

DAVID HILBRANDS, Employee/Cross-Appellant, v. BOR-SON CONSTR. and U.S. FID. & GUAR. INS. CO., Employer-Insurer/Appellants, and CLEANCO TRUCK WASH and FIREMAN'S FUND INS. CO., Employer-Insurer, and MEDICA CHOICE/HEALTHCARE RECOVERIES, INC., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 28, 2000

No. [REDACTED SSN]

HEADNOTES

CALCULATION OF BENEFITS; APPORTIONMENT - EQUITABLE; TEMPORARY PARTIAL DISABILITY. Where the liability to the employee of a 1976 work injury was foreclosed by operation of statute and the employee's earnings during the period in question exceeded his earnings on the date of his 1985 work injury, the employee failed to demonstrate primary entitlement to temporary partial disability compensation against the 1985 injury employer and insurer. Cases determining contribution and apportionment among and between employers and insurers whose injuries contributed to compensable disability are distinguishable from those establishing underlying entitlement for benefits, and although in contribution cases the liability of the employer-insurer with the highest date of injury wage properly forms the basis for calculation of contribution between employers and insurers, an employee's underlying entitlement to temporary partial benefits is not determined by imputing the highest date of injury wage among contributing injuries to all contributing dates of injury.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Where the medical records and the employee's testimony consistently indicated that his knee condition resulting from a 1985 work injury had worsened rather than improved, and that the remaining option for treatment was a total knee replacement, which was not recommended at this time because of the employee's age, there was substantial evidence to support the compensation judge's finding of maximum medical improvement regardless of whether an MMI opinion offered by a physician treating only the 1976 injury was intended to deal only with that injury or with both the 1976 and 1985 injuries.

Affirmed.

Determined by Wilson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Jeanne E. Knight

OPINION

STEVEN D. WHEELER, Judge

The employer Bor-Son and its insurer, which paid certain temporary benefits to the employee under a mistake of fact, and the employee on cross-appeal, appeal from the compensation judge's determination that the employer Cleanco Truck Wash and its insurer, Fireman's Fund, were not liable to pay temporary benefits to the employee for any period after the

date of a partial stipulation settlement in 1988 through the date of hearing. The employee further cross-appeals from the judge's finding that the employee reached maximum medical improvement from all injuries effective October 28, 1998. We affirm.

BACKGROUND

This matter was submitted in part on this stipulation of facts:

On October 11, 1976, David W. Hilbrands, "employee," was employed by the Bor-Son Construction Company ("Bor-Son,") as a construction laborer, at a wage of \$368.40 per week, when he sustained an injury arising out of and in the course of that employment. Bor-Son was insured at that time by USF&G Insurance Company.

Bor-Son/USF&G admitted liability and paid workers' compensation benefits to the employee. These benefits included permanent partial disability to the extent of 25 percent of the back, 10 percent of the stomach as an intestinal organ, 15 percent of the right arm, and the simultaneous injury factor. In addition, Bor-Son paid wage loss benefits in the form of temporary total and/or temporary partial disability benefits for all relevant periods of time from 1976 onward. The nature of the employee's disability resulting from the 1976 injury was such that these wage loss benefits were paid essentially continuously from October 11, 1996 [sic] through January 12, 1997.

The employee's disability resulting from the 1976 injury was formally registered with the Special Compensation Fund pursuant to the provisions of Minn. Stat. § 176.131 on April 23, 1981.

In addition to his physical injuries, the employee developed psychological problems which resulted in psychiatric hospitalizations and extensive psychotherapy starting in the late 1970s.

As part of his vocational rehabilitation plan following the 1976 injury, the employee made various unsuccessful attempts to return to work. In 1984, a plan was developed whereby the employee would go to work at Cleanco Truck Wash where he would be a boiler maintenance assistant. The plan was that the employee would acquire some transferable job skills, and meaningful employment, as a means of re-entering the job market after a prolonged disability.

The employee started work at Cleanco on or about December 3, 1984. He was paid \$3.35 per hour and worked a 40-hour week. Throughout the time that he worked at Cleanco, the employee continued to receive temporary partial disability benefits from Bor-Son/USF&G. These benefits were calculated based upon the employee's earnings at Cleanco (\$134.00 per week). Through this time the employee continued to receive periodic medical treatment for his physical and psychological injuries.

On June 4, 1985, the employee sustained an injury to his right knee arising out of his employment at Cleanco. His average weekly wage on the date of said injury was \$134.00 per week. The injury did not initially result in any lost time, but eventually resulted in various periods of temporary total disability and temporary partial disability as outlined in the NOID of Cleanco-FFIC dated November 20, 1998, along with a 1.5 percent permanent partial disability paid as impairment compensation.

The USF&G payment records indicate that the employee continued to earn \$134.00 per week at Cleanco until September of 1985, at which time he left Cleanco to go to work for another employer, Hardwood Visuals, at a wage of \$220.00 per week. At that point his temporary partial disability benefits were adjusted downward by Bor-Son/USF&G so as to reflect the employee's higher earnings.

In May of 1986 the employee underwent surgery on his right knee. This was performed by Dr. Robin Crandall. As a result of this surgery, as well as his other disabilities, the employee was off of work until June of 1987, at which time he went to work as a security guard. He continued to work in that occupation for approximately 10 years thereafter, before leaving that employment in early 1997

Bor-Son/USF&G continued to pay the employee ongoing temporary partial disability benefits. When the employee went off of work in connection with his knee surgery, Bor-Son/USF&G began paying temporary total disability benefits. However, these benefits were paid pursuant to a temporary order served and filed on December 21, 1986. Bor-Son/USF&G also asserted a claim for contribution/reimbursement contending that some or all of the benefits which they were paying to the employee were the responsibility of Cleanco and its insurer, Fireman's Fund Insurance Company, as a result of the employee's 1985 knee injury. At the time of said initial contribution claim Cleanco/FFIC disputed the employee's injury of June 4, 1985 and the nature and extent thereof.

Following his surgery, the employee continued to treat with Dr. Crandall in connection with his knee problems. In a report dated January 23, 1987, Dr. Crandall concluded that the employee had attained maximum medical improvement for his knee condition as of January 19, 1987. This report was served upon the employee by FFIC on January 29, 1987.

In support of their contribution claim, Bor-Son/USF&G had the employee seen by Dr. Michael Davis on October 19, 1987. Dr. Davis examined the employee and concluded that he should observe certain physical restrictions upon his employment activities. Dr. Davis felt that 50 percent of this disability was due to the 1976 injury and 50 percent was due to the 1985 injury. He further concluded that the employee's overall disability after the 1985 injury was made substantially greater by reason of the disability which resulted from the 1976 injury, and which had been registered with the Special Compensation Fund.

In 1988 the employee, Bor-Son/USF&G, Cleanco/FFIC, and the Special Compensation Fund entered into a stipulated settlement. At the time of said settlement both Cleanco/FFIC and the Special Compensation Fund denied that the employee sustained a knee injury on June 4, 1985 at Cleanco. The agreement called for Cleanco/FFIC to pay the employee certain temporary total disability benefits for the period from May 10, 1986 through May 3, 1987 at a rate of \$134.00 per week. This was the appropriate temporary total disability rate for an injury of June 4, 1985, based upon the employee's earnings at that time of \$134.00 per week, per Minn. Stat. § 176.101, subd. 1(2) (lesser of 50 percent of statement average weekly wage of employee's actual weekly wage). In addition, FFIC agreed to reimburse USF&G 25 percent of temporary partial disability benefits paid during the period from May 4, 1987 through March 20, 1988, and further agreed to reimburse USF&G in an amount equal to 25 percent of payments made for temporary total disability, temporary partial disability, permanent total disability, and rehabilitation expenses for periods from and after March 20, 1988. FFIC also paid the employee \$1,125.00 representing 1.5 percent permanent partial disability.

The Special Compensation Fund agreed to reimburse Fireman's Fund for all temporary partial disability, temporary total disability, permanent total disability and rehabilitation benefits paid for periods of disability or rehabilitation after January 1, 1988. The employee

agreed to settle his claims on a “to date” basis under said settlement. Bor-Son/USF&G agreed to settle their contribution claims through March 20, 1988 under said settlement.

The stipulation for settlement was executed by all parties, filed with the Office of Administrative Hearings, and an award on stipulation was served and filed on August 5, 1988.

From 1988 until early 1997 the employee continued to work as a security guard. He continued to receive temporary partial disability benefits from Bor-Son/USF&G. FFIC would reimburse USF&G 25 percent of TPD paid, and would in turn be reimbursed by the Special Compensation Fund for all benefits paid to USF&G.

In early 1997 USF&G realized that it had been overpaying TPD benefits to the employee. The law in effect on October 11, 1976 provided that temporary partial disability benefits were limited to 350 weeks. USF&G calculated that it had reached this total as of June 8, 1987. Accordingly, it served a NOID on the employee for the purpose of terminating temporary partial disability benefits by operation of statute.

The employee requested a conference in response to said NOID and a conference was held. It was determined that USF&G had reasonable grounds to discontinue benefits. USF&G then asserted the current Petition for Contribution/Reimbursement against Cleanco/FFIC and the Special Compensation Fund.

The parties do not dispute that Bor-Son/USF&G’s obligation to pay temporary partial disability as a result of his injury of October 11, 1976 ceased by operation of law on June 8, 1987 when the employee was paid a total of 350 weeks of temporary partial disability. Nor do the parties dispute that Bor-Son/USF&G paid temporary partial disability under mistake of fact and/or law from June 8, 1987 to January 12, 1997 in a total amount of \$99,951.00, of which they have been reimbursed \$23,880.30.

The petition, as amended, provides that USF&G has overpaid TPD to the employee in the amount of \$99,951.00 and contending that it is entitled to reimbursement from Cleanco/FFIC, and ultimately from the Special Compensation Fund, in an amount equal to \$76,070.70 after deducting the \$23,880.30 that had already been reimbursed by Fireman’s Fund. The parties do not dispute the accuracy of these figures although Cleanco/FFIC and the Special

Compensation Fund dispute Bor-Son/USF&G's entitlement to reimbursement of said amounts.

The employee also filed a claim petition setting forth a claim for "intermittent" temporary total disability and/or temporary partial disability for the period from January 12, 1997 (date of discontinuance) to the present and continuing. The employee asserts entitlement to temporary partial disability from Cleanco/FFIC based upon the higher average weekly wage in effect at the time of the employee's October 11, 1976 date of injury at Bor-Son, relying on Marsolek v. Miller Waste Mills, 69 N.W.2d 617 (Minn. 1955), and Koski v. Erie Mining Co., 223 N.W.2d 470 (Minn. 1973).

Cleanco/FFIC has obtained an independent medical examination following the filing of the employee's claim petition with Dr. Lloyd Leider. In his report of November 13, 1997, Dr. Leider concluded, *inter alia*, that the employee sustained an injury to his right knee on June 4, 1985 "which resulted in some chondral abrasion and deficit at the medial femoral condyle and the patellofemoral joint." In Dr. Leider's opinion this "set the stage for a progressive degenerative athrosis at these areas of" the employee's right knee. Dr. Leider felt the employee required restrictions as a result of his June 4, 1985 right knee injury of no prolonged kneeling or squatting, and the ability to change positions periodically as symptoms dictated.

Cleanco/FFIC and the Special Compensation Fund have answered both the claim petition and the petition for contribution denying those claims. Bor-Son/USF&G have answered the employee's claim petition denying the benefits claimed on the basis that they have no further liability to the employee by operation of law for temporary partial disability and that they have no further liability for temporary total disability pursuant to Koski, *supra*.

(Stipulated Facts, 10/19/99.)

In addition to the foregoing, the parties submitted evidence on the issue of whether the employee had reached maximum medical improvement. The evidence pertaining to this question will be discussed in the portion of this Opinion addressing our review of that issue.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire

record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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.

Question of Law

The issues on appeal in this matter also involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

Liability for Temporary Partial Disability Benefits

Appellants Bor-Son and its insurer, USF & G, seek reimbursement from employer Cleanco and its insurer Fireman's Fund for 75 percent¹ of the temporary partial disability benefits they paid to the employee in error subsequent to March 20, 1988. There is no dispute that appellants' liability for temporary partial disability benefits had ended prior to that date by operation of a 350-week statutory limitation in effect as of the date of the employee's injury sustained in Bor-Son's employment.

The parties have made extensive, complicated and convoluted arguments which, in substantial part, entirely rest on cases and principles not here applicable. For the sake of brevity, and in order to avoid introducing undue confusion, we will omit any discussion of much of the parties' arguments to the extent that it is not relevant to the essentially straightforward issue actually presented.

The appellants, joined by the employee on cross-appeal, predicate their claims on the theory that, after their liability to pay temporary partial disability ceased, Cleanco and

¹ Cleanco and Firemans Fund had already reimbursed the appellants for 25 percent of these benefits as they were paid pursuant to the parties' 1988 stipulation, and in turn were reimbursed for these payments by the Special Compensation Fund. While Cleanco/Firemans and the Fund contend that this 25 percent was also paid in error, they make no claims for a credit or other remedy with respect to the 25 percent they paid.

Fireman's became obligated to pay the portion of the employee's wage loss attributable to the employee's 1976 injury at Bor-Son in addition to any temporary benefits attributable to the employee's 1985 work injury at Cleanco, citing Marsolek v. Miller Waste Mills, 69 N.W.2d 617, 18 W.C.D. 244 (Minn. 1955). Under this theory, having mistakenly paid Cleanco/Fireman's obligation, appellants would be entitled to reimbursement.

In Marsolek, the employee sustained an injury in 1944 while working for employer Miller Waste Mills, resulting in temporary total disability for various periods through April 1, 1946, after which the employee returned to work for a different employer, Winona Machine and Foundry Company. The employee sustained further injuries in 1946 and in 1948 in this employment, and again received temporary total disability compensation, responsibility for which was equally apportioned between Miller Waste Mills and Winona Machine & Foundry. The employee again returned to work, for a third employer, in 1950. He sustained no further work injuries but as of April 10, 1953 again became temporarily totally disabled as a combined result of the 1944, 1946 and 1948 injuries. Under the law on the date of the 1944 injury, the liability of Miller Waste Mills for temporary total disability was limited to 300 weeks following the date of injury. The Industrial Commission held that this cessation of liability prevented further apportionment against Miller Waste Mills, and further held that as causation for the employee's disability had been apportioned 50 percent to the 1944 injury, the second employer, Winona Machine & Foundry, was liable to pay only 50 percent of the temporary total disability otherwise due from them following the 1946 and 1948 injuries, in effect shifting the apportionment against Miller Waste Mills onto the employee.

The Supreme Court agreed with the Commission that Miller Waste Mills' liability for temporary total disability benefits had ended after the 300 weeks since the injury had elapsed, but reversed the reduction of benefits to be paid by Winona Machine & Foundry, holding that the case was governed by the principle that the employee was "entitled to full compensation for his disability from the employer in whose employment the new accident was sustained even though the disability was the result of the aggravation of the prior infirmity." Marsolek, 69 N.W.2d at 620.

Simply put, the Marsolek case and its progeny² stand for two essential propositions - first, that under circumstances where the liability of a prior injury employer-insurer has ended as the result of the operation of statute, by prior settlement, or by an employee's failure to give timely notice for the prior injury claim, apportionment is not available in favor of a subsequent injury

² Subsequent cases which have followed and extended Marsolek include, among others, Warnecke v. Hoerner Waldorf Champion, 33 W.C.D. 654 (W.C.C.A. 1981) where the same principles were extended to a case involving the running of the statute of limitations on the first injury, and Webeck v. Mochinski General Contractor, 41 W.C.D. 1063 (W.C.C.A. 1989) where the Marsolek case was held to govern the situation where an employee had entered into a settlement prior to reinjury which foreclosed the liability of the employer and insurer at the time of the earlier injury. See also Johnson v. Tech Group, Inc., 491 N.W.2d 287, 47 W.C.D. 367 (Minn. 1992), in which the Supreme Court does not specifically cite Marsolek but cites instead its affirmance of this court's decision in Webeck.

employer against the prior injury employer-insurer; and second, that the employer on the risk from a subsequent injury may not assess this foreclosed apportionment against the employee by a reduction of benefits otherwise payable due in whole or in substantial part to that employer's injury. Neither of these propositions affect the employee's underlying entitlement, or the absence thereof, to specific benefits as a result of the later employer's injury.

In order to show entitlement to temporary partial disability compensation, an employee must show (1) a physical disability, (2) an ability to work subject to the disability, and (3) an actual loss of earning capacity that is causally related to the disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101. Here, the employee's wage on the date of injury at Cleanco was \$134.00 per week. During periods for which temporary partial disability is claimed, the employee's wage was at all times in excess of the wage on the date of the 1985 injury at Cleanco. If section 176.101 is followed and the statutory method is used to determine wage loss following the 1985 injury, the employee has not demonstrated a claim for temporary partial disability compensation against employer Cleanco.

The appellants and cross-appellant contend, however, that where an employee has sustained successive work injuries which jointly contribute to disability, the employee's entitlement to benefits must be determined by utilizing as the date-of-injury wage the highest wage earned by the employee at any of the dates of injury, here the wage earned at the time of the 1976 injury at Bor-Son. To support this deviation from the statutory method of determining liability, they cite a line of cases beginning with Brink v. Metropolitan Waste Control Commission, 34 W.C.D. 745 (W.C.C.A. 1982), which, they contend, mandate this approach to the determination of Cleanco's liability for temporary partial disability benefits.

In Brink, an employee sustained three successive work injuries while employed by three different employers. Each injury contributed to the employee's eventual temporary partial disability, with 50 percent of the employee's disability attributable to the first injury and 25 percent to each of the two succeeding injuries. Although the employee's post-injury earnings resulted in a wage loss as compared to the wage rates in effect on the dates of the second and third injuries, the employee's post-injury wage exceeded that at the time of the initial work injury. The compensation judge calculated temporary partial disability compensation based on the wage rate at the highest contributing date of injury, and ordered that each employer-insurer contribute to the temporary partial disability compensation based on that employer's apportioned share of disability. This court rejected the first employer's claim that it was not liable for its apportioned share of contribution to subsequent injury employers merely because the employee's post-injury earnings exceeded the wage rate at the time of its injury. In Burgess v. Midland Cooperative, Inc., 48 W.C.D. 334 (W.C.C.A. 1992), another case involving application of the percentage apportionment method of allocating liability for temporary partial disability resulting from multiple injuries, this court further held that it made no difference for purposes of liability for

contribution which of the successive employers' injuries bore a wage rate lower than the employee's subsequent earnings. Burgess, 48 W.C.D. at 348.

These cases, however, do not support the premise advanced by the appellants and cross-appellant in this case. The Brink and Burgess cases deal entirely with issues of an employer and insurer's entitlement to contribution and reimbursement towards payments due to the employee from another employer and insurer, and of the apportionment of benefits, where multiple injuries have contributed to a compensable disability. They have nothing to do with determining an employee's underlying entitlement to benefits in the first instance³. Brink and Burgess stand for the proposition that, where at least one employer-insurer whose injury contributed to an employee's disability bears liability for benefits, it is appropriate to assess contribution for those benefits by apportionment against other employers and insurers whose injuries also contributed to the disability for which benefits are payable, even where the weekly wage in such other injuries does not independently give rise to direct liability to the employee. This is because apportionment is not statutory but instead is based upon equitable principles established by case precedent dealing with the rights of employers-insurers inter se.

Even in such cases, however, there must be at least one employer-insurer having liability for benefits to the employee pursuant to the statutory calculation which compares the employee's post-injury earnings with the wage at the time of that injury. Unless at least one employer-insurer bears a direct liability to the employee for temporary benefits, there is nothing towards which contribution may be assessed from other employers and insurers whose injuries also contributed to the disability. Obviously, it is the amount of compensation due from the employer-insurer bearing the greatest liability which necessarily serves as the basis for calculation of the apportionment of benefits between other employers and insurers. Thus, while Brink and Burgess and similar cases give the superficial appearance of a concept of primary liability based upon the highest wage rate earned at the time of any of the contributing injuries, this is merely an artifact of the necessary basis for determining contribution and apportionment among and between employers and insurers.

Succinctly stated, contribution and apportionment are different than and subject to different principles than is the question of primary liability. Nothing in the case law provides a basis for here deviating from the statutory requirements for establishing an employee's entitlement to benefits in the first instance. The compensation judge properly found that the employee had failed to establish entitlement to temporary partial disability benefits against the employer and insurer Cleanco in this case, and we affirm.

³ The respondents argued that this case was instead controlled by an alternative line of cases including Kirchner v. County of Anoka, 410 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987) and LaFleur v. Interplastic Corp., slip op. (W.C.C.A. Apr. 4, 1991). These cases merely present an alternative method of determining apportionment and contribution among and between employers and insurers which is used where an employee's successive injuries have resulted in successive consistent wage losses. These cases are thus equally inapplicable to the present issue of the underlying primary liability of Cleanco, and we have, accordingly, not discussed them in this opinion.

Maximum Medical Improvement

The employee treated for the effects of his 1976 injury with various physicians, but on an ongoing basis has treated for that injury primarily with Dr. Steven Noran. Dr. Noran was aware of the employee's 1985 work injury to the right knee, as reflected in his office notes shortly after the injury, but he did not treat the employee's knee problems. The employee began treating for his 1985 work injury to the knee with Dr. Robin Crandall on October 14, 1985, when Dr. Crandall diagnosed probable subpatellar chondromalacia. The evidence does not disclose whether the employee was referred to Dr. Crandall by Dr. Noran; however, Dr. Crandall sent a copy of his initial chart notes and a letter about the employee's knee condition to Dr. Noran after his examination of the employee. (Exhs. 2, 3.)

In 1986, Dr. Crandall performed an arthroscopy with chondroplasty on the employee's knee. The employee continued to treat periodically through some time in 1993 with Dr. Crandall and received a knee brace and injections, but thereafter did not return to Dr. Crandall for treatment for his knee until April 23, 1997. Meanwhile, on September 27, 1996 Dr. Noran saw the employee for problems associated with the 1976 injury and rendered the opinion that the employee was at MMI. In his April 16, 1997 report, Dr. Noran noted "Status - post work injury, October 11, 1976. He has reached MMI." (Exhs. 2, 3.)

The employee returned to Dr. Crandall on April 23, 1997 reporting right knee discomfort. Dr. Crandall noted crepitus on examination, and there was a +1 effusion. X-rays showed that the employee was showing increasing medial compartment degenerative joint disease. Dr. Crandall's diagnosis was of degenerative arthritis forming in the right knee, medial, with some subpatellar degenerative joint disease. Over the next several months, the employee underwent injection to the knee and other conservative treatment, but on November 7, 1997, Dr. Crandall noted that the employee was still having a lot of pain and problems with his knee and that it had gotten worse over the past few years. Dr. Crandall found evidence supporting increased knee problems on examination, and ordered an MRI scan. On December 12, 1997, Dr. Crandall noted that the MRI revealed a vertical tear in the medial meniscus. On January 27, 1998 the employee underwent arthroscopy of the right knee with excision of torn posterior horn and right knee medial meniscus, generalized joint debridement with patellofemoral shave, and injection of both anteromedial os calci for chronic plantar fasciitis. (Exh. 2.)

On February 6, 1998 the employee was seen by Dr. Crandall in follow-up for his right knee surgery and Dr. Crandall opined that the employee had "done fairly well with respect to this." However, Dr. Crandall noted the continuing diagnosis of degenerative arthritis of the medial compartment, and advised the employee that his knee would probably require total arthroplasty in a few years. As the employee was then only 55 years old, Dr. Crandall recommended preserving the joint with a fiberglass brace. Records of Dr. Crandall's office into February 1999 indicate continuing increase to the arthritis in the employee's knee during that period, which was treated with cortisone injections. (Exh. 2.)

On July 7, 1998, the employee was seen by Dr. Noran, who listed the employee's problems, including "knee problems." In a section of his report entitled, "Assessment," Dr. Noran again mentioned a variety of problems including knee problems, and further opined, as item 7 on this list, "At maximum medical improvement." Unlike prior reports in which Dr. Noran offered an MMI opinion, this report did not place the words "at maximum medical improvement" in the same phrase as "Status - post work injury, October 11, 1976," but listed it separately as a discrete item. The report was served on the employee by Fireman's Fund, employer Cleanco's insurer, on October 22, 1998 as evidence of MMI from all injuries. (Exhs. 3, 4.)

The employee saw Dr. James M. Schaffhausen for a second opinion on his knee (as well as for another condition not here at issue) on April 1, 1999. Dr. Schaffhausen diagnosed right knee medial compartment degenerative joint disease. The only treatment offered for the knee was anti-inflammatory medication for pain relief, with a possibility of cortisone injection. The employee returned to Dr. Schaffhausen on September 23, 1999 reporting that his knee had buckled about a month before causing him to fall. Dr. Schaffhausen noted prepatellar bursal swelling, and diagnosed prepatellar bursitis of the right knee. He provided the employee with an arthropad to keep pressure on the knee inflammation and recommended that the employee continue on anti-inflammatory medication. (Exh. 1.)

At the hearing below, the employee testified both on direct and cross-examination that his knee had not improved overall, and that the remaining option for treatment was a total knee replacement, which was not recommended at this time because of his age. The following excerpt from the employee's cross-examination is fairly representative of his testimony:

Q. So let me ask you this: what's different about your knee as you sit here today as compared to how it was, say, before you had the surgery in 1998? If you could think back to how you were feeling, say, two years ago, November or December of '97?

A. Well, it's gotten a lot worse.

* * *

Q. Have you told the doctors, Schaffhausen, Crandall, Noran, that you feel like your knee is getting worse over time?

A. Yes, I have, but they also said that, "You need a new knee."

Q. So it sounds like what the doctors have told you is that short of giving you a total knee replacement, there is really nothing more that they can do for you medically that's going to help your knee much better. Is that a fair statement?

A. Yes.

Q. And at this point, you - - you don't want to have total knee replacement.

A. I would - - I wouldn't care about knee replacement. I heard it only lasts a short time.

Q. You don't have plans for that kind of surgery at this point.

A. No, they have never - -

Q. And the doctors have indicated at this point they feel you're too young for that type of surgery, correct?

A. Yes.

Q. So over the past year or so, your course of treatment has basically consisted of going in to the doctor and get these injections and medication and so forth in an effort to try and keep your pain and swelling under control; correct?

A. Yes.

(T. 52-53.)

Maximum medical improvement is defined as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. § 176.011, subd. 25. Here, the compensation judge found that the employee had reached maximum medical improvement from the effects of both the 1976 and 1985 injuries effective October 28, 1998. The employee appeals.

The employee concedes that substantial evidence supported a determination that maximum medical improvement had been reached for the effects of the 1976 injury. However, the employee argues that the compensation judge erred in finding maximum medical improvement had also been reached with respect to the employee's knee injury. The employee principally bases his argument on language in the compensation judge's memorandum which, the employee contends, shows that the judge considered that the MMI opinion of Dr. Noran rendered on July 7, 1998 was intended by that physician to encompass both the 1976 and 1985 injuries. Specifically, the employee asserts that the compensation judge viewed Dr. Noran as a "gatekeeper" physician, who directed or followed the employee's care with respect to both injuries. The employee argues that the evidence does not adequately support this view. First, the employee argues that the records of Dr. Noran, taken as a whole, clearly demonstrate that the July 7, 1998 MMI opinion was

intended to relate solely to the 1976 injury. Secondly, the employee argues that there was insufficient evidence of any “gatekeeper” function, and that as Dr. Noran treated only the effects of the 1976 injury and deferred treatment of the 1985 knee injury to Dr. Crandall, any MMI opinion by Dr. Noran as to the knee injury lacked adequate foundation.

On close reading of the compensation judge’s memorandum, we conclude that the compensation judge did not rely solely (and perhaps not at all) on Dr. Noran’s opinion or on an inferred “gatekeeper” function by that physician in determining MMI with respect to the 1985 injury. The pertinent portion of the memorandum reads as follows:

The employee objected to the discontinuance of compensation, alleging he is not at MMI. Part of the basis for that claim is that Dr. Noran has not been treating the employee for his knee. *The employers and insurers point out* that Dr. Noran is the employee’s “gatekeeper,” the one physician in over-all charge of the employee’s case, and therefore knowledgeable in all aspects of the employee’s care. The employee has continued to receive medical treatment to his knee. *However, his own testimony acknowledges that the treatment will not improve his condition.* The purpose of any present treatment is to relieve pain and swelling. The only treatment that offers the possibility of improvement in his condition is a total knee replacement, which his doctors will not consider at this time.

Mem. at 5 (emphasis added).

No medical opinion was offered specifically to the effect that MMI had not been reached for the knee condition, or to suggest further treatment was currently contemplated which was likely to result in medical improvement, rather than maintenance, for the knee condition. The employee’s testimony in this case was sufficient to support the judge’s MMI finding for the knee condition, even if Dr. Noran’s opinion is wholly disregarded with respect to the MMI issue for the 1985 injury. “A finding of MMI is one of ultimate fact. . . . [I]t is the responsibility of the compensation judge to evaluate the employee’s condition as documented by medical records, medical opinions and other data and circumstances.” Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). The judge’s findings are adequately supported by the record in this case, and we must affirm. We therefore do not reach the employee’s arguments as to whether Dr. Noran’s MMI opinion was intended to include the 1985 injury or whether, if it did so, that portion of the opinion had adequate foundation.