DENNIS J. FAUST, Employee, v. STERLING ELEC. CONSTR. and MINN. ASSIGNED RISK PLAN/WAUSAU INS. CO., Employer-Insurer, and KILLMER ELEC. CO. and FED. MUT. INS. CO., Employer-Insurer, and EGAN MCKAY ELEC. CO. and ARGONAUT MIDWEST INS. CO., Employer-Insurer/Appellants, and ST. PAUL ELEC. CONSTR. MED. REIMBURSEMENT PLAN, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 16, 2000

No. [REDACTED SSN]

HEADNOTES

APPORTIONMENT - PERMANENT PARTIAL DISABILITY. Where the employee's current 20% whole body impairment rating was found solely attributable to the employee's 1997 work injury, the compensation judge did not err by denying apportionment for the employee's pre-existing condition.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Danny P. Kelly

OPINION

DEBRA A. WILSON, Judge

Egan McKay Electrical Company and its insurer appeal from the compensation judge's denial of their request for apportionment of pre-existing permanent partial disability. We affirm.

BACKGROUND

The employee became licensed as a journeyman electrician in 1987. On April 13, 1993, while employed by Sterling Electric Construction [Sterling], the employee received an electric shock, at work, that caused him to fall six feet from a ladder to the ground. Sterling and its insurer apparently admitted liability for an electrical burn injury and paid certain benefits. In the spring of 1994, the employee began complaining of low back pain, for which he received evaluation, including x-rays, but he had by this time resumed work as an electrician.

On June 3, 1994, the employee allegedly sustained a low back injury after heavy lifting in his job with Killmer Electric Company [Killmer]. An MRI scan performed in August of 1994 revealed degenerative changes at L3-4, L4-5, and L5-S1. A few months later, in November of 1994, the employee filed a claim petition against both Sterling and Killmer, seeking temporary total disability benefits from June 3, 1994, to August 31, 1994. Both Sterling and Killmer denied liability for any injury to the employee's low back.

In September of 1995, the employee, Sterling, and Killmer entered into a stipulation for settlement, settling all of the employee's claims against Sterling and Killmer, except future nonchiropractic medical expenses claims, for $7,000, less attorney fees. According to the stipulation, it was the employee's position that he had, at a minimum, a 10% whole body impairment, due to multi-level lumbar degenerative changes, as a result of his April 13, 1993, injury with Sterling and the alleged June 3, 1994, injury with Killmer. Both employers continued to deny liability for any back injury and also alleged that the employee had no ratable permanent impairment. An award on stipulation was issued on October 2, 1995.

On April 6, 1997, the employee sustained a work-related low back injury while employed as an electrician by Egan McKay Electrical Company [Egan McKay]. An MRI scan performed on May 28, 1997, again disclosed degenerative changes at L3-4, L4-5, and L5-S1, but this time the radiologist noted displacement of the left S1 nerve root posteriorly. Following the scan, the employee's treating physician concluded that the employee had herniated discs at L4 and L5, with probable nerve root impingement at L5 and S1, and on August 4, 1997, the employee underwent low back surgery at both L4-5 and L5-S1.

The matter came on for hearing before a compensation judge on October 1, 1999, to determine liability for medical expenses, including surgical expenses, and to resolve the employee's claim for benefits, from Egan McKay, for a 20% whole body impairment. Egan McKay sought contribution for medical expenses from Sterling and Killmer and alleged that any permanent partial disability benefits awarded to the employee should be reduced by the 10% whole body impairment that the employee had claimed against Sterling and Killmer at the time of the 1995 settlement. The reasonableness and necessity of certain chiropractic treatment expenses was also disputed. Other issues listed by the compensation judge included the nature and extent of the employee's April 13, 1993, injury and the employee's alleged June 3, 1994, injury.

In a decision issued on December 6, 1999, the compensation judge concluded, in relevant part, that the employee had not injured his low back in the April 13, 1993, electrical shock incident while employed by Sterling; that the employee had sustained a temporary low back injury on June 3, 1994, while employed by Killmer; that the employee had a 20% whole body impairment as a result of his April 6, 1997, low back injury with Egan McKay; and that, while the employee had multiple level degenerative changes pre-existing the 1997 work injury, those pre-existing degenerative changes warranted a 0% rating under the applicable permanency rules. The judge therefore denied Egan McKay's claim for equitable apportionment of liability for medical expenses and for apportionment of permanent partial disability benefits related to the employee's pre-existing condition. Egan McKay and its insurer appeal.

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).

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A.) 1993).

DECISION

The compensation judge ordered Egan McKay and its insurer to pay the employee benefits for a 20% whole body impairment,[1] without any apportionment for the employee's pre-existing degenerative changes, which the judge rated at 0%. Egan McKay and its insurer essentially concede that substantial evidence supports the compensation judge's decision as to both permanent partial disability ratings. They contend, however, that, under the principle of judicial

[1] Pursuant to Minn. R. 5223.0390, subps. 4D, 4D(2), and 4D(4), which read as follows;

> **Subp. 4. Radicular syndromes.**
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> D. Radicular pain or radicular paresthesia, with or without lumbar pain syndrome, and with objective radicular findings, that is, hyporeflexia or EMG abnormality or nerve root specific muscle weakness in the lower extremity; on examination and myelographic, CT scan, or MRI scan evidence of intervertebral disc bulging, protrusion, or herniation that impinges on a lumbar nerve root, and the medical imaging findings correlate anatomically with the findings on neurologic examination, nine percent with the addition of as many of subitems (1) to (4) as apply, but each may be used only once:
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> (2) if a surgery other than a fusion performed as part of the treatment, add two percent, if surgery included a fusion, the rating is as provided in subpart 5;
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> * * *
>
> (4) additional concurrent lesion on a contralateral side at the same level or on either side at other level, which meets all of the criteria of this item or item E, add nine percent.

estoppel, the employee should not have been allowed to argue, in the most recent proceeding, that his pre-existing impairment merited a 0% rating, when he had alleged entitlement to benefits for a 10% rating in connection with his earlier settlement with Sterling and Killmer. As Egan McKay puts it, the employee should "as a matter of law" be "estopped from asserting a claim for functional loss to the same body part that was the focus of a previous proceeding by subsequently stating that his earlier claim had no validity." To hold otherwise, Egan McKay asserts, "would permit the employee to make a double recovery for the same disability." We are not persuaded.

In support of their judicial estoppel argument, Egan McKay and its insurer cite Hooper v. Zurich-American Insurance Co., 552 N.W.2d 31 (Minn. Ct. App. 1996), a case in which the Minnesota Court of Appeals stated that "[a] party cannot assert a position in one legal proceeding which is inconsistent with the position taken by that party in another legal proceeding." Id. at 36, (citation omitted). However, as late as 1999, the Minnesota Supreme Court noted that it had never "expressly recognized the doctrine of judicial estoppel," and it declined to take the opportunity to do so. State v. Profit, 591 N.W.2d 451, 462 (Minn. 1999). Moreover, as the court of appeals explained in a 1995 case, the doctrine of judicial estoppel is "intended to protect the courts from being manipulated by chamelionic litigants who seek to prevail, twice, on opposite theories"; as such, not only must all the facts at issue be the same in both cases, "the party to be estopped must have convinced the first court to adopt its position." Port Authority of the City of St. Paul v. Harstad, 531 N.W.2d 496, 500 (Minn. Ct. App. 1995) (emphasis added), quoting Levenson v. U.S., 969 F2d 260, 264-65 (7th Cir. 1992). The employee in the present matter never convinced any court to adopt his position, in that the settlement with Sterling and Killmer precluded any need for judicial determination of the permanent partial disability issue.

Whatever the merits of judicial estoppel in workers' compensation proceedings, we find no basis to reverse or reduce the compensation judge's award for permanent partial disability. Minn. Stat. § 176.104, subd. 4a "allows the compensation payable for a permanent partial disability to be reduced by the proportion of the disability attributable to a pre-existing disability." Giese v. Green Giant Co., 426 N.W.2d 879, 880-81, 41 W.C.D. 286, 288-89 (Minn. 1988). (Emphasis added.) Where, as here, the rated permanent impairment at issue is solely attributable to a particular work injury,[2] the question of apportionment never arises. See Fleener v. CBM Indus., 564 N.W.2d 215, 56 W.C.D. 495 (Minn. 1997) (where a case involves attributing a specific permanency rating to each of two discrete work-related injuries, statutory apportionment is not implicated); DeNardo v. Divine Redeemer Memorial Hosp., 450 N.W.2d 290, 42 W.C.D. 626 (Minn. 1990). The employee settled his claims for permanent impairment resulting from his 1993 and 1994 work injuries; the compensation judge properly held Egan McKay and its insurer liable for the permanent impairment resulting from the employee's 1997 work injury. See Fleener, 564 N.W.2d 215, 56 W.C.D. 495. The judge's decision is affirmed.

[2] The judge's decision on the issue is consistent with his denial of equitable apportionment of liability for medical expenses and essentially follows from the opinion of Dr. Boxall, who testified that the 1997 injury was the sole cause of the employee's disability and need for treatment, including surgery, after the date of that injury.