NORMAN E. TUREK, Employee, v. NORTHFIELD EQUIP./NORTHFIELD FREEZINGS and STATE FUND MUT. INS. CO., Employer-Insurer, and NORTHFIELD EQUIP./NORTHFIELD FREEZINGS and ACCEPTANCE INS. CO., Employer-Insurer/Cross-Appellants, and NORTHFIELD EQUIP./NORTHFIELD FREEZINGS and NAT'L UNION FIRE INS. CO./GAB, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 23, 1999

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT - EQUITABLE. Substantial evidence, including the employee's testimony and expert opinion, supported the compensation judge's equitable apportionment of liability between two insurers.

TEMPORARY TOTAL DISABILITY; JOB SEARCH; PRACTICE & PROCEDURE - REMAND. Where the compensation judge made no finding that the employee was totally disabled from a medical standpoint, and the judge made no findings at all as to job search, which was one of the insurers' primary defenses, the matter was remanded for reconsideration and/or clarification.

ATTORNEY FEES - .191 FEES. Although the employee's entitlement to temporary total disability benefits was at issue, the compensation judge was justified in concluding that the dispute was primarily between the insurers, warranting an award of attorney fees under Minn. Stat. § 176.191, subd. 1. Fees under Minn. Stat. § 176.191, subd. 1, may be awarded whether or not a temporary order has been issued.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Pederson, J., and Rykken, J.
Compensation Judge: Paul V. Rieke

OPINION

DEBRA A. WILSON, Judge

The employer and Acceptance Indemnity Insurance Company appeal from the compensation judge's decision as to equitable apportionment and the employee's entitlement to temporary total disability benefits. The employer and National Union Fire Insurance Company appeal from the judge's award of temporary total benefits and attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

The employee sustained three work-related low back injuries while employed as a sheetmetal worker for Northfield Freezings[1] [the employer], a manufacturer of devices used in frozen food production. The first of the three injuries occurred on July 31, 1992, when the employee was loading heavy bundles of steel onto a cart. The employee experienced a jabbing sensation on the left side of his low back just above the belt line. He subsequently underwent physical therapy for two weeks, used medication, and worked light duty for several months before returning to his usual job with no restrictions. The employee had no wage loss following this injury. The employer's insurer at the time, State Fund Mutual [State Fund], apparently admitted liability for the injury and paid medical expenses.

The employee's second work-related low back injury occurred on May 5, 1995, when Acceptance Indemnity Insurance Company [Acceptance] was on the risk. This injury occurred while the employee and a coworker were bending a piece of sheetmetal, working at shoulder height. The employee again experienced a "jab" at the belt line on the left, and later that day he had pain down his left leg. He then sought medical care and apparently missed several half-days of work, for which the employer apparently paid him full salary. Diagnostic scans disclosed degenerative changes in the employee's lumbar spine, and the employee again underwent physical therapy and took medication to alleviate his symptoms. He also again worked light duty for several months before resuming his job, this time with a 40-pound lifting restriction. In February of 1996, Dr. Pat Hergott issued a report indicating that the employee had reached maximum medical improvement [MMI] from the effects of this injury. This report was served on the employee on April 23, 1996. Acceptance admitted liability for the 1995 injury and paid the employee various benefits, including benefits for a 3.5% whole body impairment.

The employee's third work-related low back injury occurred on June 29, 1998, when the employee was using a hand drill to make holes in angle irons. The employee worked bent over at the waist to accomplish this job, and, as the drill went suddenly through the iron, he again experienced a sharp jabbing pain in the same general area as his previous symptoms. Following this injury, the employee was taken off work by his physician. About two weeks later, on July 14, 1998, the employee attempted to perform very light part-time supervisory work offered by the employer, but, after working only a few hours each day over the course of three days, he was unable to continue working due to the severity of his symptoms. Thereafter, his treating physician, Dr. David Halvorson, issued numerous reports of workability indicating that the employee was totally disabled. However, in his treatment notes, Dr. Halvorson suggested at times that the employee was capable of working within "stringent" limitations, and in November of 1998 he apparently advised the employee to see whether the employer might have appropriate work for him. The employee then contacted the employer to discuss job possibilities. According to the employee, the employer informed him that it had no physically appropriate work. A

[1] Formerly known as Northfield Equipment.

representative of the employer testified, however, that the doctor's slip that the employee took in to the employer indicated that the employee was still totally disabled. Effective in December of 1998, the employee was apparently approved for Social Security disability benefits.

National Union Fire Insurance Company [National Union], the insurer on the risk for the employee's 1998 injury, initially paid but then discontinued benefits on grounds that the employee was not disabled as a result of the 1998 injury. The employee requested issuance of a temporary order, requiring one of the insurers to pay benefits, but that request was denied. When the matter came on for hearing before a compensation judge on January 15, 1999, issues included the employee's entitlement to medical expenses and to payment of temporary total disability from June 29, 1998, through July 13, 1998, and from July 17, 1998, through the date of hearing; a claim by the employee for penalties; equitable apportionment among the insurers; and the employee's entitlement to attorney fees "pursuant to Minn. Stat. § 176.081, subd 8 and Minn. Stat. § 176.191." Evidence included the employee's testimony as to the nature of his injuries and his symptoms; the employee's medical records; and reports by Drs. Jack Bert, Mark Friedland, and Thomas Litman, independent examiners for the insurers.

In a decision issued on January 20, 1999, the compensation judge concluded that the employee was entitled to temporary total benefits and medical expenses as claimed and that Acceptance and National Union were each liable for 50% of those benefits. The penalty claim was denied. With regard to the employee's claim for attorney fees, the judge concluded that attorney fees "pursuant to Minn. Stat. § 176.081, subd 8," were payable, because the proceeding "was primarily that of a dispute between insurers." Acceptance and National Union 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 (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

Equitable Apportionment

The compensation judge made several findings relevant to the liability of the three insurers in this matter. With regard to State Fund's liability, the judge concluded that the 1992 injury was only temporary and was not a substantial contributing cause of the employee's disability or need for treatment during the periods at issue here. This conclusion was not appealed. The judge also concluded that the 1995 injury, covered by Acceptance, was permanent and that the employee had reached MMI from the effects of that injury on April 23, 1996, effective with service of Dr. Hergott's report. These determinations are also unappealed. Finally, the compensation judge determined that the employee had become medically unable to continue working for the employer "due in part to the effects of his May 5, 1995 work injury and the injury of June 29, 1998," that it was premature to determine whether the 1998 injury, covered by National Union, was permanent, and that the employee had not yet reached MMI from the effects of the 1995 and 1998 injuries. On the specific issue of apportionment, the compensation judge concluded that the employee's 1995 and 1998 injuries were each responsible for 50% of the employee's disability and need for medical treatment after June 29, 1998, and Acceptance and National Union were ordered to pay benefits accordingly.

On appeal, Acceptance argues initially that the compensation judge's finding as to the occurrence of a new injury on June 29, 1998, is inconsistent with his finding that the employee became medically unable to continue working as a result of the 1995 injury. More specifically, Acceptance contends that this court "has consistently determined that a subsequent specific injury precludes the finding of a 3j breakdown," referring to Minn. Stat. § 176.101, subd. 3j (repealed 1995), which provides in part as follows:

> **Subd. 3j. Medically unable to continue work**. (a) If the employee has started the job offered under subdivision 3e and is medically unable to continue at that job because of the injury, that employee shall receive temporary total compensation pursuant to clause (b). . . .
>
> (b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall cease at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e or 3f.

In response, the employee argues that the compensation judge made no reference at all to subdivision 3j. However, while the employee's contention is accurate, we are persuaded that the judge was relying on subdivision 3j in reaching his conclusion.[2] In any event, assuming that this

[2] Otherwise, it would not have been necessary for the compensation judge to determine whether the employee had reached MMI again from the combined effects of his 1995 and 1998 injuries. See Minn. Stat. § 176.101, subd. 3j; Sabby v. Copasan, Inc., 462 N.W.2d 603, 43 W.C.D.

was a 3j-type situation, we cannot conclude that a 3j disablement and a new injury are as a matter of law mutually exclusive - - we have in fact affirmed this kind of apportionment/causation decision in another case, Kvam v. Bladholm Bros., slip op. (W.C.C.A. Aug. 27, 1991), and we find no legal requirement for a different result here. For this same reason, we reject Acceptance's argument that the judge erred as a matter of law in imposing liability on Acceptance for temporary total benefits beyond the first MMI date applicable to the employee's 1995 injury, since it is undisputed on appeal that the employee has not yet reached MMI again following his medical inability to continue working. Minn. Stat. § 176.101, subd. 3j; see also Minn. Stat. § 176.101 subd. 1(2) (1998); Sabby, 462 N.W.2d 603, 43 W.C.D. 509.

Acceptance also argues that no apportionment of liability is permissible prior to MMI and/or prior to a determination as to whether the employee's 1998 injury is permanent. These arguments, however, simply have no basis in the law.

Acceptance's remaining arguments regarding the judge's apportionment decision concern causation. Acceptance argues in this regard that the employee's June 29, 1998, injury is at minimum an intervening cause of the employee's disability, at least until the employee reaches MMI, and that there is no substantial credible evidence to support the judge's apportionment determination. We are not persuaded by these arguments.

Equitable apportionment is an issue of fact for the compensation judge to decide. Ringena v. Ramsey Action Programs, 40 W.C.D. 880, 883 (W.C.C.A. 1987). Factors relevant to the issue include "the nature and severity of the initial injury, the employee's physical symptoms following the initial injury and up to the occurrence of the second injury, and the nature and severity of the second injury." Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 200, 226 N.W.2d 888, 891, 27 W.C.D. 797, 800 (1975). Where the record would support almost any number of apportionment determinations, we will not substitute our judgment for that of the compensation judge. Giem v. Robert Giem Trucking, 46 W.C.D. 409, 418 (W.C.C.A. 1992).

In the present case, substantial evidence clearly supports the conclusion that the employee's 1995 injury was permanent and significant. The employee's physician recommended a 40-pound lifting restriction after this injury, which was never removed, and the employee testified that he experienced ongoing low back symptoms thereafter. Dr. Litman concluded that the 1995 injury was a substantial contributing cause of the employee's low back condition, along with the other two work injuries, and Dr. Friedland reported that the 1995 injury was responsible for 50% of the employee's low back symptoms and need for treatment.[3] Finally, the employee was rated as having and was paid for a 3.5% whole body impairment after the 1995 work injury.

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509 (Minn. 1990); see also Minn. Stat. § 176.101, subd. 1(2) (1998).

[3] Although not until after August 1, 1998, rather than after June 29, 1998, as found by the compensation judge.

It is evident from his findings that the judge adequately considered the factors relevant to the issue of apportionment. Finding no factual or legal basis to reverse, we affirm the judge's imposition of liability on Acceptance for 50% of the employee's disability and need for treatment after June 29, 1998.

Temporary Total Disability

The compensation judge awarded the employee temporary total disability benefits, as claimed, from June 29, 1998, to July 13, 1998, and from July 17, 1998, to the date of hearing and continuing. On appeal, both Acceptance and National Union contend that substantial evidence does not support the judge's award. Acceptance argues that the employee was capable of working and suggests that he could have returned to the very light supervisory work that he had attempted in July of 1998. National Union argues that the compensation judge erred in adopting the restrictions of the employee's treating physician, that the employee was medically able to work but failed to make any job search, and that suitable work was available with the employer. After review of the record and the compensation judge's decision, we are compelled to remand the matter for further findings and clarification.

It is evident that the employee's treating physician took him totally off work for some period or periods during the intervals for which benefits were claimed and awarded. However, by the fall of 1998, the doctor was at least suggesting that the employee was capable of work with certain restrictions. All three independent examiners also indicated that the employee was capable of work. Although the compensation judge made no definite finding that the employee was totally disabled from a medical standpoint, he also made no findings as to job search at all. Because the employee's job search, or lack thereof, was apparently one of the insurers' main defenses to the employee's temporary total disability claim, and because the basis for the judge's benefit award is not reasonably ascertainable from his decision,[4] we remand the matter for

[4] In Finding 8, the judge wrote in part:

> The employee returned to the employer in November of 1998 concerning the possibility of his returning to work at the employer. At that time the doctor had not specified work restrictions and the employer was unable to offer the employee a job. As of December 8, 1998 the employee's treating physician still did not believe the employee was able to work although in November of 1998 he thought that "under stringent limitations" the employee could do some kind of work activity.

In Finding 10, the primary finding concerning temporary total disability, the judge found as follows:

> 10. The employee has expressed a willingness to work within his physical capabilities and within his doctor's restrictions and to

further findings and explanation. In evaluating the issue, the judge should consider Minn. Stat. § 176.101, subd. 1(g) (1998), as well as the usual case law principles governing entitlement, and he should explain the basis for his decision sufficiently to allow adequate review in any appeal from his decision on remand. Different considerations may apply for different periods of the employee's claim. The judge's findings should clearly reflect his resolution of the insurers' job search defense.

Attorney Fees

Concluding that the dispute in this matter was primarily between the insurers, the compensation judge awarded the employee attorney fees "pursuant to Minn. Stat. § 176.081, subd. 8." On appeal, National Union argues that the provision cited by the judge was repealed and is inapplicable, that attorney fees under an alternate provision, Minn. Stat. § 176.191, are not payable because no temporary order was issued, and that the judge erred in any event in concluding that the dispute was primarily between the insurers. We are not persuaded.

As National Union points out, Minn. Stat. § 176.081, subd. 8, was in fact repealed in 1995. However, Minn. Stat. § 176.191, subd. 1, contains an analogous attorney fee provision supporting the judge's award.[5] And, contrary to National Union's argument, attorney fees under Minn. Stat. § 176.191, subd. 1, may be awarded whether or not a temporary order has been issued. Munstermann v. Appleton Mun. Hosp., slip op. (W.C.C.A. Mar. 16, 1999).

National Union's remaining argument - that the dispute here was not primarily between the insurers - presents a somewhat closer issue. The insurers denied liability for temporary total disability benefits largely on the job search grounds. However, it is nevertheless evident from the questioning at hearing, as well as the reports from the independent examiners,

> cooperate with vocational assistance. The effects of the employee's 1995 and 1998 work injuries each have been and continued to be a significant contributing factor to the employee's unemployed status from June 29, 1998 to July 13, 1998 and from July 17, 1998 to the date of hearing on January 15, 1999 and continuing. The employee's physician has not released the employee to return to work except under stringent restrictions which have not been sufficiently specified. The employee attempted to return to work at a very light job at the employer but was unable to do so because of the effects of his 1995 and 1998 work injuries. The employee has been temporarily totally disabled from June 29, 1998 to July 13, 1998 and from July 17, 1998 to January 15, 1998 and such disablement continues.

[5] Prior to the 1995 amendments, the fee provisions of Minn. Stat. § 176.081, subd. 8, and Minn. Stat. § 176.191, subd. 1, were viewed as essentially interchangeable.

that apportionment was a primary if not the primary concern of the insurers here. Therefore, we cannot conclude that the compensation judge erred in determining that the employee is entitled to attorney fees pursuant to Minn. Stat. § 176.191, subd. 1. See Sundquist v. Kaiser Eng'rs, 456 N.W.2d 86, 42 W.C.D. 1101 (Minn. 1990).

Finally, in his respondent's brief, the employee requests that we remand the matter to the judge to determine the amount of attorney fees payable by the insurers, "including attorney time spent representing the employee in the instant appeal." We deny this request. The attorney fee awarded to the employee as part of this decision is the fee payable for attorney representation on appeal. The specific fee payable for the attorney's work in the proceedings below should be considered and determined by the judge in keeping with the customary practices of the Office of Administrative Hearings. No remand is necessary or appropriate for resolution of that issue.