation Judge: Rolf G. Hagen

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal from the compensation judge's Findings and Order that the employee sustained a combined[1] 76.85 percent permanent partial disability rating with benefits to be paid by the employer and insurer; that the employee's permanent partial disability is not subject to apportionment; and that the employee is entitled to an award of certain medical benefits. We affirm in part, vacate in part, and modify in part.

BACKGROUND

Olga Bilotta, employee, age 71, claims various workers' compensation benefits as the result of two injuries she sustained in the course and scope of her employment as a preparation cook for Pizza Hut, employer. First, as a result of her continuing work activities for the employer, the employee claimed right and left carpal tunnel syndrome culminating in disability on or about February 14, 1994. The employee underwent right carpal tunnel surgery on June 6, 1994. There are no disputed issues in this matter as to the employee's right carpal tunnel syndrome.[2] The employee sustained a second injury to her cervical and lumbar spine on August 1, 1995 when she fell at work. This incident apparently occurred when the employee picked up a 15 pound box of cheese in a walk-in refrigerator and while exiting, her right foot caught behind a rack on the floor and she fell forward landing on her left side.

Prior to the employee's August 1, 1995 work injury, the employee sustained injuries to her back in 1983, 1988 and 1990. From these injuries, permanent partial disability ratings were made of the spine by the employee's doctors which were disputed by the parties and eventually resolved by way of two stipulations, one in 1986 and one in 1993. These permanent partial disability ratings only referred to the back or spine and did not refer to any specific part or area of the employee's spine, such as the cervical, lumbar or vertebral part of the spine.

Dr. Karen Ryan was the employee's treating physician in the present matter having treated the employee for her February 14, 1994 and her August 1, 1995 work injuries. At the hearing in this matter, it was stipulated by the parties that the employee was permanently and

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[1] In this case the employee's percentages of disability to the whole body consisted of impairment ratings under more than one disability category and therefore the ratings were combined to one rating as set forth in Minn. R. 5223.0300, subp. 3E.

[2] At the hearing in this matter, the parties stipulated that the employee sustained a work injury to her right upper extremity in the nature of a carpal tunnel syndrome. In his findings and order, the compensation judge found that the employee failed to prove that she sustained a work-related left carpal tunnel syndrome. This finding was not appealed.

totally disabled effective August 1, 1995. A cervical MRI was performed of the employee on November 30, 1995, and the radiologist concluded:

> Multilevel degenerative disc disease of the cervical spine with chronic broad-based degenerative posterior bulging of the C5-6 and C6-7 disc annuli with moderate central spinal stenosis and severe bilateral lateral stenosis at the C5-6 level, moderate to moderately severe left-sided lateral spinal stenosis at the C6-7 level and mild bilateral lateral stenosis at the C4-5 level.

(Ex. E.) Dr. Ryan referred the employee to a neurosurgeon, Dr. Fox, who, on June 28, 1996 performed a C5-C7 decompression laminectomy and bilateral foraminotomies at C5-6 and C6-7. (Ex. H.) Following this surgery, the employee did not do well and another MRI was performed on February 19, 1997. This MRI was interpreted as focal alteration of signal within the cervical cord at C5 nerve, likely resulting in myelomalacia secondary to prior cord compression. (Ex. E.) Dr. Ryan reported on her examinations following the employee's cervical surgery that the employee had continuing symptoms of recurrent cervical myelopathy with neck flexion postures, L'hermitte's phenomena and residual C6-7 sensory and motor changes with persistent weakness with bilateral hand findings. She also reported the employee had problems of spasticity requiring medication and altered motor control and function in her hands, which were evident by objective neurological findings of positive Babinski responses and objectively documented on a nine hole peg test.

Dr. Ryan concluded that as a result of her 1995 work injuries, the employee, subsequent to her surgery, sustained permanent injuries to her cervical spinal cord affecting not only her central, but also her peripheral nervous system. She also felt the employee sustained musculoskeletal personal injuries affecting her cervical and her lumbar spine. Therefore, Dr. Ryan concluded that the employee had permanent partial disability of the whole body to more than one disability category, resulting in an 84.2 percent combined permanent disability rating. Prior to the hearing herein, the employer and insurer had an independent medical examination (IME) performed by Dr. Westreich.

After the hearing on this matter, the compensation judge found that the employee sustained a 76.85 percent combined permanent partial disability rating as a result of her August 1995 work injury. This total rating consisted of a 58 percent permanent partial disability rating for impairment to the employee's central nervous system disability; a 14.44 percent permanency rating for her peripheral nervous system, and a 2 percent rating for neurogenic constipation. This results in a 64.77 combined spinal cord rating applying the combination of categories formula. The compensation judge also, under the formula, gave a 34.3 percent permanent partial disability rating for the employee's total combined musculoskeletal spine. The compensation judge awarded a total 76.85 permanent partial disability rating for the employee's combined impairment ratings of the employee's central nervous system and musculoskeletal disabilities. The compensation judge denied the employer and insurer's request to apportion the employee's post 1995 permanent partial disability ratings in this matter with her pre-1995 injuries and disability;

and ordered the employer and insurer to pay for certain unpaid medical bills having found them to be reasonable and necessary to cure and relieve the employee from the effects of her work injuries. The employer and insurer appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1996). Substantial evidence supports the findings if, in the context of the entire record, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Permanent Partial Disability, Apportionment

The compensation judge determined that the employee was entitled to a 58 percent permanent partial disability rating for the work-related injury to the employee's central nervous system. This permanent partial disability (PPD) rating for the central nervous system is based on Minn. R. 5223.0360, subp. 6A, which states:

> Central Nervous System. Subpart 6. Spinal cord. To rate under this subpart, determine the impairment to the central nervous system, peripheral nervous system . . . as provided in items A through G. These ratings obtained are then combined for the final rating as described in part 5223.0300, subp. 3, item E.[3]

[3] Subpart 3, item E provides that if an impairment must be rated under more than one category, the ratings must be combined using the formula set forth in Minn. Stat. § 176.105,

> A. Central nervous system ataxia,[4] movement disorder, tremor, or spasticity as provided in [Minn. R. 5223.0360] subpart 7, item E;

Subpart 6A (spinal cord), set forth above, refers to Minn. R. 5223.0360, subp. 7, item E, which states:

> E. Ataxia, movement disorder including tremor, or spasticity:
>
> (1) In the upper extremity:
>
> (a) performance on the nine hole peg test better, that is, faster than the tenth percentile of the age -- sex specific normative value in both arms, zero percent;
>
> (b) performance on the nine hole peg test worse, that is, slower, than the tenth percentile of the age -- sex specific normative value in one arm, ten percent;
>
> (c) performance on the nine hole peg test, worse, that is, slower, than the tenth percentile of the age -- sex specific normative value in both arms, 40 percent;
>
> (d) requires some assistance with activities of daily living as defined in part 5223.0310, subp. 5, 75 percent;
>
> (e) unable to perform activities of daily living, 95 percent;

The nine hole peg test (40 percent PPD): Rule 5223.0360, subp. E(2), defines the performance requirement, in seconds, depending upon the sex and age of an injured person, to complete the nine hole peg test. Part (2)(k)(ii) applies to the employee, at age 71, as follows:

> (2) The tenth percentile of age--sex specific normative value, in seconds, of the nine hole peg test is:
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> (K) at 70-74 years of age:

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subd. 4(c).

[4] Ataxia is defined as failure of muscular coordination; irregularity of muscular action. Dorland's Medical Dictionary, Twenty-sixth Edition, p. 132 (1989).

ii. for a female: right hand -- 23.7:
left hand -- 25.5.

Minn. R. 5223.0360, subp. 7E(1)(d), 75 percent PPD (see above) refers to the activities of daily living in part 5223.0310, Definitions, subp. 5, which states:

> Subpart 5. Activities of daily living. Activities of daily living means the ability to perform all of the following:
>
> A. Self cares: urinating, defecating, brushing teeth, combing hair, bathing, dressing one's self and eating;
>
> B. Communication: writing, seeing, hearing, and speaking;
>
> C. Normal living postures: sitting, lying down, and standing;
>
> D. Ambulation: walking and climbing stairs;
>
> E. Travel: driving and riding;
>
> F. Non specialized hand functions: grasping and tacital discrimination;
>
> G. Sexual function: participating in usual sexual activities;
>
> H. Sleep: ability to have restful sleep patterns; and
>
> I. Social and recreational activities: ability to participate in group activities.

There is no dispute that the employee suffers from ataxia, movement disorder, tremor or spasticity. The issue here is whether the 58 percent PPD rating of the employee's central nervous system is proper under the circumstances. The compensation judge adopted Dr. Ryan's conclusions from her April 14, 1997 medical report, wherein she opined that the employee was entitled to a 58 percent PPD rating of her central nervous system. In explaining her PPD rating, Dr. Ryan concluded that the employee satisfied all the requirements for a 40 percent rating (spinal cord, central nervous system ataxia disability). Minn. R. 5223.0360, subp. 6A and subp. 7E(1)(c) and (2)(k)(ii). This rating was based upon the employee's performance on the nine hole peg test. In the actual test the employee was slower than the tenth percentile for her age and sex (right hand, the employee took 50 seconds which is slower than

23.7 seconds; left hand, the employee took 32 seconds which is slower than 25.5 seconds). Thus, the employee qualified for a 40 percent spinal cord permanent partial disability rating. Id. There is no dispute by the parties that the employee is qualified for this 40 percent permanent partial disability rating under the specific disability schedule noted above. The compensation judge in her memorandum also agreed that the employee is entitled to this specific 40 percent disability rating.

Dr. Ryan further, after reviewing the disability schedule for the employee's central nervous system ataxia, concluded that when applying the requirements for the next higher rating, a 75% permanent partial disability rating, the employee did not meet the requirements for this PPD rating. Minn. R. 5223.0360, subp. 6A and subp. 7E(1)(d), with 5223.0310, subp. 5. The reasoning given was that the employee was not sufficiently limited in her ability to perform the activities of daily living to qualify for the 75% PPD rating. The parties and the compensation judge do not dispute the conclusion that the employee is not entitled to this 75 percent PPD rating. However, because the employee does have a few limitations in her ability to perform the activities of daily living,[5] Dr. Ryan stated she assigned her [employee] a rating between the specific 40 percent PPD rating and the specific 75 percent PPD rating and determined that the employee should be rated at 58 percent for her permanent disability of her upper extremities, and central nervous system, ataxia. As shown in the specific central nervous system, ataxia, ratings, Minn. R. 5223.0360, subp. E(1)(a through e), upper extremity, the PPD numerical disability ratings are, depending upon the results of the nine hole peg test and the daily living activities test, zero percent, ten percent, 40 percent, 75 percent and 95 percent. There is no specific PPD rating in item E for a 58 percent disability rating. The 58 percent rating falls between the 40 and 75 percent ratings, approximately splitting the difference. Dr. Ryan refers to her PPD rating as a Weber[6] rating.

The compensation judge adopted Dr. Ryan's Adesignated@ Weber rating of 58 percent disability for the employee's central nervous system upper extremity injury, stating:

> In determining 58 percent permanent partial disability attributable to the central nervous system, this compensation judge agrees with Dr. Ryan in the application of a Weber rating. Minn. R. 5223.0360, subp. 6 refers one to subpart 7.E.(1)(c)(d). Permanency is awarded on a finding of ataxia, movement disorder, including tremor or spasticity. These findings are found in the medical records and under (c) the employee would be entitled to 40 percent permanent partial disability as a result of her performance on the nine hole peg test. However, under (d) the employee would be entitled to a 75 percent finding that the employee required some assistance with

[5] Dr. Ryan noted that the employee only needed some assistance in cutting food, putting on jewelry, writing, and has some intermittent impairment of sleep.

[6] Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

> activities of daily living. Dr. Ryan has correctly opined that where, as here, (c) (d) are not accurate that a Weber rating (consisting of a hybrid of the two) is appropriate. Clearly the employee is entitled to a minimum of 40 percent under (c), but not entitled to a full 75 percent under (d). (Emphasis added.)

(Memo. p. 9.)

The compensation judge plainly indicates that the employee qualifies for the 40 percent PPD rating under Minn. R. 5223.0360, subp. 7E(1)(c). There is no dispute that the employee is not entitled the 75 percent rating under (d). The compensation judge therefore concluded in her memo that a hybrid splitting of the difference to arrive at 58 percent is appropriate under the circumstances.

The employer and insurer argue that the compensation judge has misapplied the Weber decision in finding a non-scheduled PPD rating of a 58 percent rating for the employee's central nervous system, ataxia, disability because a departure from disability schedules is not permitted where detailed, specific ratings are provided in the schedules for the body part in question. We agree.

A finding of permanent partial disability is one of ultimate fact for the compensation judge. However, the assignment of a permanent partial disability rating to a particular disability is not an arbitrary decision in each case. Minnesota statutes and case law require that a compensation judge base an award of permanent partial disability benefits on objective medical evidence which meets the requirements of the disability schedules found in the Minnesota Rules. See, Minn. Stat. § 176.021, subd. 3; Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 41 W.C.D. 42 (Minn. 1988); Minn. R. 5223.0010 et seq.

While the permanent partial disability schedules are intended to promote consistency and objectivity in the rating of a permanent partial disability, the statute and the case law recognized that the schedules do not cover every possible rateable disability. In regard to those disabilities not discussed in the schedules, the Minnesota Legislature in Minn. Stat. § 176.105, subd. (1)(c) (1993) stated: If an injury for which there is objective medical evidence is not rated in the permanent partial disability schedule, the unrated injury must be assigned and compensated for at the rating for the most similar condition that is rated. (Emphasis added.) This statute is a codification of the Minnesota Supreme Court decision in Weber, supra. A Weber rating is not intended to be used in cases where the injuries to a particular part of the body are provided for in detail in the schedules or where the employee's claim for an increased rating is based on significant subjective complaints of pain with no objective findings. In order to award a permanent partial disability rating under any section of the schedules, all of the requirements of that section must be met.

In this case, the permanency schedules provide specific ratings for the employee's claimed central nervous system disability. Dr. Ryan and the compensation judge acknowledge that the permanent partial disability schedules provide for a permanency rating of 40 percent for

the injury to the employee's central nervous system; and, on the other hand, they also acknowledge that the employee's condition does not satisfy the requirements of the category for the higher 75 percent rating. This is not a situation where there is objective medical evidence that is not rated in the disability schedules. As the employee does not meet the requirements for the higher rating of 75 percent, therefore the lower disability rating of 40 percent is the employee's applicable permanent partial disability rating. We therefore vacate that part of the compensation judge's findings and order giving the employee a 58 percent permanent partial disability rating for her central nervous system disability and modify the findings and order to state that the employee is entitled to a 40 percent permanent partial disability rating for this impairment.

The compensation judge awarded a 27 percent cumulative rating under Minn. R. 5223.0370, subp. 4E, for radicular pain or paresthesia attributable to the employee's cervical spine injury. Part 0370, subpart 4E, states:

> Subp. 4. Radicular syndromes.
>
> E. Radicular pain or paresthesia, with or without cervical pain syndrome, and with objective radicular findings, that is, reflex changes or EMG abnormality or nerve root specific muscle weakness in the upper extremity or myelopathic findings on examination and myelographic, CT scan, or MRI scan evidence of spinal stenosis, as defined in part 5223.0310, subp. 47, that impinges on a cervical nerve root or spinal cord and medical imaging findings correlate with the findings on neurological examination, 10 percent with the addition of as many of subparts one to four apply, but each may be used only once:
>
> (1) If chronic radicular pain or paresthesia or myelopathic symptoms persist despite treatment, add 3 percent;
>
> (2) If a surgery other than a fusion performed as part of the treatment, add 5 percent, if surgery included in fusion, the rating is as provided in subpart 5;
>
> (3) For additional surgery other than a fusion regardless of the number of additional surgeries, add 3 percent if the additional surgery included a fusion, the rating is as provided in subpart 5;
>
> (4) Additional concurrent lesion on contralateral side at same level or at either side at other level which meets all the criteria of this item, or item D, add 9 percent.

A review of the medical records of Dr. Ryan, as well as the independent medical examination of Dr. Westreich, identifies the necessary objective radicular findings for a permanent partial disability of 10 percent under subp. E. (Id.) The compensation judge also added and found the employee is entitled, under Item E(1), to an additional 3 percent; an additional 5 percent under part (2), and an additional 9 percent under part (4). This totals the 27 percent permanent partial disability awarded under subp. 4 above. There is substantial evidence in the record to support the 10% rating, plus additional ratings of 3 and 5 percent under subpart E (1) and (2). The employee had chronic radicular pain despite treatment and had additional surgery including a fusion. As to subp. E(4), there is a lack of substantial evidence to support the requirement that the employee had an additional current lesion on contralateral side at the same level, or an opinion that such lesion exists, to support the 9 percent award under Item E(4). We therefore vacate the 27 percent rating of the compensation judge in his findings and order and modify the rating to reflect to a total of 18 percent PPD under Minn. R. 5223.0370, subp. 4E for the employee's disability to her cervical spine.

Substantial evidence supports the compensation judge's rating of 2 percent for neurologic constipation requiring medication. Medical records of the employee following her work injury disclosed that the employee continuously complained of constipation which Dr. Ryan treated with medication. Dr. Ryan concluded this condition was caused by the employee's neurological problems which were related to the employee's work injury. Substantial evidence supports the 2 percent permanent partial disability rating. See Minn. R. 5223.0360, subp. 6E, and 5223.0590, subp. 4A(2), which basically provide: Anus, signs of organic anal disorder are present, and there is anatomic loss or alteration and anal symptoms are mild, intermittent, and controlled by treatment. We affirm this 2 percent PPD rating.

The employer and insurer claim there is no basis for the award of a 10 percent permanent partial disability rating for the employee's lumbar pain syndrome. Minn. R. 5223.0390, subp. 3C(2).[7] They argue that this current disability is attributable to a pre-existing low back disability of the employee which was as a result of the employee's back injuries of 1983, 1988 and 1990. In 1991 and 1992, the employee was rated by her medical providers to have a permanent partial disability and the ratings only referred to her disability as occurring in her back or spine. These matters were settled and there is evidence, including medical evidence, that after

[7] This rule states:

Subp. 3. Lumbar pain syndrome.

> C. Symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, but no radiographic abnormality, 3.5 percent.
>
> (2) multiple vertebral levels, ten percent.

the employee recovered from her 1983, 1988 and 1990 injuries, she worked full-time without any disability until she was injured at work in 1995. It was only after the employee's injury of August 1, 1995 that the employee became, as was agreed by the parties herein, permanently totally disabled. Following her August 1, 1995 injury, the employee filed a claim petition in which the issues were: whether her 1995 injury was temporary or permanent; whether certain medical treatment was reasonably required treatment; and for continuing temporary total disability. A review of the December 23, 1996 findings and order in this matter indicates that the parties stipulated that the employee sustained an injury to her cervical spine in 1983 and injuries to her low back in 1988 and 1990. In Finding 2 the compensation judge found in his Findings and Order served and filed December 23, 1996, that:

> The preponderance of the credible evidence supports a finding that for more than two years prior to August 1, 1995, the employee's pre-existing cervical and lumbar spine conditions were asymptomatic or, at most, mildly symptomatic, but not disabling.

This finding was appealed, however was not argued, and not considered in this court's prior decision. See Bilotta v. Pizza Hut, No. *[redacted to remove social security number]* (W.C.C.A. Dec. 23, 1996).

As to the employee's pre-existing injuries, Dr. Lawrence Miller, a chiropractor, in 1991 identified the employee's back problem as a lumbar sprain/strain, particularly at L5-S1 level. In 1992, Dr. Paul Wicklund reported the employee's diagnosis after her 1988 and 1990 injuries was lumbar osteoarthritis and that she [employee] would qualify for an overall rating of 7% of the whole body based on the section 5223.0070, subpart 1A(3)(a) [Musculoskeletal Schedule; Back, Lumbar Spine, healed sprain, strain or contusion, single vertebral level] due to the narrowing at L5-S1 . . . And, following the employee's 1995 injury, her treating doctor, Dr. Ryan, concluded that the employee's 1995 work injury resulted in a 10 percent permanent partial disability to the lumbar spine. This disability rating was per Minn. R. 5223.0390, subp. 3C(2), which states: lumbar pain syndrome, symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings . . . (2) multiple vertebral levels, ten percent. A part of Dr. Ryan's records, an MRI report of the employee's lumbar spine taken on October 30, 1995 concluded that at the L1-2 level the employee showed a disc herniation with impingement on the left L1 nerve root; at level L2-3 a left sided disc herniation produced mild impingement on the left L2 nerve root; at L3-4 there is a bulging of the disc producing moderate central spinal stenosis; at the L4-5 level, there is a right sided disc herniation, producing moderate impingement on the right L5; and at the L5-S1 level there is posterior bulging of the disc annulus which did not produce any nerve root compression. The compensation judge was not unreasonable in concluding that the employee sustained a separate or different injury in 1995 to her low back, in the nature of a lumbar pain syndrome to the employee's multiple vertebral levels L1 through L4-5. The evidence reasonably indicates that the post 1995 injury did not involve the L5-S1 area of the employee's low back. It appears that the employee, at the time of her August 1995 work injury was apparently not disabled by her pre-existing back sprain type injuries. The compensation judge could reasonably conclude that the employee's multilevel lumbar injuries in

1995 were distinct and were not causally related to her back or spinal injuries that pre-existed August 1, 1995. Substantial evidence supports a 10% permanent partial disability rating by the compensation judge for the employee's current lumbar pain syndrome and we affirm.[8]

Under the circumstances of this case, substantial evidence supports the compensation judge's denial of apportionment of the employee's permanent partial disability ratings. Minn. Stat. § 176.101, subd. 4a. The employee's pre-existing injuries and disabilities were not clearly evidenced and were basically separate and discrete injuries from the injuries and disabilities she sustained from her 1995 work injury. In 1983 the employee sustained a sprain type injury to her cervical spine; as a result of her 1995 work injury the employee sustained a severe cervical injury to her spinal cord in the C5-7 area of her spine. The employee's 1988 and 1990 lumbar spine injuries were diagnosed as a sprain/strain injury mainly at the L5-S1 level. As a result of her 1995 work injury, the employee sustained injuries and disabilities to different lumbar vertebral levels: the employee had a diagnosis of herniated disc type injuries to her lumbar spine at the L1-2, L2-3, L3-4 and L4-5 levels. The evidence reasonably supports the conclusion that the employee was given a PPD rating in the 1991 and 1992 reports of her medical providers, which rating was causally related to the employee's pre-1990 injuries. And, the evidence indicates that the employee's August 1, 1995 work injury caused her present PPD disability ratings. The employee settled her claims for permanent partial disability benefits caused by her injuries sustained in 1983, 1988 and 1990 to her back. The employee now makes claim in this matter for separate specific injuries and permanency disability ratings of her lumbar and cervical spine as a result of her 1995 injury. Under these facts, statutory or equitable apportionment is not applicable. See Fleener v. CBM Indus., 564 N.W.2d 215, 56 W.C.D. 495 (Minn. 1997).

The employer and insurer also argue that the stipulation for settlement between the parties, dated June 2, 1986, closed out all claims for permanency to the employee's cervical and lumbar spine to the extent of 15%. Therefore the employee's claims for permanency benefits from her 1995 injury should be denied. However the 1986 stipulation only states that [p]ermanent partial disability shall be closed out to the extent of 15 percent to the back. (Emphasis added.) The back injuries were noted in 1986 to be strain/sprain type injuries. The closing out of 15 percent to the back in the stipulation, as well as the medical reports, only refer to the employee's back or spine. This reference in 1986 is too broad to affect or close out the employee's claim for future injuries and her present claims from her specific injuries and disabilities to her lumbar spine and cervical spine and spinal cord from her 1995 work injury. The employer and insurer cannot, in this case, purport to, in her 1986 settlement compromise or settle the employee's present separate claims for injuries from her August 1995 work injury that were not in existence and not a subject of dispute between the parties in 1986. See Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 41 (Minn. 1986).

[8] The PPD ratings, as modified in this opinion, shall be combined and re-computed under Minn. R. 5223.0300, subp. 3E.

We affirm the award of permanent partial disability benefits, as modified; and we affirm the compensation judge's denial of apportionment.

Medical Expenses

The employer and insurer claim the compensation judge erred in awarding the employee payment of the medical expenses of Dr. Ryan for her treatment of the employee's left upper extremity on September 18, October 2 and November 4, 1996. Although it was agreed that the employee had sustained a work-related carpal tunnel injury to her right upper extremity, the compensation judge found that the employee failed to prove a left carpal tunnel condition attributable to her work.[9] Dr. Ryan's medical records for the dates in question indicate that she treated the employee for basically for all her claimed work injuries and there was one total bill for each day. There is lack of showing of any billing amounts which were for the left carpal tunnel treatment only. Dr. Ryan's treatment of the employee on the dates in controversy can reasonably be found to have been rendered in connection with her treatment, supervision or management of the employee's claimed work injuries. The reasonableness and necessity of medical treatment under Minn. Stat. § 176.135 is a question of fact for the compensation judge. The compensation judge noted in her memorandum that Dr. Ryan continued to treat the employee (including upper left extremity) over a fairly long period of time without an ultimate diagnosis of the employee's condition and [before] cause for same was determined. Substantial evidence supports the compensation judge's finding that the expenses for the medical treatment of Dr. Ryan, which was objected to, were reasonably required to cure and relieve the employee from the effects of her work injury. We affirm the compensation judge.

Claims of Employee

The employee did not appeal or cross-appeal in this matter. The employee raises the issue and argues, for the first time in her appeal brief, that the PPD benefits awarded should be paid to her in a lump sum form rather than on a weekly basis as determined by the compensation judge in Order 3 of his March 23, 1998 Findings and Order. The employee also raises for the first time in her appeal brief, a challenge to the compensation judge's overall permanency rating of 76.85 percent, claiming that the total rating should be 84.2 percent, as set forth in her claim petition. Without any appeal by the employee, we cannot consider the issues raised in the employee's brief. See Minn. R. 9800.0900.

[9] This finding was not appealed.