DOUGLAS L. FOIX, Employee/Appellant, v. ITASCA NURSING HOME and LUMBERMEN'S UNDERWRITING ALL., Employer-Insurer/Cross-Appellants, and ITASCA NURSING HOME and AM. COMP. INS./RTW, INC., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 4, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - WEBER RATING. Where the record contained insufficient information to allow the compensation judge to make a reasoned decision as to permanent partial disability, pursuant to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990), the compensation judge did not err in denying the employee's claim for permanent partial disability benefits, despite a doctor's opinion assigning ratings.

INTERVENORS; PRACTICE & PROCEDURE - REMAND. Where the intervenor filed a motion to intervene after the hearing, the compensation judge closed the record the day after the motion was filed, and the insurer asserted that some of the intervention claims had been paid and some were related to a condition for which the insurer was not liable, the matter would be remanded for reconsideration.

COSTS & DISBURSEMENTS. Where the employee had not yet filed a petition for costs by the time of the compensation judge's decision, so that what cost items were at issue was not ascertainable, and where the employee prevailed on few if any claims against one of the two insurers in the matter, it was premature for the compensation judge to allocate liability for the employee's reasonable costs and disbursements on a 50/50 basis between the two insurers.

Affirmed in part, reversed in part, vacated in part, and remanded.

Determined by Wilson, J., Pederson, J., and Rykken, J.
Compensation Judge: Gregory A. Bonovetz

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of permanent partial disability benefits. The employer and Lumbermen's Underwriting Alliance appeal from the compensation judge's award of reimbursement to Blue Cross and Blue Shield of Minnesota and from the judge's order as to liability for costs. We affirm in part, reverse in part, vacate in part, and remand the matter for further proceedings.

BACKGROUND

The employee began working as a nursing assistant for Itasca Nursing Home [the employer] in 1984. He began experiencing pain in one or both shoulders in about 1988, and on April 29, 1991, and May 21, 1991, he sustained specific work-related injuries to his right shoulder. MRI scans of each shoulder were taken on July 18, 1991. The radiologist's conclusion as to the employee's left shoulder was "mild impingement upon the supra-spinatous tendon by the acromion and AC joint without significant tendinitis"; mild subdeltoid bursitis; and "tendinitis involving the subscapularis tendon with a possible partial thickness tear." As to the employee's right shoulder, the radiologist noted "mild impingement upon the supraspinatous muscle by acromion and acromioclavicular joint without significant supraspinatous tendinitis or bursitis" and "severe tendinitis involving the subscapularis tendon with full-thickness tear of a portion of the supraspinatous tendon near its attachment to the humerus."

About a month after the MRI scans were performed, on August 26, 1991, the employee underwent right shoulder surgery, an arthrotomy with a partial acromionectomy and resection of the cortical acromial ligament. Following the surgery, the employee was off work entirely until about mid December of 1991 and then returned to essentially unrestricted duty in February of 1992. The employer and its insurer at the time, Lumbermen's Underwriting Alliance [Lumbermen's], apparently accepted liability for the employee's right shoulder condition and paid various wage loss and medical expense benefits.

On February 27, 1992, the employee's surgeon, Dr. Franklin Budd, issued a report indicating that maximum medical improvement [MMI] was anticipated on March 1, 1992. Dr. Budd also indicated that the employee's final diagnosis was "impingement syndrome - tendinitis both shoulders," and he wrote, "I feel [the employee] does have permanent partial disability - but there is no category for his problem!!"

The employee apparently continued to experience shoulder symptoms after his surgery but sought no additional medical care for about five years. Then, beginning in the spring of 1997, he sustained several more work-related injuries. The first of these, a left shoulder injury, occurred on May 20, 1997; the second, a right arm and shoulder injury, occurred on July 3, 1997; and the third, a right and left shoulder injury, occurred on April 5, 1998.[1] The employer was insured for workers' compensation purposes by American Compensation Insurance [American] on these dates of injury.

The employee filed a claim petition alleging entitlement to various benefits from the employer and the two insurers, as a result of various claimed shoulder injuries, and the matter proceeded to hearing before a compensation judge on December 22, 1998. Among other things, the employee claimed entitlement to temporary partial disability benefits, to payment for proposed

[1] These injuries were disputed at the hearing before the compensation judge but are undisputed on appeal.

left shoulder surgery, and to permanent partial disability benefits in accordance with the opinion of Dr. Duane Person, who indicated that the employee had a 6% whole body impairment relative to his right shoulder and a 3% whole body impairment relative to his left shoulder. Another issue was whether the employee had sustained a specific injury to his left shoulder in 1991, when Lumbermen's was on the risk. Evidence included the employee's medical records, the report and deposition testimony of Dr. Person, and reports from Drs. Larry Stern and Paul Yellin, the employer and insurers' independent examiners. At the commencement of the hearing, the employee's attorney informed the judge that Blue Cross and Blue Shield of Minnesota [Blue Cross] intended to intervene to recover medical expenses paid for the employee's shoulder treatment. About a week after the hearing, on December 29, 1998, Blue Cross served and filed its intervention motion, seeking reimbursement for medical expenses paid beginning in 1991.

In a decision issued on February 25, 1999, the compensation judge joined Blue Cross as a party to the proceedings, and he concluded in part that the employee was entitled to temporary partial disability benefits from American, as claimed, that the employee had no permanent partial disability to either shoulder, that Blue Cross was entitled to reimbursement on its intervention claim from Lumbermen's and from American, and that the employee was entitled to reasonable costs and disbursements, to be paid by Lumbermen's and American on a 50/50 basis. The compensation judge also determined that the first specific injury to the employee's left shoulder occurred in 1997, when American was on the risk. The employee and Lumbermen's 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." Min421, subd. 1 (1992). 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.

DECISION

Permanent Partial Disability

According to Dr. Person, the employee has chronic impingement syndrome with

tendinitis, bursitis, and a tear of the rotator cuff of the right shoulder, and chronic impingement syndrome with tendinitis and bursitis of the left shoulder. Dr. Person further indicated that the employee did have "permanent disability" as a result of his shoulder conditions but that his conditions were not "specifically listed" in the permanent partial disability rules. Accordingly, Dr. Person explained that he would "have to use a Weber equivalent,"[2] and, after citing Minn. R. 5223.0110, subp. 5, he indicated that the employee had a 6% whole body impairment due to his right shoulder condition. Similarly, after citing Minn. R. 5223.0450, the "more current" guideline, and again referring to Weber, the doctor assigned a 3% whole body rating for the employee's left shoulder condition. At his deposition, Dr. Person testified that he could better explain his ratings if he could refer to the permanency schedules, but no copy of the schedules was available at the time.

Drs. Yellin and Stern also examined the employee and prepared reports concerning the employee's diagnosis and permanent partial disability, among other issues. Dr. Yellin concluded that the employee was suffering from bilateral shoulder impingement syndrome, he stated that "no rotator cuff tear was noted" "[a]t the time of [the employee's] surgery," and he found "no ratable permanency" relating to any of the employee's work injuries. Dr. Stern diagnosed "[l]ong-standing history of bilateral subacromial impingement and bursitis, right side status post acromioplasty, and probable left and right shoulder mild rotator cuff tendinitis," and he reported that the employee had no permanent partial disability "as a result of the injuries of May 20, 1997, or July 3, 1997." All three physicians, Drs. Person, Stern, and Yellin, found normal range of motion in both of the employee's shoulders.

The employee claimed entitlement to benefits in accordance with the ratings issued by Dr. Person. The compensation judge denied the claims, finding as follows:

> 24. As a result of the work-related shoulder injuries, particularly those suffered in the late 1990's the employee suffers from chronic impingement syndrome with tendinitis and bursitis of the right shoulder and of the left shoulder.
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> 25. In spite of the chronic conditions afflicting the employee's left and right shoulders and although the employee continues to experience pain and discomfort in both shoulders, the employee continues to exhibit full range of motion of both shoulders.
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> 26. Although experiencing pain and discomfort in both

[2] Evidently referring to Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990). Weber suggests that compensation judges should assign unscheduled permanent impairments to the closest rating category in the permanency schedules. See also Minn. Stat. § 176.105, subd. 1(c).

> shoulders and although exhibiting an ongoing degenerative process in both shoulders, as of the date of hearing the employee has sustained 0% permanent partial disability of the right shoulder and 0% permanent partial disability of the left shoulder.

In his memorandum, the compensation judge explained that, applying "the actual physical findings to the permanent partial disability schedules, both pre and post July 1, 1993," the employee's shoulder conditions did not fall within any of the rating categories, meaning that the employee had a 0% impairment under the schedules as written.

On appeal, the employee essentially concedes that his shoulder conditions do not fall within the applicable permanency schedules. He argues, however, that the judge erred in rejecting Dr. Person's 3% and 6% ratings under Weber. This is a difficult issue. The employee did, after all, have surgery on his right shoulder, and all physicians seem to agree that the employee has a permanent bilateral shoulder condition. However, under the particular circumstances of this case, we cannot conclude that the compensation judge erred in denying the employee's claims.

In his memorandum, the compensation judge explained his Weber analysis as follows:

> [T]he Court looked to Dr. Person's deposition of December 15, 1998 for his explanation as to how he arrived at the specific 6% and 3% ratings. Unfortunately no questions were raised and no answers given by Dr. Person at his deposition as to this topic. Nowhere in either his medical report or his rather extensive deposition is Dr. Person asked to explain how he arrived at his rating nor does Dr. Person at any point volunteer an explanation. The closest he comes in his deposition of December 15, 1998 surrounds his attempt to apportion permanent partial disability for the right shoulder. Referring to the different permanent partial disability rules applicable to the 1991 injuries as opposed to the 1997 injuries Dr. Person alludes in passing to specific ratings for shoulder procedures and on more than one occasion intimates that a clearer answer might be forthcoming if he had access to "a workmen's compensation guideline book." Attorney Balmer indicated he did not bring his permanent partial disability schedule along and apparently neither of the defense attorneys had the schedules available.
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> Since the employee has the burden of proving by a preponderance of the evidence that he in fact did sustain a permanent loss of function as a result of one or more of the work injuries, since a fair reading of the various diagnoses and MRI's reveal no shoulder

> conditions which fit within the permanent partial disability schedules and since Dr. Person did not provide an explanation as to how he may have arrived at his 6% and 3% ratings the Court must find that, as did Dr. Stern and Dr. Yellin, the employee has sustained no permanent partial disability to either shoulder.

We would also note that there is no subpart 5 in Minn. R. 5223.0110, contrary to Dr. Person's reference in his report, and that none of the described conditions in the other subparts of the rule have any obvious similarity to the employee's diagnosed right shoulder condition. Moreover, Minn. R. 5223.0450, the rule referenced by Dr. Person with regard to the employee's left shoulder condition, has numerous and detailed rating categories but again none with any obvious bearing on the employee's left shoulder condition.[3] This is especially true given that all physicians have indicated that the employee has full range of motion in both shoulders.

For many medical conditions, a compensation judge may easily determine the appropriate permanent partial disability rating by comparing the findings in the employee's medical records with the conditions described in the schedules, even in the absence of any medical opinion as to the extent of an employee's permanent partial disability. Choosing an appropriate Weber rating without medical explanation is more difficult but may still be accomplished if the employee's condition bears some ascertainable resemblance to some category in the schedules. In the present case, however, the evidence was wholly insufficient to allow the compensation judge to determine whether the ratings given by Dr. Person were reasonable, on what specific categories Dr. Person was relying, or whether the employee's conditions bear any resemblance at all to any of the impairments described in any of the schedules. This was not, as the employee contends, a simple "disagreement about the particular rating"; this was a case in which the evidence was inadequate to allow a reasoned determination by the judge.

A finding of permanent partial disability is one of ultimate fact. See Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1977). Therefore, while the compensation judge could perhaps have accepted Dr. Person's ratings without further explanation, he was not required to do so, and, given the state of the record, we cannot conclude that the judge erred in denying the employee's claims.

Blue Cross - Intervention Claim

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[3] Minn. R. 5223.0450, subp. 3A(1), provides for a 6% rating for a rotator cuff tear, a condition diagnosed by Dr. Person relative to the employee's right shoulder, but Dr. Person did not cite this rule when discussing the employee's right shoulder. More importantly, Dr. Yellin indicated that the employee did not have any rotator cuff tear on the right as none was found during surgery, and the compensation judge's description of the nature of the employee's condition does not include a rotator cuff tear. Therefore, we must assume that the compensation judge was not persuaded that the employee had a rotator cuff tear. Given Dr. Yellin's report, substantial evidence supports the compensation judge's apparent conclusion in this regard.

At the hearing, the employee's attorney indicated that Blue Cross had paid some medical expense bills to the Duluth Clinic, in the amount of $1,567.50, adding that "those would be bills just for the last year." When Blue Cross filed its motion to intervene, the total claim was for $3,873.40, including pharmacy and medical bills, together with interest, extending back to 1991. The compensation judge granted the motion to intervene and ordered each of the insurers to pay part of the charges, with Lumbermen's to reimburse Blue Cross for medical expenses paid to providers in 1991 and American to pay for the costs of care provided in the latter part of the 1990s. On appeal, Lumbermen's contends that the judge's award against it improperly includes costs for medical care provided for the employee's left shoulder, for which it is not responsible, and further includes some bills for which Lumbermen's has already reimbursed Blue Cross.

We see no evidence that either insurer responded to Blue Cross's motion to intervene. However, according to the compensation judge's decision, the record in the matter was closed on December 30, 1998, the day after the intervention motion was filed. Moreover, Lumbermen's never admitted liability for any left shoulder condition, and the compensation judge made no finding of liability, on Lumbermen's part, for a left shoulder injury of any kind. Finally, it is not the intent of the statute to allow an intervenor to recoup double payment. Therefore, while Lumbermen's should have responded to the intervention motion in a timely fashion, we vacate the judge's award to the intervenor and remand the matter for further proceedings to establish what payments by Lumbermen's to Blue Cross are properly due.

Costs

The compensation judge awarded the employee "his reasonable costs and disbursements," 50% of which were to be paid by each insurer. On appeal, Lumbermen's argues that the judge erred by imposing 50% liability for costs on Lumbermen's when the employee did not prevail against Lumbermen's on any issue. We vacate the judge's 50/50 allocation of liability. The employee had not yet filed a petition for costs by the time of the compensation judge's award. Given the lack of any information as to what costs were at issue, it was, at the very least, premature for the judge to determine how liability for those costs should be allocated. The judge should reconsider the issue when the employee files his petition. See also Bauer v. Imperial Custom Molding, slip op. (W.C.C.A. Aug. 4, 1998); Hodgin v. Ford Motor Co., 341 N.W.2d 567, 36 W.C.D. 423 (Minn. 1983); Minn. Stat. § 176.511, subd. 2.