LOIS O'MEARA, Employee, v. MOLENAAR PLASTICS and FEDERATED MUT. INS. CO., Employer-Insurer, and MOLENAAR PLASTICS and CNA INS. CO., Employer-Insurer/Appellants, and MOLENAAR PLASTICS and WAUSAU INS. CO., Employer-Insurer/Cross-Appellants, and MN DEP'T OF LABOR & INDUS., MN DEP'T OF HUMAN SERVS., MN DEP'T OF ECON. SEC. and ACUPUNCTURE CHIROPRACTIC CLINIC, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 14, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - TEMPORARY AGGRAVATION; PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the finding that the employee's 1987 work-related back injury was temporary in nature and did not result in any permanent partial disability; and that the employee's 9 percent permanent partial disability was a result of the employee's 1992 back injury.

TEMPORARY BENEFITS - SUBSTANTIAL EVIDENCE. The employee established by substantial evidence that following her work injury, she had work-related disability, was able to work subject to the disability, earning a wage reduced from her pre-injury wage; and the employer and insurer did not adequately rebut the employee's evidence of her earning capacity, therefore the employee was entitled to temporary partial disability benefits. Where the evidence substantially supported that the employee's work-related back injury, as well as her work-related problem with her hands, were contributing factors to the employee's medical inability to work, the employee was entitled to temporary total benefits.

MEDICAL TREATMENT & EXPENSE. Finding awarding medical expense modified where the order thereafter, as to the same medical expense, placed a time limitation on the continuing medical expense.

CREDITS & OFFSETS - CREDIT FOR OVERPAYMENT; STATUTES CONSTRUED - MINN. STAT. § 176.179. Where the employee sustained a work-related low back sprain in 1987 and then sustained an injury to her low back in 1992 consisting of a L5-S1 herniated disc with compression on a nerve root; the 1987 injury was found by the compensation judge to be temporary in nature and without any permanent partial disability; the 1992 injury was found to have resulted in a 9 percent permanent partial disability; the compensation judge also found that the insurer, Wausau, for the 1987 injury, mistakenly paid 3.5 percent disability benefits to the employee; and the compensation judge ordered that under Minn. Stat. § 176.179 Wausau was entitled to a 3.5 percent credit from further compensation payments for the same injury, Wausau is not entitled to a credit and reimbursement of the mistakenly paid 3.5 percent PPD benefits from the 9 percent PPD disability payments made as a result of the employee's 1992 injury as substantial evidence

supports the fact that the employee's 1992 injury is not the same injury as the 1987 injury, and the 1987 injury was not shown to be a contributing factor to the employee's 9 percent PPD.

COSTS & DISBURSEMENTS. The compensation judge's denial of costs for a doctor's charge incurred by the insurer for the employee having missed a scheduled independent medical examination is clearly erroneous as the evidence clearly indicates that the employee's attorneys were notified of the scheduled IME appointment which was missed by their client, the employee.

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

Determined by Hefte, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer, CNA/American Casualty Company, appeal the compensation judge's findings that the employee is entitled to certain temporary partial, temporary total and permanent partial disability benefits. The employer and CNA also request that Orders 8 and 11, ordering the reimbursement of certain medical expenses, be modified by the time limitation in unappealed finding 53. The employer and insurer, Employers Mutual of Wausau, appeal the compensation judge's order that Wausau is entitled to a credit for the 3.5 percent permanent partial disability benefits paid under a mistake of fact. Wausau also appeals the denial of its motion for assessment of costs against the employee's attorney due to the failure of the employee to attend a September 6, 1997 independent medical examination. We affirm in part, modify in part, and reverse in part.

BACKGROUND

Lois O'Meara, the employee, began working for Molenaar Plastics, the employer, as a press operator in August of 1985. The press machine operated by the employee processed plastic to make various plastic parts for the employer's business. This job required that the employee transport plastic granules (called a carba mix) by using her hands with a container to dip the granules from a barrel and then pour the granules into a hopper of the press machine.

This matter concerns claims for three work-related injuries of the employee all which occurred while the employee was working for Molenaar; however, Molenaar was insured for workers' compensation liability by a different insurer for each injury. On March 5, 1987, the employee sustained an admitted work-related back injury. At this time, the employer was insured for workers' compensation liability by Employers Insurance of Wausau (Wausau). Following this injury, the employee's treating medical provider, Dr. R.E. Hodapp, on May 7, 1987, gave the employee a 10 percent impairment rating to the body as a whole for her disability for her 1987 back injury which he had diagnosed as a muscular low back sprain. The doctor gave the 10

percent rating without referencing any provision in the workers' compensation disability schedule. Wausau, in 1987, and based on the disability schedules, paid the employee 3.5 percent permanent partial disability benefits.

Following her 1987 back injury, the employee lost no time from work and continued to work for the employer full-time until she sustained another back injury on September 25, 1992. CNA/American Casualty Company (CNA) was the employer's workers' compensation insurer when this 1992 injury occurred. Dr. Hodapp again treated the employee and diagnosed a lumbar contusion. The employee treated with Bruce Peterson, D.C., in June of 1995 for a short period of time. The employee also began treatment with Paul Hjort, D.C., in 1995 and this treatment continued until the time of the hearing in 1998. Because of her increased low back symptoms, Dr. Hjort ordered an MRI examination of the employee's lumbar spine on February 8, 1996. The MRI revealed that the employee had multi-level degenerative disc disease; a L5-S1 disc herniation with subarticular displacement and compression on the left S1 nerve root; a left far-lateral protrusion to contact and flatten the ganglion and post-ganglionic portion of the right L5 nerve; and annular bulging at L2-3 and L3-4 without central or lateral neural impingement.

In the latter part of 1993, the employee began to have a problem with her hands. This culminated with an alleged compensable workers' compensation injury on December 15, 1994 at which time the employee asked, and was given, a leave of absence from work because of the problem with her hands. At this time the employer was insured for workers' compensation liability by Federated Mutual Insurance Company (Federated). The employee was treated by a dermatologist, Dr. Burrel H. Deaton, who diagnosed the employee as having psoriasis or contract dermatitis allegedly from the employee's reaction to handling the carba mix used to make plastic products. In May of 1995 the employee testified she asked if she could return to work but her employer told her she could not do the job. Thereafter the employee did not return to work for the employer, but began a job search. She found a number of jobs that she tried to perform but claimed she was unable to do because of her disabilities from her work injuries. On February 28, 1996, she commenced working for X-Cel Optical which she states is "within most of her physical capabilities." The employee was still employed for X-Cel as of the date of the hearing, March 1998.

On August 5, 1997, an attorney for Wausau notified the employee's attorney that an independent medical examination (IME) was scheduled of the employee for September 6, 1997. The employee did not attend this examination. She testified at the hearing that although she could not say that she did not get any notice of this IME, she did not recall receiving any notification from her attorney regarding this appointment. Wausau moved for an assessment of costs against the employee's attorney for reimbursement of the doctor's $433.00 lost time charge.

The employee filed a claim petition for various workers' compensation benefits which are claimed to be causally related to her injuries of 1987, 1992 and 1994. A hearing was held on the employee's claim petition on March 17, 1998. In her findings and order, the compensation judge found that the employee was entitled to certain temporary total disability (TTD) and temporary partial disability (TPD) benefits for various periods of time between

January 3, 1995, through March 21, 1997, from her work-related injuries of 1992 and 1994. The compensation judge ordered Federated to pay the employee TTD benefits from January 3, 1995, to March 20, 1995, and TPD benefits from March 21 to April 23, 1995. Periods of temporary total and temporary partial disability claims awarded the employee after April 23, 1995 were ordered paid one-half each by Federated and CNA.[1] The compensation judge also found that the employee's 1987 injury was temporary in nature and that there was no evidence that the employee sustained any permanent disability related to her 1987 injury. Therefore, the compensation judge found that Wausau paid the employee 3.5 percent permanent partial disability benefits from her 1987 injury under a mistake of fact and that Wausau is entitled to a credit from future employee benefits that may result from the employee's 1987 injury. The compensation judge found it was unclear from the evidence whether the employee was ever notified directly of the IME appointment set for September 6, 1997, which the employee missed. Therefore the compensation judge ordered that Wausau is not entitled to costs from the employee's attorney for reimbursement of the doctor's charge for the missed IME.

Wausau and CNA 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 (1998). 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

[1] These awards were made as the compensation judge found that "the employer and Federated have primary liability for a December 15, 1994, injury in the nature of contact dermatitis and CNA was primarily liable for the employee's 1992 injury." After the hearing herein and prior to the filing of the appeal briefs, the employee settled all her claims against the employer and Federated which claims arose out of the employee's injury of contact dermatitis of December 15, 1994. Thus, when a stipulation for settlement was approved on August 13, 1998, the employer and Federated were dismissed from this matter and are no longer parties to the appeals in this court

Employer and CNA

The employer and insurer CNA claim that substantial evidence does not support the finding that the employee sustained a 9 percent permanent partial disability of the body as a whole as a result of the employee's 1992 work injury. We do not agree.

CNA argues that there is a lack of substantial evidence to support the compensation judge's conclusion made in 1996 that the employee sustained a 9 percent permanent partial disability rating causally related to her 1992 work injury. CNA points to the fact that it was only after the employee had an increase in her back symptoms in 1995 that an MRI, as arranged by Dr. Hjort, revealed degenerative changes, an L5-S1 herniated disc with compression on the left S1 nerve root, a left lateral protrusion to contact and flatten the ganglion portion of the right L5 nerve, and annular bulging at L2-3 and L3-4 without impingement. Although the MRI in this matter was not taken until a number of years after the employee's 1992 work injury, the employee's medical history indicates that she complained of continuing back problems over the years after 1992 and to the date of the MRI in 1996. During this time, there is no showing of any other incident or trauma to the employee's lumbar spine. After the MRI, Dr. Hjort, who continued to treat the employee, gave his opinion that, as a result of her 1992 back injury, the employee had a 9 percent permanent partial disability rating of her body as a whole.

CNA also maintains Dr. Hjort's opinion lacks adequate foundation and questions Dr. Hjort's ability to interpret the MRI scan. Dr. Hjort took a history of the employee's injury and her complaints, obtained the names of the employee's previous medical providers, ordered the MRI, and treated the employee from 1996 through the date of the hearing in 1998. A consulting radiologist gave a full written report on the MRI scan to Dr. Hjort. Although it is not clear as to all of the prior medical records that Dr. Hjort examined, there is adequate foundation for the doctor's opinion. Dr. Edwards, an IME examiner, also found that the employee had a permanent partial disability to her lumbar spine, even though he did not causally relate this permanent partial disability to the employee's 1992 work injury. The compensation judge concluded in her memorandum, page 10,

> [b]ecause of the condition of the employee's back after the 1992 injury, including the finding of the herniated disc in the 1996 MRI, the employee is entitled to 9% permanent partial disability, per Dr. Edwards. (Emphasis added.)

Under the circumstances, there is substantial evidence of adequate foundation supporting Dr. Hjort's opinion; and the compensation judge was not clearly erroneous in her reliance on the medical opinions she referenced in finding that the employee sustained a permanent partial disability rating of 9 percent which is causally related to the employee's 1992 low back work injury.[2] See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

[2] CNA also argues in its brief that the benefits for the employee's 9 percent PPD rating for

CNA argues that the employee is not entitled to temporary partial disability (TPD), claiming that the evidence does not support the fact that the employee sustained a loss of earning capacity during the periods of time that these benefits are claimed by the employee. We disagree. Minn. Stat. § 176.101, subd. 2, requires that temporary partial disability benefits be paid based on the difference between the weekly wage of the employee at the time of the injury and the wage the employee is able to earn in the employee's partially disabled condition. To demonstrate entitlement to temporary partial disability benefits, an employee must show a work-related physical disability, an ability to work subject to the disability, and an actual loss of earning capacity that is causally related to the disability. See Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). A party is entitled to rely upon post-injury wages as presumptive of earning capacity, subject to an adequate rebuttal. E.g. French v. Minn. Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1985).

In this matter the employee claims TPD benefits for certain time periods after the employee no longer worked for the employer and thereafter until the date the employee's earnings at X-Cel Company exceeded her earnings at the time of her 1992 injury. These periods of time are from March 20 through April 23, 1995; May 15 through May 27, 1995; June 4 through June 10, 1995; October 7 through November 25, 1995 and February 21, 1995, through March 21, 1997. There is ample evidence that during the periods of time the employee is claiming TPD, she had a disability and restrictions from her work-related injuries of 1992 and 1994. Dr. Hjort, on April 14, 1997, indicated because of her back injury the employee had restrictions of no prolonged sitting or standing, no lifting over 25 pounds, no repetitive bending, twisting and no lifting from floor level. Later in 1997, he restricted the employee from sitting longer than 20 minutes. The employee testified to these restrictions as well as noting the restrictions she had because of her contact dermatitis. Substantial evidence supports the fact the employee not only had a disability but was able to work subject to her disability and restrictions during the periods of time she is claiming TPD.

CNA's vocational expert, Ms. Moncharsh, testified she felt the employee had no loss of earning capacity and therefore the employee was not entitled to TPD benefits. She felt the employee could have continued to perform the job she had when she was injured in 1992 even though she had restrictions. The employer also argues that the employee could have performed her pre-1992 injury job with the employer. However the compensation judge pointed out that the employee testified and maintained that she asked the employer to allow her to return to work in May of 1994 but was rebuffed by Steve Molenaar, who informed the employee she could not come back to as "she could not do her job." (Unappealed Finding 14.) Thereafter, prior to finding her

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the low back should be reduced by the benefits for the 3.5 percent rating which were mistakenly paid in 1987 by Wausau; and CNA, rather than pay the employee, should reimburse Wausau for the 3.5 percent it paid in 1987. Wausau makes this same argument and we will address this issue later in this opinion.

present job with X-Cel, the employee found and tried a number of jobs she was unable to perform because of her disability from her work injuries. For example, the employee testified she was unable to continue to work for Bethesda Homes in 1995 because she could not lift. She started a job at Jennie-O Foods but the cold in her workplace bothered her back so she could not continue. She applied at St. Cloud Hospital but failed the medical examination in part because of her back problems. The employee eventually found a job at X-Cel which she could do within her restrictions. Also, there is little or no evidence that there were jobs available at a greater wage than the employee was earning during the times the employee claimed TPD benefits. The evidence did not rebut the presumption that the employee's post-injury wages represented her earning capacity. Substantial evidence supports the award of temporary partial disability benefits and we affirm.

As to temporary total disability (TTD) benefits, the compensation judge found that Federated and CNA should pay TTD benefits equally for the period of time between April 24, 1995, and February 20, 1996.[3] CNA argues it should not be responsible for any TTD benefits as any total disability was solely caused by the employee's dermatitis, which was contracted when the employer was insured by Federated. However, there is substantial evidence that during the periods of time when TTD is claimed, the employee was also continually bothered by her back problems which initially arose in 1992 and continued to the time of the hearing. The employee testified that she was limited in what she could do and especially restricted in lifting because of her back condition. The compensation judge specifically found that the employee was entitled to a 9 percent PPD and these benefits were found to be wholly the responsibility of the 1992 work injury. The compensation judge reasonably concluded that as a result of her 1992 injury the employee had a continual back problem after her 1992 work injury which was a contributing factor in the employee being medically unable to work, and therefore the employee was entitled to temporary total disability benefits. Substantial evidence supports the finding that CNA was liable to the employee along with Federated for her claimed temporary total disability benefits and we affirm on this issue.

Lastly, CNA points out that Order 8 of the compensation judge's findings and order simply states that "CNA shall reimburse Dr. Bruce Peterson and Crossroads Chiropractic Clinic for benefits provided the employee per the Minnesota Maximum Fee Schedule." Unappealed Finding 53, however, determined that the chiropractic treatment of Dr. Peterson and the Crossroads Clinic was reasonable and necessary only "for a period through February 7, 1996 . . . treatment after that date was for maintenance only and is not compensable." We therefore modify Order 8 to state that the payments to Dr. Peterson and the Crossroads Clinic may be made only for the treatment provided for the period up to and including February 7, 1996.

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[3] Federated alone was ordered to pay certain temporary total disability and temporary partial benefits from January 3 through March 20, 1995 (TTD) and March 21 through April 23, 1995 (TPD) initially after the employee contracted dermatitis. The claims are not at issue as Federated has settled all of the employee's claims against the employer when Federated was the insurer herein.

Employer and Wausau Insurance Company

After the employee's work-related low back injury on March 5, 1987, Dr. Hodapp determined that the employee sustained a back sprain and reached maximum medical improvement on May 28, 1987. On that date Dr. Hodapp gave the employee a 10 percent permanent partial disability (PPD) rating without reference to any provision of the workers' compensation disability schedule. Wausau then paid the employee permanent partial disability benefits for her 1987 back injury based on a rating of 3.5 percent. Following her 1987 injury, the employee did not miss any time from work and continued performing her regular duties for the employer until her 1992 work injury. The employee testified that from 1987 to 1992 she had no problems with her back and had no restrictions or limitations in her job that were doctor imposed or self-imposed. She testified that she had fully recovered from her 1987 work-related back injury. Following the March 17, 1998, hearing in this matter, the compensation judge found that the employee's 1987 back injury was temporary in nature and specifically stated "there is no evidence that the employee sustained any permanent partial disability related to her 1987 injury." (Findings 50, 51.) These findings are supported by substantial evidence.[4]

Therefore the compensation judge found that the 1987 payment by Wausau of 3.5 percent permanent partial disability benefits was made under a mistake of fact and ordered as follows: "Wausau is entitled to a credit for the 3.5 percent permanent partial disability payment paid under mistake of fact." The compensation judge made no finding that the mistakenly paid 3.5 percent PPD should be applied as a credit to the 9 percent PPD which CNA was ordered to pay the employee as a result of the employee's 1992 work-related back injury, and that CNA should reimburse the 3.5 percent to Wausau. In other words, Wausau, and CNA both maintain that, under the circumstances of this case, Wausau should receive reimbursement of the 3.5 percent PPD benefit, paid by mistake in 1987, from the 9 percent permanent partial disability benefits that CNA has been ordered to pay the employee because of the employee's 1992 work injury. Applying this argument, the employee would only receive a 5.5 percent PPD benefit (9 percent minus 3.5). We disagree with Wausau and CNA's position.

The credit of 3.5 percent PPD was given Wausau as a credit against any future payments of compensation due the employee from her 1987 injury. This is pursuant to statute, Minn. Stat. § 176.179 (1986) which states, in part:

> . . . no lump sum or weekly payment . . . which is voluntarily paid

[4] We note that CNA briefly argues that the employee had a pre-existing PPD disability rating of 10 percent evidenced by Dr. Hodapp's report in 1987 which by operation of Minn. Stat. § 176.101, subd. 4a, should be deducted from the PPD awarded the employee as a result of her 1992 work injury. We reject this argument as there is a lack of proof of a pre-existing disability from her 1987 injury that is clearly evidenced by a medical report, as required by the statute, and we have affirmed the finding that the employee did not sustain any PPD related to her 1987 injury.

> to an injured employee . . . and received in good faith by the employee . . . shall be refunded to the paying employer or insurer in the event that it is subsequently determined that the payment was made under a mistake in fact or law by the employer or insurer. When the payments have been made to a person who is entitled to receive further payments of compensation for the same injury, the mistaken compensation may be taken as a full credit against future lump sum benefit entitlement and as a partial credit against future weekly benefits. (Emphasis added.)[5]

This statute allows Wausau only a credit of the mistakenly made PPD benefit from future payments of compensation for the same injury. There is substantial evidence in this matter to support the fact that the 1992 work injury of the employee is not the same injury as her 1987 work injury. The employee's 1987 injury was diagnosed as a muscular low back sprain. The employee, as the compensation judge found and this court has affirmed, sustained only a temporary injury to her back as a result of her 1987 occurrence and she did not sustain any PPD related to her 1987 injury. The employee worked full-time without any disability from 1987 to 1992 and the evidence supports the compensation judge's finding that the employee had no PPD to her back just prior to her 1992 back injury.

The employee's 1992 injury was quite different than her 1987 injury. The 1992 injury resulted in a lumbar contusion with significant back pain along with lumbar spasms and loss of motion. The employee missed 27 days at work following the 1992 injury, and when she returned to work for the employer her work hours and duties were altered and reduced so she could perform her job. Her low back pain and back limitations remained constant until 1996 when her back symptoms increased. An MRI scan of the employee's lumbar back then revealed, among other findings, lumbar degenerative disc disease and a herniated disc at L5-S1 with compression on the left S1 nerve root. The evidence reasonably shows that the employee's 1992 injury resulted in a different diagnosis than she had after her 1987 injury. The compensation judge found that the employee had no PPD from her 1987 injury and stated in her memorandum that "[b]ecause of the condition of the employee's back after the 1992 injury, including the finding of the herniated disc in the 1996 MRI the employee is entitled to 9 percent permanent partial disability per Dr. Edwards."[6] The employee's testimony and the medical records and medical opinions reasonably support the finding that the employee sustained a 9 percent permanent partial disability

[5] This statute was amended in 1995, and the applicable amendment deleted the provision that allowed mistaken compensation to be taken as a full credit against future lump sum benefit entitlements and substituted "future periodic payments" for "future weekly payments" and inserted "permanent partial disability."

[6] There appears to be no dispute concerning numerical disability rating of 9 percent PPD. CNA argues that the 1992 injury was not proven to be a cause of the 9 percent PPD rating in any way.

which is "wholly the responsibility of CNA for the 1992 back injury." (Finding 49.) In addition, there is a lack of evidence that the employee's temporary 1987 injury was a contributing factor to the employee's PPD resulting from her 1992 injury. Substantial evidence supports the fact that Wausau is not entitled to a credit and a reimbursement from CNA of the mistakenly paid 3.5 percent permanent partial disability benefits from the 9 percent PPD benefits ordered paid by CNA. The employee is entitled to be paid PPD benefits for the 9 percent rating. The order that Wausau, who mistakenly paid 3.5 PPD benefits to the employee for her 1987 work injury is entitled to a credit for said benefits mistakenly paid from the employee's future benefits for the same (1987) injury, is affirmed.

Also Wausau moved for an order assessing costs against the employee's attorney for the doctor's charge when the employee failed to attend an IME which Wausau scheduled. Or, in the alternative, Wausau claims because of the employee's failure to attend the IME it should be given a credit against any appellate fees that may be awarded by this court to the employee's attorney. It is clear by the record that Wausau notified the employee's attorneys, a month before the IME appointment of September 6, 1997, that the employee was to attend this IME. The employee's attorneys obviously were aware of the scheduled IME appointment as a letter was drafted by the employee's attorneys' office giving the employee notice of the appointment. Although the employee testified she did not recall getting the notice, but she may have, the employer and insurer adequately gave the employee's attorneys notice of the appointment. The employer and Wausau are entitled to recover on their claim for costs in the amount of the doctor's charge for the missed IME. The compensation judge was clearly erroneous in denying Wausau's motion. We reverse. The employer and Wausau are awarded costs for the missed IME charge against the employee's attorneys.