PAMELA MACDONALD, Employee/Appellant, v. INDEP. SCH. DIST. #624, SELF-INSURED, Employer/Cross-Appellant, and SUMMIT/LANDMARK ORTHOPEDICS and ST. CROIX ORTHOPAEDICS, Intervenors, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 17, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where the parties agreed to withdraw the issue of permanent total disability, the issue was not properly before the compensation judge; therefore the finding regarding permanent total disability must be vacated.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee's low back condition was not causally related to her work injury.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's findings establishing the employee's permanent partial disability rating at 26.5% for her right lower extremity, ankle and foot.

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. The compensation judge erred by apportioning part of the employee's permanent partial disability rating for a pre-existing condition where the condition was not "clearly evidenced" in a pre-existing medical record.

SETTLEMENTS - INTERPRETATION. Stipulation in the record regarding future credit modified to reflect parties' intention at time of stipulation.

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

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: William R. Johnson

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's denial of her claimed low back injury, and also appeals from the compensation judge's determination of the level of permanent partial disability sustained by the employee. The employer and insurer cross-appeal from the findings concerning the nature and level of the permanent partial disability to the employee's right lower extremity and also cross-appeal from the judge's statement of the stipulated

facts relative to a future credit for benefits already paid by the employer and insurer. Both parties appeal from and request vacation of the judge's finding concerning permanent total disability status, arguing that this portion of the claim was withdrawn prior to the hearing. We affirm in part, vacate in part, reverse in part and modify in part.

BACKGROUND

On September 16, 1991, Pamela MacDonald (employee) sustained an injury to her right ankle which arose out of and in the course of her employment at Independent School District #624 (employer). On that date, the employer was self-insured for its workers' compensation liability, with Berkley Administrators serving as third-party administrator. The employee earned an average weekly wage of $416.00 on the date of her injury.

Following her injury, the employee underwent surgeries to her right foot and ankle. She was paid temporary partial and temporary total disability benefits for various periods of time. The employee was served with notice of maximum medical improvement on October 23, 1997; temporary total disability benefits were discontinued 90 days thereafter in January 1998. No ongoing benefits were being paid at the time of the hearing, and no weekly benefits were at issue at the time of hearing.

In 1996, the employee developed low back pain. She claims that her low back condition occurred as a result of a consequential injury to her right ankle injury. The employee testified that since her original injury of September 16, 1991, she has been unable to walk on a normal basis. Since that injury, she has limped for a period of time, and utilized crutches post-surgery. Although her treating physician had diagnosed a special orthotic device to compensate for her right leg height discrepancy, she was unable to obtain those orthotics because the insurer denied payment for the same. (T. 40-41.)

Prior to her injury on September 16, 1991, the employee had worked as a custodian for the employer for approximately six years. She worked full-time, 40 hours per week and generally worked on her feet for the duration of her daily work shift. (T. 23-24.) The employee also played sports and walked nearly every day. (T. 25.) Prior to her injury on September 16, 1991, the employee had been advised that she was flat footed. She wore inserts in her shoes for support and experienced occasional foot pain after being on her feet for several hours. The employee had experienced this type of intermittent foot pain since childhood, and testified that the pain was worse in her right foot than her left. (T. 54, 56; Er. Ex. 7.) The sole pre-injury medical report in the record which relates to any pre-1991 treatment to the employee's feet is a chart note written by Dr. Cyril Kapsner, Group Health, dated December 11, 1990, listing an assessment of "flat feet with some foot pain, especially after prolonged standing or walking." (Er. Ex. 7.) That chart note was written in conjunction with a general physical examination conducted by Dr. Kapsner.

On September 16, 1991, while working as a custodian, the employee twisted her right ankle as she walked down a flight of stairs at work. She grabbed the stair handrail and did

not fall to the ground. She was able to work for approximately two more hours after this incident. (T. 51-52.) The employee sought medical treatment the following day, September 17, and was seen by Dr. Philip Weber of Group Health. An x-ray of her right ankle taken that day was normal, and Dr. Weber diagnosed the employee with a right ankle sprain. (Er. Ex. 7.)

The employee received follow-up orthopedic treatment from Dr. John Larkin. On October 31, 1991, the employee had an MRI scan taken of her right ankle, which was interpreted to show a congenital defect in her right ankle. (Ee. Exs. E and F.) She was diagnosed with a tarsal coalition, a congenital defect which pre-existed her September 1991 injury. Tarsal coalition is an abnormal bony connection between the calcaneus and the talus, the heel bone and an adjoining bone. Problems associated with this condition include pain in the foot and arch and pain while walking on uneven surfaces. (Er. Ex. 1, Dr. Wicklund Depo. at 12.)

On November 21, 1991, the employee underwent surgery of her right ankle, in the nature of an arthroscopic debridement and synovectomy of the right ankle joint. According to Dr. John Larkin's report dated December 2, 1991, the employee was reported to be doing "exceedingly well." (Er. Ex. E.) The employee's ankle symptoms persisted including decreased range of motion and swelling of the ankle. Dr. Larkin referred the employee to Dr. Donald Campbell, an orthopedic surgeon at Mayo Clinic, for a second opinion and further treatment. Dr. Campbell first examined the employee on June 22, 1992. He confirmed the congenital condition apparent in both feet, and also confirmed that the September 1991 injury caused her ongoing symptoms and current condition. Dr. Campbell recommended a proper orthosis combined with a medial buttress and a walking or athletic-type shoe. He also determined that "it may be necessary to consider surgery which would probably require triple arthrodesis." (Ee. Ex. C.)

Dr. Campbell continued to provide follow-up treatment to the employee for her right ankle injury. Due to continued ankle pain, Dr. Larkin performed a right ankle fusion on September 2, 1994. On May 16, 1995, Dr. Larkin performed a second fusion surgery to the employee's right ankle, required due to the failure of her 1994 fusion surgery. On March 21, 1996, the employee underwent additional surgery to remove a bone spur impinging on her right ankle joint. Dr. Campbell performed this surgery.

In early 1997, Dr. Campbell referred the employee to Dr. Paul Schanfield, neurologist, to address the employee's low back pain and radiation of pain down into her right leg. The employee reported to Dr. Schanfield that the onset of her low back pain began in January 1996, and that she had limped ever since her 1991 ankle injury which aggravated her back pain. The neurological examination by Dr. Schanfield, including an EMG of the right leg, indicated active denervation and neurogenic changes in the L5 and S1 nerve roots. An MRI of the lumbar spine taken on February 27, 1997, indicated a broad based central and right-sided bulge at the L4-5 level, and a central disc protrusion at the L4-5 level. For further evaluation of the employee's back condition, Dr. Schanfield referred the employee to Dr. John Dowdle in May 1997.

Dr. Dowdle first examined the employee on June 17, 1997. On that date, the

employee reported pain in her lower back and left leg, with no specific inciting event. Dr. Dowdle diagnosed mechanical low back pain, degenerative disc disease at three levels, and sacroiliac joint inflammation on the left side. In his chart note on June 17, 1997, Dr. Dowdle stated that "[a]ssuming the [employee's] history is correct, the current problem is not a work-related injury." (Er. Ex. 8.) He recommended an SI joint injection on the left, and arranged for a follow-up appointment in one week. According to a chart note prepared by Dr. Dowdle dated December 12, 1997, he stated that "it is my opinion that the ankle injury has nothing to do with the degenerative condition of her back." (Er. Ex. 9.)

At the request of the employer and insurer, the employee underwent an independent medical examination with Dr. Paul Wicklund on September 16, 1997. In his report dated September 16, 1997, Dr. Wicklund outlined his opinions concerning causation of the employee's low back injury and level of permanent partial disability sustained to her right ankle. In Dr. Wicklund's opinion, the employee's degenerative condition in her lumbar spine was not caused nor substantially aggravated by her original right ankle injury on September 16, 1991, and he believed that she sustained no consequential low back injury which started in December 1996. At his deposition, Dr. Wicklund assigned a 15 percent permanent partial disability to the body as a whole, as a result of the employee's ankle fusion surgery and resulting limited range of motion. However, Dr. Wicklund testified there was no causal relationship between the employee's September 16, 1991 injury and the four surgeries she subsequently underwent. (Er. Ex. 1, 13, 15-17.)

The employee continued to experience low back symptoms. On February 12, 1998, the employee underwent an MRI of the lumbar spine. That scan noted degenerative changes at three levels, with an annular tear and bulge at the L4-5 level, and an annular bulge at the L5-S1 level. Dr. Campbell opined that the employee's foot and ankle injury of September 16, 1991 represented a substantial contributing cause to her low back condition. Dr. Campbell stated, in a report dated February 24, 1999, that "[i]t is extremely common for people who must use crutches or favor one foot or lower extremity for a long period of time to have low back problems." Dr. Campbell also assigned a higher permanency rating to the employee's ankle condition than the one assigned by Dr. Wicklund. Dr. Campbell assigned a total permanency rating of 34 percent permanent partial disability to the body as a whole, based upon the employee's ankle joint fusion, subtalar fusion, and loss of motion in the mid part of the foot, associated with severe pain with weight bearing.

Following a hearing on October 22, 1998, the compensation judge determined that the employee has sustained an overall 26.5 percent permanent partial disability to the body as a whole, relative to the employee's right lower extremity, ankle and foot, but apportioned 7.5 percent of the employee's permanency to the employee's pre-existing medical condition. The compensation judge also determined that the employee's low back problems were not caused nor even substantially aggravated by the employee's work-related ankle injury. The compensation judge determined that the employee failed to prove that she was permanently and totally disabled from September 16, 1991 as a result of her injury on that date. The employee appeals and the employer and insurer cross-appeal from the Findings and Order.

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 (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 Total Disability Claim

At the beginning of the hearing, the parties advised the compensation judge that the employee had withdrawn her claim for permanent total disability benefits. In the Findings and Order, the compensation judge stated that one of the issues to be determined was whether the employee was permanently and totally disabled from September 16, 1991, to the present as a result of the admitted ankle sprain and the claimed low back injury. The compensation judge then found that the employee had failed to prove by a preponderance of the credible evidence that she was permanently and totally disabled from September 16, 1991, to the present and continuing as allowed by statute. (Finding No. 8.) Since the employee withdrew her claim for permanent total disability benefits, that issue was not properly before the compensation judge, and we vacate Finding No. 8 concerning the employee's permanent total disability status.

Low Back Injury - Causation

The compensation judge determined that the employee failed to prove by a preponderance of the credible evidence that her low back problems arose out of and in the course of her employment. In so doing, the compensation judge adopted the opinions of Dr. John Dowdle and Dr. Paul Wicklund who both concluded that the employee's claimed low back problems stem from degenerative changes that the employee experienced as a result of her age and physical condition. In Dr. Wicklund's opinion, the employee's degenerative problems in her lumbar spine developed over a period of years and were not caused, nor substantially aggravated, by any incident that happened on September 16, 1991. However, at his deposition, Dr. Wicklund admitted that if an individual has a permanent limp due to unequal length of the legs, that discrepancy in leg length can affect the low back, and potentially could cause a consequential

injury to the low back. (Wicklund Depo. p. 56.)

Dr. John Dowdle, who initially examined the employee on June 17, 1997, also noted that the employee has multi-level degenerative problems in her lumbar spine and some sacroiliac joint inflammation on the left, but emphatically stated on the cover of the employee's medical chart that "it is my opinion that the ankle injury has nothing to do with the degenerative condition of [the employee's] back." (Er. Ex. 2.)

The employee relies upon the medical opinion of Dr. Donald Campbell, the orthopedic surgeon who treated the employee for her right foot and ankle injury. In his report dated February 24, 1998, Dr. Campbell stated that the employee's foot and ankle conditions were a substantial contributing cause to the employee's low back condition. In his deposition, Dr. Campbell stated that he "certainly reserve[s] the role of having some opinion with regard to the interaction of her lower extremity problems to her back." However, he deferred the specific diagnosis of the employee's condition to a physician who has examined the employee's low back and has an expertise in treatment of the lumbar spine, such as Dr. Dowdle. (Er. Ex. A, pp. 33, 37-38.)

The employee testified as to the gradual onset of her low back symptoms, which she noted to be aggravated by her limp. The employee also relies on the opinion of Dr. Paul Schanfield, who conducted a neurological examination of the employee on February 7, 1997, including an EMG of the employee's right leg. Dr. Schanfield noted in his letter of March 13, 1997, that:

> [The employee] does have the right ankle problems chronically and fusion, and limp from that is probably causing her back to deteriorate quicker [sic] than normal and is probably directly related, therefore, to her workers' compensation injury to the ankle that occurred in September 1991. (Ee. Ex. D.)

Even though a medical opinion does not have to express absolute certainty, the employee must still sustain his or her burden of proving causal relationship by a preponderance of the evidence. See Schopf v. Red Owl Stores, Inc., 323 N.W.2d 801, 803, 35 W.C.D. 216, 220 (Minn. 1982). The compensation judge found that the employee failed to prove by a preponderance of the credible evidence that her low back problems arose out of and in the course of her employment. (Finding No. 4.) "Where more than one inference may reasonably be drawn from the evidence, the compensation judge's findings shall be upheld." Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 371 (Minn. 1985). We also note that it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Id. at 342, 37 W.C.D. at 372. The compensation judge could reasonably rely on the opinions expressed by Dr. Paul Wicklund and Dr. John Dowdle. We therefore affirm the compensation judge's determination that the employee sustained no consequential injury to her low back as a result of her work-related injury to her right foot and ankle on September 16, 1991.

Permanent Partial Disability Claim

The compensation judge determined that the employee sustained an overall 26.5 percent permanent partial disability of the body as a whole of the body as a whole, with such rating reducible by the statutory formula set out in Minn. Stat. § 176.105, subd.4(c). The employee claims she sustained 34 percent permanent partial disability of the body as a whole, based upon ratings assigned by Dr. Campbell, with such rating reducible pursuant to the statutory formula. The employer asserts that the employee sustained no permanent partial disability which was causally related to the employee's September 16, 1991 injury. Whereas the employer earlier paid periodic economic recovery compensation to the employee based upon a 12 percent whole body impairment rating, the employer now asserts that such payments were based upon mistake of fact.

As trier of fact, a compensation judge is responsible for determining the degree of disability after considering all evidence and relevant legal factors in a case. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983); see Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Accordingly, medical testimony is considered helpful but not dispositive on the issue of disability. Id.; see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 640 (Minn. 1989) (determination of degree of permanency rests with compensation judge not member of medical profession). Minn. R. 5223.0010, subp. 2 requires a rating to be "the category most closely representing the [employee's] condition." A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987).

We find that substantial evidence exists to support the compensation judge's determination of the overall rating of 26.5 percent permanent partial disability to the body as a whole, but reverse the compensation judge's apportionment of permanent partial disability, thereby awarding permanency benefits to the employee based upon the 26.5 percent permanency rating.

The compensation judge relied on Dr. Campbell's opinions in assessing the level of the employee's permanency. Dr. Campbell arrived at his total permanency rating of 34 percent permanent partial disability to the body as a whole by assigning separate ratings relative to the employee's right lower extremity, ankle and foot. We have addressed each of those ratings separately.

Dr. Campbell assigned a rating of 4.5% permanent partial disability of the body as a whole, pursuant to Minn. Rules 5223.0170, Subp. 2(B), based upon the shortness of the employee's right extremity. In his report of September 25, 1998, Dr. Campbell states that the employee has a "limb length discrepancy due to her injury and subsequent treatments" (which in this case were surgeries to her right foot and ankle). (Ee's Ex. A) The rule cites to a "surgical or traumatic shortening of lower extremity; 4.5% applies to a shortening in the range of 3/4 inch to 1-1/4 inches. Dr. Wicklund did not address whether the employee's shortened right extremity

resulted in any permanent partial disability. Substantial evidence supports the judge's determination of this permanency rating; accordingly, we affirm the judge's assignment of this 4.5 percent permanency rating.

Dr. Campbell also determined that the employee qualifies for a rating of 12% permanent partial disability of the body as a whole, pursuant to Minn. Rules 5223.0170, Subp. 7A(3) due to her ankle fusion surgery, fusion or ankylosis of the tibia and talus.[1] Dr. Campbell also assigned 7.5 percent permanent partial disability of the body as a whole, pursuant to Minn. R. 5223.0170, subp. 7A(2) due to her subtalar arthrodesis. By contrast, Dr. Wicklund assigned a rating of 15 percent permanent partial disability of the body as a whole, pursuant to Minn. R. 5223.0170, subp. 7A(1)(a). This rating reflects a pantalar arthrodesis, a total ankylosis (fusion) of the employee's ankle and foot, and is a rating which Dr. Wicklund determined accounted for both the employee's fusion surgery and the congenital and post-surgery condition of her foot and ankle. (Er. Ex. 1, p. 19.)

Dr. Campbell disagreed with Dr. Wicklund's assignment of permanency and testified that the appropriate permanency rating for the employee's fusion surgery and ankle condition is found in Minn. R. 5223.0170, subp. 7. Dr. Campbell testified:

> Now, there is not a single category which actually describes Ms. McDonald. The first category refers to pantalar arthrodesis. The term pantalar implies all of the talus. The talus bone has three joints. One is the ankle joint, above. One is the subtalar joint below. And the next one is the talar navicular joint, which is in the front of the ankle joint. Ms. McDonald does not have an arthrodesis of the talar navicular joint. So, she does not have a pantalar arthrodesis and that is an inappropriate category.
>
> So, we must next go to Item (2), under ankylosis of the foot. It states, "Subtalar or triple arthrodesis." She does not have a triple arthrodesis, but she does have a subtalar arthrodesis. This qualifies for 7.5 percent impairment or disability rating.
>
> The ankle joint is described in Section (3), "ankylosis of tibia and talus," and that would be a 12 percent whole body rating.
>
> The only fair and accurate way to describe Ms. McDonald's current state is - - based on this schedule - - is with these two categories I have cited combining them using the formula set forth by the code.

[1] The Findings and Order cite Minn. Stat. § 176.1070, subp. 7(A)(2). It appears that this is merely a typographical error, because the 12 percent rating is found in the Minnesota Rules 5223.0170, subp. 7A(3).

(Ee. Ex. A., 19-20.)

The compensation judge found that the employee is entitled to the 12 percent permanency rating due to her ankle fusion surgery. The compensation judge also determined that the employee does have the subtalar fusion referred to by Dr. Campbell as qualifying for a 7.5 percent permanency rating. However, the judge found that the employee was not entitled to that 7.5 percent rating because the subtalar fusion was a congenital defect. We agree with the compensation judge that the employee qualifies for the 12 percent rating, based upon substantial evidence of record, and affirm that finding.

We also affirm the compensation judge's finding that the employee's condition qualifies for an additional 7.5 percent permanent partial disability of the body as a whole, based upon substantial evidence of record. As outlined below, we have reversed the judge's determination that 7.5 percent permanency should be apportioned due to the employee's congenital condition, and therefore reverse the compensation judge's denial of the addition 7.5 percent permanent partial disability to the body as a whole. The compensation judge found Dr. Campbell's testimony to be persuasive and so do we.

Dr. Campbell assigned an additional 10% rating pursuant to Minn. R. 5223.0170, subp. 8A(2)(e), based upon a severe limitation of range of motion, but then qualified that rating by noting that "the issue in the mid-foot is not quite as cut and dry, because the rating relies heavily either on a procedure that has been done to the foot or a specific injury which has occurred or to a measurable change in the motion of the joint." Dr. Campbell further testified that "severe" limitation of range of motion is the most accurate description of the effect of the changes in the mid foot, and that the 10 percent figure therefore is the most equitable, even though the range of motion qualifications may not be met." (Ee.'s Ex. A, pp. 10-11, 20-21.)

The compensation judge determined that the employee sustained only an additional 2.5% permanent partial disability of the body as a whole, as opposed to the 10 percent rating, based upon her mid-foot condition. The employee appeals from this finding, relying on Dr. Campbell's rating, for this condition. The compensation judge explained that Dr. Campbell provided no indication as to why he determined the limited motion to be "severe." The compensation judge reduced this portion of the rating to 2.5%, explaining that the employee's rating is complicated by the fact that she has three other conditions (limb shortening, ankle fusion and subtalar congenital fusion) which also limit her activities. As trier of fact, a compensation judge is responsible for determining the degree of disability after considering all evidence and relevant legal factors in a case. Erickson, supra, at 43. A factfinder generally "may accept all or only a part of any witness' testimony." Proffit v. Minnesota Harvest Apple Orchard, 48 W.C.D. 215, 219-20 (W.C.C.A. 1992), summarily aff'd (Minn. March 3, 1993) (quoting City of Minnetonka v. Carlson, 298 N.W.2d 763, 767 (Minn. 1980). The compensation judge's finding concerning the level of permanency sustained by the employee relative to her mid-foot condition is supported by substantial evidence of record; accordingly, we affirm this 2.5 percent permanency rating.

Statutory Apportionment of Permanent Partial Disability

The compensation judge awarded benefits based upon an overall permanency rating of 19 percent permanent partial disability of the body as a whole. He arrived at this rating by apportioning a portion of the employee's permanency rating, pursuant to Minn. Stat. § 176.101, subd. 4a, based upon the employee's pre-existing congenital condition. The compensation judge determined that the level of pre-existing impairment was 7.5 percent permanent partial disability to the body as a whole, pursuant to Minn. R. 5223.0170, subp. (7)(2).[2] The judge based his decision on the employee's congenital ankle condition, a subtalar fusion, and apportioned the permanency rating solely based upon the fact that this is a pre-existing condition.

The employee argues that the compensation judge erred in apportioning this permanency, asserting that there is no prior medical record sufficient to satisfy the requirements of the statute allowing apportionment. The employee also relies on the portion of Dr. Wicklund's testimony which indicates that, in his opinion, there are no prior medical reports that would allow him to diagnose the employee's congenital foot condition or provide a permanency rating under the disability schedule. (Er. Ex. 1, pp. 41-42.) In addition, the employee testified that her activities, prior to her injury on September 16, 1991, were not limited due to her flat foot condition. She testified that she only generally recalls that her feet would ache if she was standing a great deal. Dr. Campbell also testified that the lack of problems the employee noticed from her congenital defect in her left foot de-emphasized any role that defect played in causing her right foot problems. (Ee. Ex. A, pp. 10-13.)

Apportionment of a permanent partial disability and therefore a reduction in payment of permanency benefits is allowed by the Minnesota Workers' Compensation statute in very specific circumstances. Minn. Stat. § 176.101, subd. 4a(a), provides: "An apportionment of a permanent partial disability under this subdivision shall be made only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury." See generally Giese v. Green Giant Co., 426 N.W.2d 879, 881, 41 W.C.D. 286, 289 (Minn. 1988). Additionally, in order to qualify for apportionment under subdivision 4a, prior medical evidence of disability must be sufficient to independently permit the preexisting disability to be rated. Spies v. Gateway Glass, 47 W.C.D. 143, 146 (W.C.C.A. 1992) (citing Sass v. Blachowski Truck Line, Inc., 42 W.C.D. 640, 644 (W.C.C.A. 1989)), summarily aff'd (Minn. Aug. 10, 1992); see Minn. R. 5223.0250 (A) (rating of preexisting impairments). A previous assignment of a permanency rating is not required by the statute; what is required is that the pre-existing disability be clearly evidenced in medical records generated prior to the work injury at issue. Hansen v. Kuppenheimer Men's Clothiers, 46 W.C.D. 359 (W.C.C.A. 1991), summarily aff'd (Minn. Mar. 31, 1992).

Following the employee's injury in 1991, she was diagnosed as having a congenital tarsal coalition of the right foot. However, she had not undergone any medical treatment prior to

[2] The Findings and Order cite statutory section, Minn. Stat. § 176.0170, subp. (7)(2). It appears that this is a typographical error, because the 7.5 percent rating is found in the Minnesota Rules Section 5223.0170, subp. 7A(2).

her 1991 injury, as a result of that congenital condition. In this case, the sole medical report in the record which refers to the employee's feet and which pre-exists the employee's 1991 injury is Dr. Kapsner's December 11, 1990 report which lists an assessment of "flat feet with some foot pain, especially after prolonged standing or walking." (Er. Ex. 7.) This report or chart note is not sufficient to satisfy the requirements of Minn. Stat. § 176.101, subd. 4a. Substantial evidence of record therefore does not exist to support the compensation judge's statutory apportionment of 7.5 percent permanent partial disability of the body as a whole, due to the employee's congenital condition. We therefore reverse the compensation judge's finding in that regard.

Stipulation to Credit Against Future Benefits

At the hearing, the parties stipulated that "if the employee is at anytime later adjudicated to be permanent total, or a settlement is reached regarding permanent total, there will be a credit against future permanent total disability benefits in the amount of $10,966.60." (T. 7) The parties further stipulated that this credit be withheld pursuant to Minn. Stat. Section 176.179. (T. 9).[3]

In Finding No. 2, the compensation judge stated the following:

> STIPULATED FACTS. At the time of the hearing the parties stipulated to the following facts:
>
> (A) If it is determined that the employee was permanently and totally disabled that [sic] the self-insured employer is entitled to a credit for $10,966 pursuant to Minn. Stat. 176.179.

The employee asserts that the stipulation in the Findings and Order should indicate that the credit applies to a finding of permanent total disability at any time, through litigation or through a settlement, not solely in conjunction with this hearing before the compensation judge. We agree that Finding No. 2 does not specify the entire stipulation agreed to by the parties at the hearing, and we therefore modify Finding No. 2(a) to read as follows:

> 2.(a) If the employee is at anytime later adjudicated to be permanently, totally disabled, or if the parties reach a stipulated settlement to permanent total disability status, the self-insured employer will be entitled to a credit against payment of future permanent total disability benefits in the amount of $10,966.60, to be

[3] Although the parties did not specify the nature of this credit, it appears that this amount represents the difference between impairment compensation based on 12 percent whole body impairment and the economic recovery compensation paid by the employer.

credited pursuant to Minn. Stat. § 176.179.