REGINALD W. BROWN, Employee, v. EXPRESS PERSONNEL SERVS. and INS. CO. OF PENN./GAB SERVS, INC., Employer-Insurer, and HITCHCOCK INDUS., INC., and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF ECON. SEC./RID, MN DEP'T OF HUM. SERVS., and SHEFFIELD, OLSON & MCQUEEN, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 12, 2000

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Where the compensation judge failed to make factual findings or provide any explanation supporting her conclusory denial of apportionment under Minn. Stat. § 176.101, subd. 4a, and failed to resolve the issue of whether equitable apportionment was appropriate, the denial of apportionment of permanency is reversed and the question remanded for redetermination.

ATTORNEY FEES - .191 FEES. The compensation judge properly awarded attorney fees from and after June 11, 1998, the date of the employee's second work injury. The matter is remanded, however, for apportionment of liability for attorney fees between the two employers and insurers, and for reconsideration and determination of possibly conflicting awards of fees under § 176.108 and § 176.191.

Affirmed in part, reversed in part, and remanded.

Determined by: Johnson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

Hitchcock Industries, Inc., and State Fund Mutual Insurance appeal the compensation judge's order denying apportionment of permanent partial disability and the judge's award of attorney fees under Minn. Stat. § 176.191, subd. 1. We reverse the compensation judge's denial of apportionment and remand the case to the compensation judge for further findings. We affirm the award of attorney fees but remand the issue to the compensation judge for clarification.

BACKGROUND

Reginald W. Brown, the employee, sought treatment for low back pain on November 30, 1976 at Cook County Hospital in Chicago, Illinois. An x-ray was negative for fracture, dislocation or arthritis but showed a neural arch defect at S1. (Pet. Ex. H.) The employee had no recollection of the event, and testified he had no ongoing low back problems after this incident. (T. 38.)

On June 4, 1996, the employee sustained an injury to his right knee, left shoulder and low back while working for Express Personnel Services, insured by Insurance Company of Pennsylvania, with claims administered by Gallagher-Bassett. The employee's weekly wage on that date was $337.07.

The employee was seen following this injury by Dr. McQoid at the Golden Valley Clinic on June 4, 1996. The diagnosis was contusions and abrasions of the right shoulder, right elbow and lower back. (Express Ex. 5.) On July 3, 1996, the employee was seen at the Hennepin County Medical Center complaining of right shoulder, low back and right knee pain. The doctor diagnosed multiple trauma, took the employee off work and prescribed physical therapy. On July 24, Dr. Mary Arneson released the employee to return to work, with restrictions. An MRI scan of the right knee on July 30, 1996 showed a large horizontal cleavage tear of the posterior horn of the medial meniscus, a partial tear of the lateral patellar retinaculum and a small tear of the posterior horn of the lateral meniscus. On August 7, 1996, Dr. Arneson recommended right knee surgery. The employee underwent a right knee arthroscope and debridement of the medial meniscus on August 29, 1996 at Hennepin County Medical Center. Following surgery, the employee had more physical therapy for the right knee. On November 8, 1996, Dr. Arneson released the employee to return to work without restrictions. (Pet. Ex. G; Express Ex. 7.)

The employee did not return to work for Express following his knee surgery. In November or December 1996, the employee obtained a job working at the snack bars at the Minneapolis Convention Center. The employee testified he continued to have occasional low back pain with pain radiating into both legs. (T. 46-47.)

In January 1998, the employee was hired by Hitchcock Industries, Inc. On June 11, 1998, the employee suffered a personal injury to his low back. Hitchcock was then insured by State Fund Mutual Insurance Company. The employee's weekly wage was $610.00. On June 16, 1998, the employee sought treatment at Fairview-University Medical Center complaining of a sore throat and an acute exacerbation of low back and leg pain. The employee testified the pain was in the same area of his back as it had been in 1996. (T. 56.) The employee returned to the clinic on June 19, 1998, and was seen by Dr. Amit Ghosh. The employee reported his back pain was much reduced. Dr. Ghosh prescribed physical therapy. On October 26, 1998, the employee returned to see Dr. Ghosh. On examination, the doctor found no paraspinal muscle spasm or abnormal flexibility. The doctor concluded the employee's low back pain was resolved. The employee asked to be released to return to work without restrictions and Dr. Ghosh did so. (Pet. Ex. D.)

The employee was off work from June 14, 1998 through October 1998. When he returned to Hitchcock, the employee was told he was laid off. The employee eventually returned to work for Hitchcock on January 25, 1999. The employee worked as a sandblaster for one week, then switched to bench grinding. The employee testified his low back pain dramatically increased after three days as a bench grinder. By March 2, 1999, the employee testified he had excruciating pain in his low back radiating into both legs. (T. 60-62.) The employee returned to see Dr. Ghosh and was taken off work. An MRI scan of the lumbar spine on July 15, 1999 showed degenerative changes at L4-5 and a broad-based disc protrusion at L5-S1, without spinal canal or neural

foraminal stenosis. (Pet. Ex. B.) In an unappealed conclusion of law, the compensation judge found the employee sustained a third personal injury on March 2, 1999 in the nature of a permanent aggravation of pre-existing lumbar degenerative disc disease. (Conclusion of Law 1.)

The employee was off work from March 2 through October 1999 at which time he returned to work at Hitchcock. He testified his low back pain improved by October 1999. The employee testified he asked to be released to return to work without restrictions because Hitchcock would not take him back to work if he had restrictions. Upon returning to work, the employee again worked as a sandblaster and a grinder for a short time and then trained for a new position which was less stressful on his back. The employee continued to work for Hitchcock through the date of the hearing. (T. 63-66.)

Dr. Robert Wengler examined the employee on three occasions. On June 5, 1998, the employee complained of right knee and low back pain, with no radiating pain into his legs. Dr. Wengler's neurologic examination was normal and straight leg raising was negative bilaterally. An x-ray showed mild narrowing of the L5-S1 disc space. Dr. Wengler diagnosed a resolved soft tissue injury to the right shoulder, lumbar degenerative disc disease at L5-S1 and a tear of the medial meniscus. Dr. Wengler concluded these conditions were secondary to the employee's injury of June 28, 1996. The doctor rated a 7 percent whole body disability for single level degenerative disc disease[1] and a 2 percent whole body disability for the meniscectomy.[2] (Pet. Ex. A.)

Dr. Wengler re-examined the employee on August 10, 1998, following the employee's second personal injury on June 11, 1998. On examination, the doctor found muscle spasm and noted a slight depression of the left ankle reflex and positive straight leg raising. Dr. Wengler suspected a central disc herniation and recommended an MRI scan of the lumbar spine. Dr. Wengler re-examined the employee on May 13, 1999, and again diagnosed probable discogenic back pain. The doctor again recommended an MRI scan examination of the lumbar spine. (Pet. Ex. A.)

A deposition of Dr. Wengler was obtained on March 23, 1999, at the request of Hitchcock Industries. The doctor testified the employee injured his right shoulder, right knee and low back on June 4, 1996, and diagnosed a torn medial meniscus and degenerative disc disease at L5-S1. Dr. Wengler rated a 7 percent permanent partial disability, and testified the entire 7 percent permanent disability was related to the June 4, 1996 injury and none was apportionable to a pre-existing condition in November 1994. Dr. Wengler testified the employee sustained a second work-related low back injury on June 11, 1998. He based this opinion on a distinct change in the employee's physical findings in his examination of August 10, 1998. The depression of the left ankle reflex, the doctor testified, raised the possibility of a disc injury so he recommended an MRI scan. The doctor stated the employee had a pre-existing condition in his low back, but opined both the 1996 and 1998 injuries were substantial contributing causes of the employee's wage loss and

[1] See Minn. R. 5223.0390, subp. 3.C.(1).

[2] See Minn. R. 5223.0510, subp. 3.B.(1).

need for medical care. The doctor apportioned responsibility for wage loss and medical benefits equally between the two injuries. (Hitchcock Ex. A.)

Dr. Wengler was again deposed on December 8, 1999, following his third examination of the employee on May 13, 1999. The doctor opined the employee sustained a third injury to his low back on March 2, 1999, in the nature of a permanent aggravation of a pre-existing degenerative condition. Dr. Wengler then testified that as of the date of his last examination, the employee had a 9 percent whole body disability for radicular pain,[3] plus an additional 3 percent for chronic radicular pain or paresthesia persisting despite treatment,[4] for a total of 12 percent permanent disability due to the low back condition. The doctor apportioned responsibility for temporary total disability benefits after March 1999, 45 percent to the 1996 injury, 45 percent to the 1998 injury and 10 percent to a Gillette[5] injury in March 1999. The doctor also equitably apportioned the 12 percent permanent partial disability in the same percentage. (Pet. Ex. N.)

Dr. Mark Engasser examined the employee three times on behalf of Express Personnel. On July 1, 1997, the doctor diagnosed a contusion of the right shoulder, contusion and myoligamentous strain of the lumbosacral spine and a tear of the right medial meniscus. The doctor opined the right shoulder and low back conditions resulted from the work injury but stated the right knee injury could have resulted at work or occurred without injury. Dr. Engasser rated a 2 percent permanent partial disability secondary to the right knee condition. He rated no permanent partial disability secondary to the right shoulder or low back injuries as he believed these injuries were temporary in nature. Dr. Engasser re-examined the employee on September 22, 1998. His diagnosis remained unchanged from his prior examination. Dr. Engasser opined the employee sustained a second temporary injury to his low back on June 11, 1998, but opined the employee had no restrictions resulting from that injury.

On April 6, 1999, Dr. Engasser examined the employee for a third time. The doctor diagnosed a myoligamentous strain of the lumbosacral spine and a tear of the right medial meniscus. The doctor again opined the employee sustained temporary injuries to his low back on June 4, 1996 and June 11, 1998, and a temporary Gillette aggravation on March 2, 1999. In his view, these injuries were temporary aggravations of a pre-existing lumbar degenerative disc condition at L5-S1. The doctor opined the employee could work subject to restrictions on bending and lifting for a period of six weeks and then the employee could return to work without restrictions.

By report dated December 16, 1999, Dr. Engasser noted that following the June 1998 injury, the employee began experiencing increasing low back and radicular pain. The doctor also noted a decrease in the employee's left ankle jerk and positive straight leg raising following the June 1998 injury. Accordingly, Dr. Engasser now opined the employee sustained a permanent

[3] See Minn. R. 5223.0390, subp. 4.D.

[4] See Minn. R. 5223.0390, subp. 4.D.(1).

[5] Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

injury on June 11, 1998. Dr. Engasser rated a 9 percent whole body disability secondary to the L5-S1 disc herniation, apportioning liability 75 percent to the 1998 injury and 25 percent to the Gillette injury on March 2, 1999. The doctor repeated his opinion that the June 4, 1996 injury was a temporary injury resulting in no ongoing limitations or permanent disability. (Pet. Ex. I.)

The employee filed a claim petition in February 1997, claiming benefits from Express Personnel as a result of the June 4, 1996 injury. That claim petition was dismissed on November 19, 1998. An amended claim petition was filed in December 1998, seeking benefits from both Express Personnel and Hitchcock Industries. The claim was heard by a compensation judge at the Office of Administrative Hearings on December 21, 1999. In a Findings and Order served and filed February 22, 2000, the compensation judge determined the employee sustained a personal injury to his right knee and low back on June 4, 1996 and sustained permanent aggravations of pre-existing degenerative disc disease of the lumbar spine on June 4, 1996, June 11, 1998 and March 2, 1999. The compensation judge ordered the employer and insurers to pay various periods of temporary total and temporary partial disability benefits. The judge apportioned liability for the wage loss benefits, prior to March 1999, equally between the June 1996 and June 1998 injuries. Temporary total disability benefits after March 3, 1999 were apportioned 45 percent to the 1996 injury, 45 percent to the 1998 injury, and 10 percent to the March 2, 1999 injury. These legal conclusions were not appealed. The compensation judge found the employee sustained a 9 percent whole body disability of the low back secondary to the June 1998 injury and denied apportionment under Minn. Stat. § 176.101, subd. 4a to the 1996 injury.[6] Finally, the compensation judge awarded attorney's fees under Minn. Stat. § 176.191 from June 11, 1998 and continuing. Hitchcock Industries appeal the denial of apportionment and the award of fees.

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

[6] The parties agreed the claim for permanent partial disability of the low back would be limited to the 9 percent rated by Dr. Wengler and Dr. Engasser. The additional 3 percent rated by Dr. Wengler was not in issue at the hearing. (T. 15.)

Apportionment

Hitchcock Industries, Inc., and State Fund Mutual Insurance Company contend the compensation judge erroneously failed to apportion to the June 4, 1996 injury, any portion of the 9 percent permanent disability of the lumbar spine. The appellants argue the evidence establishes the employee had a 7 percent permanent disability as a result of the June 1996 injury. They contend Dr. Wengler's examination and the x-rays taken on June 5, 1998, clearly evidence a pre-existing impairment resulting from the 1996 injury. Accordingly, appellants assert the compensation judge's conclusion that Minn. Stat. § 176.101, subd. 4a, is not applicable is without evidentiary support.

Apportionment of permanent partial disability benefits between work-related injuries is allowable under Minn. Stat. § 176.101, subd. 4a(a):

> If a personal injury results in a disability which is attributable in part to a preexisting disability that arises from a congenital condition or is the result of a traumatic injury or incident, whether or not compensable under this chapter, the compensation payable for the permanent partial disability pursuant to this section shall be reduced by the proportion of the disability which is attributable only to the preexisting disability. 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. Evidence of a copy of the medical report or record upon which apportionment is based shall be made available to the employee by the employer at the time compensation for the permanent partial disability is begun.

In appropriate cases, liability for permanent partial disability benefits may also be apportioned equitably between two or more work-related injuries. See Stone v. Lakeland Constr., 533 N.W.2d 36, 52 W.C.D. 637 (Minn. 1995) ("When, as is the situation in this case, benefits are appropriately awarded on the basis of a single permanency rating of the disability resulting from more than one compensable injury, the situation seems to us better served by the application of the principles of equitable apportionment"). In this case, the compensation judge concluded that Minn. Stat. § 176.101, subd. 4a, was not applicable. The judge, however, made no findings of fact to support this conclusion and provided no explanation in the memorandum explaining her decision.

Express contends the judge's conclusion is supported by the opinions of Dr. Engasser who stated the employee sustained no permanent disability as a result of the June 4, 1996 personal injury. Accordingly, the respondent asserts the judge's decision must be affirmed. We cannot agree. Dr. Engasser opined the employee sustained no permanent disability to his low back resulting from the June 1996 injury because in his opinion, the injury was temporary in nature and resolved without residual disability. The compensation judge specifically rejected this opinion. Instead, the compensation judge adopted Dr. Wengler's opinion that the 1996 injury was

a permanent injury and a substantial contributing cause of the employee's current disability. The compensation judge specifically adopted Dr. Wengler's equitable apportionment opinions with respect to wage loss benefits, and apportioned to the June 1996 injury a proportional share of liability for the employee's wage loss benefits.

The compensation judge did not, however, resolve the question of whether any portion of the 9 percent permanent partial disability awarded may be equitably apportioned to the 1996 injury. Furthermore, the compensation judge made no findings and gave no explanation for her conclusory determination denying statutory apportionment. Accordingly, the case is remanded to the compensation judge to make further findings consistent with this opinion.

Attorney Fees

The compensation judge found the employee is entitled to an award of attorney fees under Minn. Stat. § 176.191, subd. 1.[7] The appellant does not dispute that fees are payable under this provision. The compensation judge further found the employee was entitled to such fees from June 11, 1998 to the present and continuing. Both employers and insurers contend this portion of the award is in error. They assert the dispute between the two employers and insurers did not commence until the employee filed an amended claim petition on December 17, 1998. We disagree.

The employee sustained a second personal injury on June 11, 1998, while in the employ of a second employer, Hitchcock Industries, Inc. The employee was off work from June 14 to October 1998. The employers and insurers agree benefits were due to the employee for this period. Neither employer, however, paid benefits to the employee. The compensation judge apportioned responsibility for these benefits equally between the two employers and insurers. Accordingly, a dispute existed as of June 11, 1998. The compensation judge's decision is affirmed.

We note, however, the compensation judge did not apportion liability for the attorney fees awarded under Minn. Stat. § 176.191 between the employers and insurers. On remand, the compensation judge should consider that issue and make appropriate findings. We further note the compensation judge also ordered attorney fees withheld from the benefits payable to the employee under Minn. Stat. § 176.081. To the extent the employee's attorney fees are paid under Minn. Stat. § 176.191, it is improper to also award fees under § 176.081. On remand, the compensation judge should reconsider and determine this issue.

[7] Minn. Stat. § 176.191, subd. 1, applies where compensation benefits are payable to an employee and a dispute exists between two or more employers and insurers as to which is liable for payment. In such case, the "claimant shall also be awarded a reasonable attorney fee, to be paid by the party held liable for the benefits."