GERALD C. LANIGAN, Employee/Appellant, v. SUPERWOOD CORP., a div. of GEORGIA-PACIFIC, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 25, 2001

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE. Where a copy of a bill from Radiological Associates for $239.50, the amount claimed, was attached to the employee's claim petition, and the exhibits contained other records which could support the claim, the compensation judge's finding that the employee failed to document the claim is vacated and the matter is remanded for redetermination.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY; MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. The compensation judge's decision denying payment of medical expenses related to the employee's treatment at PTOSI is vacated and remanded where (1) the compensation judge failed to resolve the issue, raised and argued by the parties, of whether the treatment was reasonable and necessary; and (2) neither the parties or the compensation judge identified the specific treatment parameters relied upon.

TEMPORARY PARTIAL DISABILITY BENEFITS. Where the compensation judge may have improperly relied upon restrictions legally determined prior to the time period in dispute, and where the compensation judge overlooked critical medical treatment records and misconstrued other evidence relating to the employee's medical treatment and restrictions, the compensation judge's determination that the employee was not entitled to temporary partial disability benefits after December 11, 1999 is vacated and remanded for redetermination.

UNDERPAYMENT OF BENEFITS. There is sufficient evidence in the record to determine whether the employee was underpaid wage loss benefits from and after September 28, 1999, and the compensation judge erred in failing to determine the issue; we vacate and remand.

Vacated, in part, and remanded.

Determined by: Johnson, J., Rykken, J., and Pederson, J.
Compensation Judge: Donald C. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's findings denying payment of medical expenses at Radiological Associates of Duluth and Physical Therapy Orthopaedic Specialists Inc. (PTOSI), along with reimbursement for out-of-pocket expenses and mileage. The employee also appeals the compensation judge's denial of temporary partial disability benefits

from and after December 11, 1999, and the employee's claim for underpayment of wage loss benefits from and after September 22, 1998. We vacate findings 13, 18-21, 23-24, 29, 38-42 and order 1.a.-d., and remand for reconsideration in accordance with this decision.

BACKGROUND

This case has an extensive litigation history, and we incorporate by reference previous decisions including the Findings and Orders filed on June 6, 1995 and September 25, 1998, together with this court's decisions of January 10, 1996 and May 6, 1999.

The employee, Gerald C. Lanigan, sustained an admitted personal injury to his mid- and low back on January 23, 1991, while working as a laborer for the self-insured employer, Superwood Corporation/Georgia Pacific Corporation. At the time of the injury, the employee was working on a rotating shift, twelve hours a day, four days on and four days off. The employee received treatment following the injury, and returned to work for the employer with various restrictions.

On May 2, 1994, the self-insured employer filed a notice of intent to discontinue wage loss benefits (NOID), asserting the employee was medically able to return to his regular work without restrictions. In a Findings and Order, served and filed June 6, 1995, Compensation Judge Gregory Bonovetz found, that since January 27, 1993, the employee was reasonably restricted to eight hours of work per day, no more than five consecutive days a week. The employee was also to avoid repetitive lifting, bending and twisting.[1]

Following the hearing, the employee sought ongoing treatment for his mid- and low back condition from his family physician, Dr. Jean Hoyer. On June 14, 1995, Dr. Hoyer diagnosed mechanical low back pain, and advised the employee to keep the same work restrictions in place. In September 1995, Dr. Frank W. Budd, an orthopedist, completed an on-site visit at the request of the self-insured employer. By report dated September 11, 1995, Dr. Budd opined the employee could work twelve hour days, four days in a row. Dr. Hoyer disagreed, maintaining restrictions of an eight hour day, five days a week, with no bending, twisting, or prolonged sitting or standing. On January 5, 1996, Dr. Hoyer indicated the employee's eight hour day, five days a week restrictions were permanent. The employee continued treatment with Dr. Hoyer through the summer of 1998 for periodic exacerbations with increased spasm, tightness and pain in the mid- and low back.

On December 24, 1997, the self-insured employer filed a Rehabilitation Request, seeking a determination that the employee could return to work twelve hours a day, four days a week. Following a hearing on August 12, 1998, Compensation Judge Donald C. Erickson issued a Findings and Order on September 25, 1998, denying the request, accepting Dr. Hoyer's restrictions, and determining the evidence did not support changing the employee's restrictions from eight hours a day, five days a week. This court affirmed the compensation judge's determination in a decision served and filed May 6, 1999.

[1] See Footnote 4.

On September 22, 1998, the employee was seen at the Duluth Clinic for an aggravation of his thoracic-lumbar condition. The doctor took the employee off work and advised the employee to follow-up with Dr. Hoyer. On September 29, 1998, Dr. Hoyer continued the employee off work and referred him for physical therapy. The employee was released to return to work on October 5, 1998 by Dr. Hoyer "with his chronic restrictions but initially should return working four hour shifts for one week." (Pet. Ex. G.) On October 19, 1998, the employee reported he was back on eight hour shifts and was essentially at his baseline. Dr. Hoyer advised the employee to return if flare-ups occurred, and continued the prior permanent work restrictions, including eight hour days. (Findings 6, 7, 8, 9, 10.)

The employee returned to Dr. Hoyer on December 11, 1998, reporting one week of worsening back pain and left leg pain. The employee was taken off work for five days and referred for an MRI scan. The scan, taken on December 15, 1998, revealed mild to moderate degenerative changes at L4-5 and L5-S1 without stenosis or nerve root impingement. The employee contacted Dr. Hoyer's office again on March 31, 1999, reporting increasing back pain. Toradol was prescribed for pain. (Pet. Ex. G.)

On June 15, 1999, the employee contacted Dr. Hoyer's office reporting increased back pain. When examined by Dr. Hoyer on June 17, 1999, the employee gave a history of worsening low back pain since June 14, 1999 when, at home, he twisted his back trying to remove rusty bolts (from a car he was restoring) with a large socket wrench. Dr. Hoyer assessed chronic low back pain with extension into the mid-back, continued the employee off work and referred the employee for physical therapy. (Pet. Ex. G.)

The employee was seen in follow-up by Dr. Hoyer on June 21, 1999. She released the employee to return to work on June 23, 1999, with his "permanent" restrictions but limited to four-hour shifts. On June 30, 1999, Dr. Hoyer continued the limitation of four-hour shifts, and referred the employee to Dr. Martinson for consultation regarding other treatment options. Dr. Martinson examined the employee on July 7, 1999. Dr. Martinson prescribed six weeks of physical therapy at the Duluth Clinic-Hermantown, and continued the "permanent" work restrictions and four-hour shift limitation. (Pet. Ex. G.)

The employee returned to Dr. Martinson on August 17, 1999. The employee reported his back pain was unchanged with constant pain in the right mid- and low back region. Physical therapy was continued, and the employee's four hour work restrictions were extended. Dr. Martinson also made a referral to PTOSI for further evaluation and treatment. The employee was seen in follow-up by Dr. Hoyer on September 3, 1999, who again continued the four hour shift limitation.

The employee began treatment at the Minnetonka PTOSI clinic on September 13, 1999. He was seen for treatment twice a day for five days through September 17, 1999. During the week he stayed at a hotel, and also incurred travel and meal expenses. The discharge summary, dated September 23, 1999, states the employee was reporting good improvement in his condition following the treatment.

On October 11, 1999, the employee was examined by Dr. Paul Cederberg at the request of the self-insured employer. By report dated October 15, 1999, Dr. Cederberg assessed a recurrent thoracic strain following a non-work exacerbation on June 14, 1999, which had resolved by the date of the examination. The doctor concluded the employee had no objective findings, and opined the employee could return to the same work hours and restrictions "as found by Judge Erickson in his order of September 25, 1998." (Resp. Ex. 16.) The employee was rechecked by Dr. Hoyer on October 13, 1999. Dr. Hoyer noted chronic low back pain with symptoms radiating into the right thoracic region. The doctor maintained the four-hour work shift with permanent restrictions until seen by Dr. Martinson on October 27th.

At the follow-up with Dr. Martinson on October 27, 1999, the employee reported his symptoms had improved with the treatment at PTOSI, but were slowly increasing again. The doctor recommended an additional 2-3 day course of treatment at PTOSI, and continued the employee's "current work hours and restrictions" until after completion of the treatment. The following day, October 28, 1999, the self-insured employer informed the employee that, according to the independent medical examiner, he could return to work eight hours a day, and that work was available to him on an eight hour a day basis with light-duty restrictions. The self-insured employer advised the employee of the availability of eight-hour a day work, in writing, in a letter dated November 9, 1999.

On December 9, 1999, the employee returned to see Dr. Martinson. The self-insured employer had denied authorization for additional treatment at PTOSI. The employee also reported that on December 7, 1999, the employer had transferred him from the production department to the finishing department where he was working as a finishing assistant. The employee stated that his symptoms had increased in severity with the new job. Dr. Martinson again recommended evaluation and treatment at PTOSI, and, if denied, in light of his recent exacerbations, a new functional capacities evaluation (FCE) to assess the employee's current work abilities based on an eight hour day. Dr. Martinson provided specific light-duty restrictions and continued the four-hour per day limitation until the treatment or FCE was completed.

On October 28, 1999, the self-insured employer served an NOID, seeking discontinuance of temporary partial disability benefits from and after October 17, 1999, asserting the employee was able to return to work eight hours a day based on the opinion of Dr. Cederburg. In an order issued December 6, 1999, Compensation Judge Arnold, Settlement Division, permitted the discontinuance of temporary partial disability benefits effective December 11, 1999. The employee filed an Objection to Discontinuance on January 3, 2000. On November 11, 1999, the employee had filed a claim petition alleging underpayment of temporary total and temporary partial disability benefits from September 22, 1998 and continuing, and seeking payment of a bill from Radiological Associates. The employee later amended the claim seeking payment for expenses related to his treatment at PTOSI. The claim petition and objection to discontinuance were consolidated for hearing.

The case was heard by Compensation Judge Donald Erickson on April 10, 2000. In a Findings and Order, served and filed July 10, 2000, the judge found, *inter alia*, the employee failed to prove: (1) entitlement to payment of the bill from Radiological Associates, (2) he was underpaid indemnity benefits from and after September 22, 1998, or (3) that an exception to the

treatment parameters applied to the treatment received at PTOSI. The compensation judge also found the four hour work restriction claimed by the employee was contrary to the previous Findings and Orders of two compensation judges and was not supported by the weight of the evidence. The judge, accordingly, denied payment of medical expense benefits for Radiological Associates and PTOSI, denied the claim for underpayment of indemnity benefits, and denied the employee's claim for temporary partial disability benefits after December 11, 1999. The employee appeals.

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). 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

Radiological Associates Bill

The compensation judge denied the employee's claim for payment of a medical bill from Radiological Associates of Duluth, finding the employee had not submitted into evidence either a bill for unpaid services or records from Radiological Associates, making it impossible to determine what medical expense at Radiological Associates was unpaid. The employee appeals.

The Radiological Associates bill is not among the medical bills admitted at the hearing. (See T. 6-7.) The self-insured employer argues the judge properly dismissed the claim, asserting a judge may not consider factual information that is not a part of the record. Minn. R. 1415.3000, subp. 1. However, under Minn. R. 1415.2900, subp. 7.B., "the record" in a compensation case includes "all pleadings, . . . including the judgment roll." In this case, a copy of a bill from Radiological Associates for $239.50, the amount claimed (T. 6), is attached to the employee's November 9, 1999 Claim Petition. The statement is dated April 1, 1999, lists George Alan Norris as the "Resp Phys" and indicates it is a workers' compensation bill. The employee had an MRI scan of the lumbar spine on December 14, 1998, the report of which was completed by G. Alan Norris, M.D. This report was admitted into evidence as Petitioner's Exhibit G. The scan was done at the request of Dr. Jean E. Hoyer, the employee's treating physician. (Pet. Ex. G: 12/11/98.) It is generally prudent to introduce a bill supporting a claim as an exhibit at the time of hearing, especially where, as in this case, the judgment roll is quite extensive. However, in this case, the evidence necessary to determine the issue was clearly part of the record. We, accordingly, vacate finding 41 and order 1.a. and remand for redetermination.

Medical Treatment at PTOSI

The compensation judge found the employee failed to prove the treatment provided at PTOSI between September 13 and 19, 1999, fell within any exception to the medical treatment parameters, and denied payment along with reimbursement for out-of-pocket expenses. (Finding 40.) The employee appeals.

Reasonableness and Necessity

The employee first asserts the compensation judge committed an error of law by failing to make any finding regarding the reasonableness and necessity of the treatment at PTOSI. The threshold issue for determining the compensability of medical treatment expenses, regardless of whether the treatment parameters apply, is whether under case law standards the treatment was reasonable and necessary to cure or relieve the effects of the personal injury. Lehman v. Hy-Vee Food Stores, No. [REDACTED SSN] (W.C.C.A. Nov. 2, 1995; see also Martin v. Xerox Corp., 59 W.C.D. 509 (W.C.C.A. 1999); Minn. Stat. § 176.135, subd. 1(a); Minn. R. 5221.6040, subp. 10; Minn. R. 5221.6050, subp. 1.A. The parties clearly raised and argued the question of whether the treatment provided at PTOSI was reasonable or necessary, and it was specifically listed by the judge in the issues presented for decision. (Finding 1.e.; T. 9, 19, 27). It is equally clear the dispute was not resolved by the judge. Although it is not always necessary to address this issue, it seems appropriate given the circumstances in this case, to remand the issue for determination.

Treatment Parameters

At the hearing, the self-insured employer asserted the PTOSI treatment "exceed[ed] the treatment parameters." The respondent, however, neither developed the treatment parameters argument or identified the particular treatment parameter(s) on which they relied. (T. 9, 19, 27, 33-34.) Nor did the judge cite any specific treatment parameters in his decision, or discuss how any particular treatment parameter applied to limit or allow compensation for the treatment provided on the facts of this case.

On appeal, the parties cite to and argue specific treatment parameters in support of their position on liability for the PTOSI treatment expenses. However, none of these arguments were made to the court below. It is not the responsibility of this court to apply the facts to the rules or to guess at the judge's reasoning, nor, given the length and complexity of the treatment parameters, should the compensation judge be required to guess at the parties' claims and defenses under the rules.

> [T]he treatment parameters are complex, and they are not workable in litigation unless the parties inform the judge as to which specific rules are at issue and the judge then explains in his or her decision . . . how the rules allow, or preclude, any given claimed treatment expense. . . . It is simply unacceptable for the parties or the judge to simply cite [the "treatment parameters"] without further explanation.

Boryca v. Marvin Lumber & Cedar, No. [REDACTED SSN] (W.C.C.A. (Nov. 10, 1999).[2]

Furthermore, the compensation judge's determination appears to be based, in part, on his finding that the employee's treating physiatrist, Dr. Martinson, "admitted" the employee's "passive treatment" exceeded the "treatment parameters." (Findings 39, 40.) Although, in his deposition, Dr. Martinson agreed the employee had a lot of physical therapy, and that it would exceed "the *minimum* standards" (emphasis added) under the treatment parameters, the doctor did not agree the treatment provided was beyond that which the treatment parameters would authorize. Neither counsel for the self-insured employer or Dr. Martinson used the words "passive treatment" during this exchange, nor is there any discussion of any specific treatment parameter(s) relating to "physical therapy" or whether PTOSI's treatment fell within some "passive treatment" category under the treatment parameters. (Resp. Ex. 19 at 41-42.) Moreover, the issue of whether and how the treatment parameters apply is not a question determinable solely by medical opinion, but one of ultimate fact which must be determined by the compensation judge on all of the facts presented.

We, accordingly, vacate findings 39 and 40 and order 1.c. and remand the matter to the compensation judge for reconsideration. Issues for determination on remand include whether the treatment provided at PTOSI was reasonable or necessary; whether the treatment is inconsistent with any treatment parameter specifically identified by the self-insured employer; and whether any of the grounds for departure from the applicable parameters apply. See Minn. R. 5221.6050, subp. 7.D.; see Martin at 517. The compensation judge may consider additional evidence or argument regarding the application of specific treatment parameters, as necessary. The judge need not and should not consider claims based on any rule not specifically raised by the parties.

Temporary Partial Disability Benefits after December 11, 1999

The compensation judge denied the employee's claim for temporary partial disability benefits after December 11, 1999, concluding there was no compelling reason the employee could not work eight hours a day. The employee contends the compensation judge's determination is contrary to substantial evidence and is clearly erroneous. We vacate and remand for redetermination.

It is not entirely clear on what basis the compensation judge found the "four hour work restriction is contrary to . . . the weight of the evidence in this proceeding." (Finding 38.) However, the judge concluded, in part, that the "four hour restriction is contrary to the Findings and Order of two Compensation Judges in previous litigation." (Finding 38.) The employee alleged an aggravation of his work-related low back condition on June 14, 1999, resulting in increased limitations. The restrictions judicially established prior to the aggravation are not res judicata after that date. Rather, an independent determination must be made of the employee's

[2] See also Olson v. Allina Health System, 59 W.C.D. 37 (W.C.C.A. 1999)(and cases cited therein); Dawson v. University of Minnesota, No. [REDACTED SSN] (W.C.C.A. May 6, 1999); Moorman v. St. Anthony Health Ctr., No. [REDACTED SSN] (W.C.C.A. Feb. 17, 1999).

restrictions during the periods in which entitlement to temporary partial disability benefits were in dispute.

It appears the compensation judge's determination was also based on the judge's finding that the employee had "convince[d] Dr. Martinson he had a permanent four hour restriction" when he, in fact, had an "8 hour per day permanent restriction," (findings 20, 38) and to some extent, at least, on the conclusion that medical records from Dr. Hoyer were not submitted into evidence. The judge found that Dr. Hoyer, the employee's long-time family physician, "apparently" saw the employee on June 17 and 21, 1999, returned the employee to work at four hours per day on June 23, 1999, "and according to her deposition turned his care over to Dr. Martinson." In a footnote, the judge added, "The records of these office visits were not submitted into evidence." (Finding 18, ftnt. 1.) In his memorandum, the judge emphasized that "[c]ritical records of the employee's treatment after the exacerbation, if they exist at all, were never submitted into evidence." (Mem. at 10.) This is incorrect. The judge clearly overlooked portions of the exhibit containing Dr. Hoyer's records. Copies of Dr. Hoyer's treatment notes for June 15, 17, 21, and 30, 1999 *are* included in Petitioner's Exhibit G. Morever, it was during this period of time that Dr. Hoyer returned the employee to work, effective June 23, 1999, stating she would "not have to change his already permanent restrictions but will have him return on four-hour shifts." On July 30, 1999, Dr. Hoyer referred the employee to Dr. Martinson who had seen the employee once previously in 1998. On the employee's first visit on July 7, 1999, Dr. Martinson recorded Dr. Hoyer's restrictions nearly verbatim, noting the employee was released to work with "permanent restrictions with four-hour shifts." Dr. Hoyer did *not* turn over the employee's care to Dr. Martinson at that point, but continued to see and treat the employee through October 13, 1999. These records are also in evidence and the judge, in fact, references some of that treatment.

In finding 20, the compensation judge found that "On July 7, 1999, the employee was examined by Dr. Martinson. **The employee incorrectly advised Dr. Martinson that he had a permanent four hour restriction, when in fact, he had an 8 hour per day permanent restriction**." (Emphasis and underlining is the judge's; see also findings 19, 38.) This finding is not supported by substantial evidence. At the July 7, 1999 visit, Dr. Martinson continued the employee's physical therapy at the Duluth Clinic Hermantown for six weeks and gave the employee a slip continuing the "current work hours/restrictions (four hours per day with permanent restrictions)," with follow-up in six weeks. The doctor stated "advancing work hours" without significant intervening improvement would place him at risk for reinjury "until completion of his therapy program." (Pet. Ex. G.)

Both Dr. Hoyer and Dr. Martinson consistently used similar language in describing the employee's restrictions. Both referred to the employee's "chronic" or "permanent" restrictions as something separate from limitations on his work hours. In her deposition, Dr. Hoyer explained that "permanent restrictions" and "four-hour shifts" refer to two different things. The employee's previous restrictions included light-duty restrictions and eight hour shifts, so "what I had said was that I was not changing his restrictions as far as his duties, that light duty restriction, but he was changed to four-hour shifts." (Resp. Ex. 18 at 22; compare finding 19.)

There is nothing in Dr. Martinson's *records* that indicate he ever treated the four-hour shift limitation as a permanent restriction. However, in his deposition, Dr. Martinson testified

he could not recall who placed the light duty and four hour restrictions on the employee, but they were apparently permanent at the time he initially saw him.[3] (Pet. Ex. G; Resp. Ex. 19 at 7-8.) The employee testified he did not tell Dr. Martinson the four-hour restriction was a permanent restriction. (T. 65.) Similarly, Dr. Martinson testified the employee did not ask him for restrictions or make specific comments regarding his restrictions. The doctor stated he did recall the four hours and the light duty, but "I don't recall him [the employee] saying that they were permanent in nature." When pressed by counsel for the self-insured employer to state whether his understanding that "those" were "permanent restrictions" likely came from the employee, Dr. Martinson stated "probably." (Resp. Ex. 19 at 31-32.)[4]

The compensation judge also found that on July 9, 1999, the employer asked "Dr. Martinson" to clarify why the employee was restricted to four hours of work "for an additional six weeks" instead of returning him to his "permanent restrictions of eight hours per day," and that the record did not reflect a response by Dr. Martinson. (Finding 21.) In fact, the letter was sent by the Georgia-Pacific Corporation claims supervisor, from its office in Portland, Oregon, solely to Dr. Hoyer at her office in Superior, Wisconsin, and not to Dr. Martinson who offices at the

[3] Unfortunately, at the time Dr. Martinson was deposed on January 11, 2000, the chart records were *not available* and Dr. Martinson had not had an opportunity to review his treatment records prior to October 27, 1999. (Resp. Ex. 19 at 6-7, 10.)

[4] Counsel for the self-insured employer persisted in arguing, both at the hearing and on appeal, that Dr. Hoyer's restrictions merely reflect "discredited restrictions from Dr. Downs," and that the employee has a long history of misleading his doctors. This is contrary to previous decisions in this matter. In his June 6, 1995 Findings and Order, Compensation Judge Bonovetz found that little weight could be given to Dr. Down's opinions. (Findings 29, 30.) However, he specifically found the evidence did "*not* clearly evince an attempt on the part of the employee to misrepresent material facts concerning his condition." (Finding 40, emphasis added.) Judge Bonovetz also rejected the self-insured employer's contention the employee could return to work 12 hours per day with no restrictions, finding instead, based on "all of the lay and medical evidence" the employee was reasonably restricted to eight hours per day with no more than five days worked consecutively. The employee was also to avoid repetitive lifting, bending and twisting. (Finding 45.) These findings were not appealed, and the compensation judge's findings, in that respect, were accepted by this court in its decision of January 10, 1996. Lanigan v. Superwood Corp., 54 W.C.D. 278, 287 (W.C.C.A. 1996). In his Findings and Order of September 25, 1998, Compensation Judge Donald Erickson found the opinions of Dr. Hoyer more persuasive than those of the independent medical examiner, and held the evidence did not support changing the employee's restrictions from eight hours per day to 12 hours a day. On appeal, the self-insured employer again argued the judge erred in relying on Dr. Hoyer's restrictions since she relied on the "discredited" opinions of Dr. Downs. This court affirmed the compensation judge's findings, including his acceptance of Dr. Hoyer's opinions regarding the employee's restrictions subsequent to the prior decision. Lanigan v. Superwood Corp., No. [REDACTED SSN] (W.C.C.A., May 6, 1999).

Polinsky Center in Duluth, Minnesota. The letter requested a faxed response to the Portland, Oregon, office number.[5] (Pet. Ex. G.)

In finding 24, the judge references a September 3, 1999 recheck by Dr. Hoyer, noting that on examination the doctor found "*a normal ROM, motor strength, deep tendon reflexes, and sensation to light touch in the upper/lower extremities bilaterally.*" (Emphasis the judge's.) However, the employee's condition has always been diagnosed as a thoracic-lumbar strain/sprain with no symptoms in the arms or legs and no clinical neurological findings. The judge's emphasis is perplexing since the examination findings reflect no findings that are significantly different relating to the employee's condition at that point.

In finding 29, the compensation judge notes the employee reported to Dr. Hoyer on October 13, 1999, that he had fractured two ribs while receiving physical therapy at PTOSI, and that x-rays of the "thoracic spine" taken that day did not reveal any fractures. While the employee did report "fractured ribs" to Dr. Hoyer, the thoracic spine x-ray was separately ordered by Dr. Hoyer because she was concerned about the employee's increasing mid-back (thoracic spine) symptoms. It was not an x-ray of his ribs. (Pet. Ex. G: 10/13/99; see Dr. Martinson 10/27/99.)

Finally, the compensation judge found "Dr. Martinson admitted that the job description he had received from the employee was inconsistent with the job the employee had described to both Dr. Hoyer and his physical therapist at the Duluth Clinic-Hermantown." (Finding 39.) This again is not consistent with the medical records or Dr. Martinson's testimony. The "job description" given Dr. Hoyer refers to a statement in her June 17, 1999 chart note, shortly after the exacerbation, indicating the employee reported he had been off work all week, stating that although his "new duties" at work were not "too intensive," he had been unable to maintain himself in any one position for long enough to do anything. (Pet. Ex. G.) Similarly, in a note in the Hermantown office records on June 23, 1999, the therapist wrote the employee had returned to work on Monday, four hours per day and was "Not doing much." On August 17, 1999, Dr. Martinson commented the employee had returned to work as of June 23, 1999, and the employee stated his employer had been extremely amenable allowing him to change positions and modify activities as needed. Dr. Martinson continued to make similar notations through October 27, 1999. On November 9, 1999, the employer informed the employee in writing that, based on the representations of their attorney indicating the IME doctor had released him to eight hours of work per day, they had available and had offered light-duty work on an eight hour a day basis. (See findings 28, 32; Resp. Ex. 25.) The employee returned to see Dr. Martinson on December 9, 1999, reporting that on his arrival at work on December 7, 1999, his job position had been changed. The employee stated he had been working in the production department but was transferred to the finishing department. It was this job, according to the employee, that required standing on a concrete floor, lifting over 25 pounds, and significant amounts of bending and twisting. (Pet. Ex. G; Resp. Ex. 19 at 13-14.) When asked about the "discrepancies" in the "job descriptions" given to Dr. Hoyer and the therapist and his December 1999 description, Dr. Martinson stated he was not aware of what the employee had told Dr. Hoyer or the Hermantown therapist. He agreed the above statement recorded by Dr. Hoyer would be

[5] Compare the letter of August 18, 1999, again sent to Dr. Hoyer at the Superior, Wisconsin, clinic, but including Dr. Martinson's name. (Pet. Ex. G.)

inconsistent with the employee's description of his job on December 9, 1999, but the employee had indicated he had been transferred so he could not be sure of any correlation between the two jobs. (Resp. Ex. 19 at 13-14, 16-17.).

Given the number of discrepancies between the evidence of record and the compensation judge's factual findings, we believe the matter must be remanded for reconsideration. We, accordingly, vacate findings 13, 18-21, 24, 29, 38-39 and order 1.d. and remand the question of entitlement to temporary partial disability benefits after December 11, 1999, for redetermination.

Underpayment of Wage Loss Benefits from September 22, 1998

The compensation judge found the employee submitted no evidence regarding the amount of indemnity benefits paid from and after September 22, 1998, or an accounting of the difference between what the employee was paid from September 22, 1998 and what he claimed he should have been paid, and denied the employee's underpayment claim. (Finding 42.) The employee appeals, asserting he submitted sufficient evidence to support his claim for underpayment of wage loss benefits.

At the hearing, the employee submitted Petitioner's Exhibit F which contained a two page indemnity worksheet listing the employee's average weekly wage, his earnings, the temporary partial disability rate, and total compensation due. Attached to the worksheet are copies of payroll records showing the employee's earnings during the claimed period of underpayment. The worksheet was admitted for "illustrative purposes" only. However, contrary to counsel's argument, the self-insured employer did not object to admission of the payroll records and they were, in fact, admitted for evidentiary purposes. (T. 10-11.) Attached to the employee's Claim Petition are copies of indemnity payments made to the employee by Georgia-Pacific between September 28, 1998 and October 20, 1999. While it would be helpful to have a itemization calculating the difference between the benefits claimed and the amount of indemnity paid, there is sufficient evidence in the record to determine whether there has been an underpayment of wage loss benefits due to the employee. We, therefore, vacate finding 42 and order 1.b., and remand for determination. On remand, the compensation judge may request further information from the parties to aid the judge in resolving this issue.