THOMAS THORSTON, Employee/Appellant, v. MINN. LABORERS, LOCAL 132 and WAUSAU INS. CO., Employer-Insurer, and MINN. LABORERS HEALTH & WELFARE FUND, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 16, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - BACK. Substantial evidence, including medical records and expert medical opinion, supported the compensation judge's finding that the employee had sustained a zero percent permanent partial disability.

INTERVENORS. Where it is not clear that prejudice to the other parties would result from a late application for intervention, we remand for reconsideration.

INTERVENORS; STATUTES CONSTRUED - MINN. STAT. § 176.135, SUBD. 3. Where an intervenor files a proposed stipulation under Minn. Stat. § 176.135, subd. 2(b)(9), and no timely objection is made, two elements of the intervenor's claim for reimbursement are deemed established: first, that the intervenor's statement of the amounts paid on behalf of the employee is accurate, and second, that the payments were related to the alleged workers' compensation injury or condition. If the employee's underlying claim is compensable, the intervenor is entitled to full reimbursement and the employer and insurer may not contest the services claimed. In order to preserve their defense, the employer and insurer must file a timely objection.

MEDICAL TREATMENT & EXPENSE - SECOND SURGICAL OPINION; STATUTES CONSTRUED - MINN. STAT. § 176.135, SUBD. 1(a). The statutory language of this section grants an employee the right to a second opinion with a physician of his choice, at the expense of the employer and insurer, without qualification when surgery has been proposed for the condition resulting from his work injury. The reasonableness and necessity of an employee obtaining a second opinion to assist in consideration of whether to undergo a serious surgical procedure is implicit in the statutory grant of this right. While a second surgical opinion may be denied where the proposed surgery itself has been found to be not reasonable or necessary treatment, the compensation judge improperly denied the second surgical opinion where the question of the reasonableness and necessity of the proposed surgery had not been adjudicated and was not presented at the hearing.

Affirmed in part, reversed in part, and vacated and remanded in part.

Determined by Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Carol A. Eckerson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's determination that he sustained a zero percent permanent partial disability as a result of his December 9, 1996 work injury. The employee also appeals from a denial of penalties, denial of a request for approval of a second surgical opinion, denial of an award of reimbursement to the intervenor, Minnesota Laborers Health and Welfare Fund, and from denial of a post-hearing motion for intervention filed by a health care provider, St. Paul Radiology, P.A.

BACKGROUND

The employee, Thomas L. Thorston, was born in 1949 and is fifty-one years old. He is a high school graduate with some vocational training who, since 1974, has worked in the construction industry, primarily doing concrete work. In about 1996 he was appointed as a business agent for his union, Minnesota Laborers Local 132, the employer in this case. On December 9, 1996, the employee was carrying paperwork from the union's office to his car when he fell on ice and landed on his back. He was rendered unconscious and was taken to United Hospital by ambulance. (T. 10-14.)

The employee was seen at the hospital by Dr. David Covington, M.D., where he complained of a stiff neck and low back pain. He denied pain or radiation into his legs or feet. Some spinous process tenderness was noted posteriorly. Lateral lumbar and cervical spine x-rays were normal, with normal alignment and without evidence of fracture. Additional lumbar and cervical spine x-rays showed degenerative changes consisting of marginal spurring from the L2 through L4 levels without evidence of acute fracture or subluxation. Dr. Covington diagnosed a cervical and lumbar strain status post fall, together with a closed head trauma. The employee was discharged to his home, given pain medications, and instructed to massage his neck and back with ice and return if his symptoms worsened. (T. 14-16; Exhs. A, 1.)

The employee thereafter treated for his low back symptoms for a brief period with his family physician, Dr. Conrad Butwinick, M.D. On February 13, 1997, the employee underwent an MRI scan of the lumbar spine ordered by Dr. Butwinick. The scan was read by a radiologist, Dr. David C. Dahlgren, M.D., as showing a normal disc at L5-S1, a minimal annular bulge without disc protrusion or spinal stenosis at L4-5, and an annular tear with broad-based central disc protrusion, causing mild stenosis, at L3-4. A small extrusion of disc fragment inferiorly and below the disc level was also noted at L3-4. The MRI was otherwise negative. Dr. Butwinick referred the employee to a neurosurgeon, Dr. Max E Zarling, M.D., for consultation. (T. 23-24; Exh. B: 2/13/1997 MRI report.)

On May 7, 1998 the employee filed a claim petition seeking reimbursement for out-of-pocket medical expenses in the amount of $112.64 and for an unpaid bill from Dr. Butwinick for $65.00. The employer and insurer answered, alleging that the employee's injury had been temporary in nature and that the treatment expenses sought were not related to the work injury. (Judgment Roll.)

Dr. Zarling saw the employee on May 13, 1997 for neurosurgical consultation. The employee reported that he had been well until he slipped and fell in December 1996, but had experienced pain in the neck and back since. He complained of frequent spasms and tightness in his back on over-exertion, and reported that he was having some numbness in his posterior thighs, worse on the left than right. On examination, Dr. Zarling noted that the employee's posture was quite good. The employee had some pain with extension but a fair range of motion. Straight leg raising was negative, knee reflexes were equal and active, ankle reflexes were equal and active, and motor and sensory exams were normal. Dr. Zarling reviewed the MRI scan, noting that it showed moderate central disc protrusion at L3-4. His diagnosis was of a centrally protruded disc producing some degree of spinal stenosis. Dr. Zarling recommended conservative treatment, noting that the employee "does not have much of a deficit." He prescribed pain medications. (Exh. B.)

On September 16, 1998 the employee was seen by Dr. Gary E. Wyard, M.D., for an examination on behalf of the employer and insurer. Dr. Wyard noted that the employee could stand erect, bend forward, and touch his fingertips almost to the floor. His examination showed no spasm, sacroiliac joint tenderness or fibromuscular nodules in the employee's lower back. Straight-leg raising was negative, and the employee had a full range of motion of the hips, knees and ankles, with no atrophy of thighs or calves or sensory deprivation of the lower extremities. Dr. Wyard noted that the medical records furnished to him showed no treatment from May 1, 1997 to January 8, 1998, and in his view the medical records contradicted the employee's claim that he had gotten progressively worse since the work injury. He characterized the employee's reported symptoms as subjective complaints without specific persistent objective clinical findings. In his opinion, the work injury on December 9, 1996 had been no more than a strain/sprain, and the employee required no restrictions, no ongoing care or treatment, and had reached maximum medical improvement by three months after the injury. The doctor also diagnosed a herniated disc at L3-4, neurologically intact, which he did not believe was related to the 1998 injury, though in the absence of any objective persistent clinical findings he was unable to speculate about when the employee's lumbar disc had become displaced. He rated the employee's permanent partial disability at zero percent based on Minn. R. 5223.0390, subpart 3A or subpart 4A. (Exh. 2.)

Another lumbar MRI scan was requested by Dr. Butwinick and performed on October 15, 1998. It was read by radiologist Steven D Johnson, M.D., as negative at the L4-5 and L5-S1 levels and as showing an annular tear with minimal bulge and minimal effacing effects at L3-4. (Exh. B.)

The employee returned to Dr. Zarling on November 12, 1998 complaining that his low back problems had worsened over the last year or so. He reported low back pain, especially in the morning, with a sharp pain down the hip into the upper leg and some pain in the right leg from the buttocks to the toes depending on activity. Straight-leg raising was negative. The employee reported some pain with extension of the back while flexion was pain free. Dr. Zarling noted that the new MRI scan showed a "dark disc" at L3-4 with some posterior bulging but that there was no evidence of root compression of any kind. He rated the employee with a seven percent permanent partial disability under Minn. R. 5223.0390, subpart 3C(1). He prescribed

pain medications and recommended that the employee "sit tight at present" since he could tolerate his work, and advised that the employee could consider fusion if he worsened. (Exhs. B, E.)

Some time in November 1998 the employee lost his post as union business agent and returned to active employment as a working foreman in the construction industry until June 15, 1999 when he was again appointed as a union business agent. (T. 20-21.)

On December 11, 1998 a compensation judge issued an order granting intervention by the Minnesota Laborers Health and Welfare Fund, which had paid medical expenses on behalf of the employee. (Judgment Roll.)

The employee returned to Dr. Zarling on January 4, 1999, to discuss the choice between continuing on medications and surgical treatment. At that time he was having recurrent pain, with low right-sided back pain, occasional right leg pain, and occasional right leg numbness when sitting too long. The employee apparently was continued on pain medications. (Exh. E.)

The employee filed an amended claim petition on August 24, 1999 asserting a claim to permanent partial disability compensation for a seven percent whole body disability to the low back. (Judgment Roll.) The employee next returned to Dr. Zarling on November 4, 1999, reporting that he was having more trouble with pain in the right side of his low back. Dr. Zarling recommended an epidural steroid injection at L3-4. (Exh. B.)

The employee underwent another lumbar MRI on January 17, 2000. This MRI was read as showing disc dessication with some loss of disc height and a posterior annular tear with a diffuse concentric annular bulge at L3-4. Only minimal ventral thecal sac effacement was seen and there was no evidence of foraminal narrowing or neural impingement. The scan was interpreted as showing no change from that of October 15, 1998 at this level. At L4-5 mild disc desiccation was present without focal posterior disc protrusion. There was no central, foraminal stenosis or evidence for neural impingement. (Exh. B.)

The employee saw Dr. Zarling on January 20, 2000. (Exh. B.) He reported that he still had pain in his back and in his right leg "if he does anything physical." He told the doctor that the epidural injection had been of little benefit after the first "couple" of weeks. Straight-leg raising was still negative on the left, and on the right the employee reported a little pain at 90 degrees. His right knee reflex was less than the left. Ankle reflexes were equal and active and motor and sensory functions were normal. Dr. Zarling noted that the 1998 and 2000 scans seemed about the same. He recommended discography and that the employee see Dr. Jerone D. Kennedy at Neurosurgery Associates, Ltd., to discuss a fusion. (Exh. B.)

A discogram conducted on February 3, 2000 showed degenerative disc disease at L3-4, but the examination was negative for reproduction of the employee's typical pain. (Exh. C.) The employee was examined by Dr. Kennedy on March 15, 2000 for consideration of a lumbar fusion. Dr. Kennedy noted that the employee had known degenerative disc changes at L3-4 and less so at L2-3 and L4-5. He thought that the discogram results were inadequate and recommended that the employee undergo a more complete discogram to rule out multi-level etiology. (Exh. C.) A discogram done on March 29, 2000 was read as positive at L3-4 for reproduction of the

employee's typical symptoms. There was abnormal discography at L3-4, indicating an annular tear. (Exh. C.)

Dr. Kennedy saw the employee again on April 13, 2000. The employee continued to complain of disabling low back pain, particularly with activity. Dr. Kennedy noted that the repeat myelogram revealed concordant pain at L3-4 but not at the adjoining disc spaces. He discussed the pros and cons of a lumbar fusion with the employee. In his view the employee had 50-70 percent odds of a significant relief in pain. The employee at that time stated he was interested in proceeding with surgery. (Exh. C.)

The employee was seen again by Dr. Wyard on June 14, 2000 at the employer and insurer's request. The employee complained of low back pain and some numbness down his right leg. He reported that since last seen he had gone back into construction work for a period of time without ongoing problems or difficulties doing the work, but with self-imposed limitations, and that he was now again a business agent for the union. The employee appeared to not be in distress. He sat comfortably and could walk on his heels and toes and forward bend. Some limitation was noted in back bending, side bending and rotation, but the doctor noted he found the employee's cooperation somewhat suspect. There was a full range of motion of the hips, knees and ankles, no atrophy in the thighs or calves and no sensory deprivation. Dr. Wyard noted that the employee's complaints of numbness were in a non-anatomical pattern over the right leg. Knee and ankle reflexes were active and motor testing was normal. (Exh. 2.)

Dr. Wyard diagnosed degenerative lumbar disc disease at L3-4, neurologically intact, consistent with a degenerative process and with the employee's age and natural aging. He continued in the opinion that the employee had sustained no permanency from the work injury on December 9, 1996, which he believed had been only a myofascial strain/sprain. The doctor noted that the employee's subjective complaints were not consistent with his clinical findings or imaging tests. His only treatment recommendations were that the employee lose weight, exercise, and take anti-inflammatory medications. In his view, surgical intervention was not recommended. He stated that surgery was clearly not reasonable or necessary to cure or relieve the effects of employee's work injury, which was a myofascial strain/sprain. Further, he did not believe that surgery was indicated for the employee's natural deterioration of the L3-4 disc, especially in the absence of objective findings. (Exh. 2.).

A hearing was held before a compensation judge of the Office of Administrative Hearings on August 2, 2000. The issues at that time were the extent of the employee's permanent partial disability, whether the intervenor was entitled to reimbursement of medical bills it paid, whether the employee was entitled to penalties for the employer and insurer's failure to pay permanent partial disability benefits, and whether a second surgical opinion at the Low Back Institute would be reasonable and necessary. Following the hearing, the compensation judge found that the employee had sustained a zero percent permanency as a result of the December 9, 1996 work injury, that the intervenor was entitled to reimbursement only for those expenses for which medical records had been submitted, that the employee was not entitled to penalties from the employer and insurer, and that the employee's request for a second surgical opinion was neither reasonable nor necessary.

The employee appeals.

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.

DECISION

1. Permanent Partial Disability Rating

A compensation judge's finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). As trier of fact, a compensation judge is responsible for determining the degree of disability after considering all evidence and relevant legal factors in a case. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 43, 35 W.C.D. 523, 528 (Minn. 1983); see Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Accordingly, medical testimony is considered helpful but not dispositive on the issue of disability. Id.; see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 640 (Minn. 1989) (determination of degree of permanency rests with compensation judge, not member of medical profession).

The employee claimed a seven percent permanent partial disability pursuant to Minn. R. 5223.0390, subpart 3C(1), which requires

> symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and with any radiographic, myelographic, CT scan or MRI scan abnormality not specifically addressed elsewhere in this part . . . at a single vertebral level.

In order to show entitlement to a specific permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc.,

40 W.C.D. 336, 338 (W.C.C.A. 1987) (citing Davies v. Marriott-Host Int'l, 39 W.C.D. 631, 633 (W.C.C.A. 1987)). Here, the employee was required to prove two elements: (1) persistent objective clinical findings of either involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and (2) a single-level radiographic, myelographic, CT scan or MRI scan abnormality.[1]

The compensation judge found that the medical records failed to establish persistent spasm or restricted range of motion, and that the employee had accordingly failed to show by a preponderance of the evidence that he had sustained a seven percent disability. On appeal, the employee asserts that the compensation judge erred. He claims that the compensation judge overlooked objective findings in the medical records, showing spasm and decreased range of motion.

Our review of the medical records in evidence discloses that these records chronicle virtually nothing by way of objective examination findings of spasm or range of motion limitation, and certainly no evidence of "persistent" findings of this nature. While these records do indicate that the employee persistently made complaints of low back pain, and of other symptoms on a varying basis, the notations regarding objective examination findings are for the most part ones indicating an absence rather than presence of spasm or reduced range of motion, as well as negative results in virtually all other physical examination procedures.

The employee asserts that the seven percent rating offered by Dr. Zarling "implicitly reflect[s] such [examination] findings." (Employee's brief at 9-10.) Essentially, this seems to be an argument that the permanency opinion of Dr. Zarling constitutes sufficient evidence to permit a conclusion that despite a failure to record it in his notes, that physician had observed persistent objective evidence of spasm or reduced range of motion. We have serious reservations about this suggestion. However, even if we were to accept the argument that Dr. Zarling's rating could provide sufficient evidence for a compensation judge to find persistent spasm or reduced range of motion, that rating would certainly not be the kind of evidence which would *require* such a finding, since it rests heavily on a judge's resolution of inference. We do not believe the compensation judge here erred in failing to reach such a finding based on inference from Dr. Zarling providing a rating which requires persistent objective evidence of spasm or lost range of motion.

The employee next argues that such evidence was provided by the employee's own testimony, and, presumably, by his complaints to the doctors as recorded in the medical records. We do not find this argument persuasive. First, the compensation judge was entitled to disregard the employee's testimony about his symptoms on the basis of credibility, a matter uniquely

[1] In addition, an employee must, of course, show that the disability was causally related to the work injury. The employer and insurer maintained that the employee's work injury had resulted only in a temporary strain/sprain condition and that the employee's multi-level degenerative disc disease and disc bulge or herniation at L3-4 were unrelated to the work injury. However, the attorney for the employer and insurer waived this defense at the hearing and agreed that the issue before the judge was that of the extent of the employee's lumbar permanency regardless of the causal relationship to the injury. (T. 69-70.)

committed to the compensation judge. Second, what the rule here specifically requires is not merely "evidence" of persistent spasm or reduced range of motion, but "objective clinical findings," which the employee's testimony does not provide. Thus the compensation judge did not err in failing to use the employee's testimony as a basis for this element of a seven percent rating.

The employee's final objection to the rating reached by the compensation judge is to assert that foundation was lacking for the opinion of Dr. Wyard, who had reached the same zero percent rating found by the compensation judge. We note, first, that the alleged foundational defect was the employee's testimony that Dr. Wyard performed at most a very cursory examination. This allegation does not demonstrate a fatal foundational defect. First, the compensation judge expressly discounted the employee's testimony that Dr. Wyard had performed an incomplete examination as lacking in credibility. (Mem. at 4.) A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). Second, Dr. Wyard had reviewed the other medical records, including the physical examination findings of the other physicians, and the examination findings he relied on in forming his opinion were entirely consistent with those recorded by the other physicians. There was adequate foundation for Dr. Wyard's opinions in this case even had he personally performed no examination of the employee, but had simply reviewed the medical records. Finally, the compensation judge's memorandum discloses that the basis for decision was "that the treating doctors' records did not establish the necessary objective findings." Thus, it does not appear from the compensation judge's findings or memorandum that she relied primarily on Dr. Wyard's opinion to rate the employee's disability.

2. Penalties

The employee sought penalties from the employer and insurer on the theory that their refusal to pay permanent partial disability benefits for a seven percent permanency was without any justification and that their defense to the claim for a seven percent permanency was frivolous. The compensation judge denied the employee's permanency claim and thus appropriately denied the claim for penalties. Our affirmance of the compensation judge's denial of the permanency claim renders this issue moot on appeal.

3. Intervention Interests

a. Minnesota Laborers Health & Welfare Fund.

The compensation judge awarded reimbursement for certain medical expenses paid on behalf of the employee by the intervenor, Minnesota Laborers Health & Welfare Fund ("Health & Welfare Fund"), but denied reimbursement for those expenses for which no medical records were in evidence to establish specifically what treatment or services were rendered and to permit an assessment whether such care was reasonable or necessary. The employee appeals, arguing that the judge should have awarded all claimed reimbursement by this intervenor, as a matter of law, citing Minn. Stat. § 176.361, subd. 3.

Minn. Stat. § 176.361 governs intervention under the Workers' Compensation Act. Subdivision 2 of that statute sets forth the specific requirements for an application for intervention, and subdivision 2(b)(9) affords the intervenor an option to submit a proposed stipulation which "states that all of the payments for which reimbursement are claimed are related to the injury or condition in dispute in the case and that, if the petitioner is successful in proving the compensability of the claim, it is agreed that the sum be reimbursed to the intervenor." Where such a proposed stipulation has been included with the application for intervention, subdivision 3 provides that "all parties shall either execute and return the signed stipulation to the intervenor . . . or serve . . .and file . . . specific and detailed objections to any payments made by the intervenor which are not conceded to be correct and related to the injury or condition the petitioner has asserted is compensable." Where a party fails either to sign and return the stipulation or to object to it within 30 days, "the petitioner's right to reimbursement for the amount sought is deemed established provided that the petitioner's claim is determined to be compensable."

The Health & Welfare Fund filed an application to intervene on November 30, 1998. Accompanying the application was a proposed stipulation which provided as follows:

> Pursuant to the provisions of Minnesota Rules 1415.1200, it is hereby stipulated and agreed that Minnesota Laborers Health and Welfare Fund has sufficient interest to be joined as an intervenor in the above matter. The parties do not dispute that Exhibit A, attached to the Application to Intervene, filed herewith, accurately lists the amounts and dates of payments made by the intervenor on behalf of the employee. This exhibit may be amended if additional payment are made.
>
> It is stipulated and agreed by the parties hereto that the payments for which reimbursement is being claimed are related to the alleged injury or condition in dispute and that, if petitioner is successful in proving the compensability of the claim, it is agreed that the sum be reimbursed to the intervenor.

The employer and insurer neither signed and returned nor specifically objected to this proposed stipulation. The employee asserts that the reimbursement was accordingly due to the Health & Welfare Fund for all claimed medical expenses without the necessity of further proof of the specific nature or the reasonableness and necessity of the treatment rendered.

The statutory language mandates that where no timely response is made to an intervenor's proposed stipulation, two elements of the intervenor's claim for reimbursement are deemed established: first, that the intervenor's statement of the amounts paid on behalf of the employee is accurate, and second, that the payments were related to the alleged workers' compensation injury or condition. Subdivision 3 also limits the reimbursement to situations where "the petitioner's claim is determined to be compensable." In this case, the intervenor presented its specific claim, listing the providers and dates of service and some information concerning the services provided. If the insurer wished to reserve a right to contest any of these services it merely had to file a timely objection, for whatever reason, possibly including either that the services were

not related to the injury or that insufficient information had been provided to establish a causal relationship with the work injury. Because the insurer filed no such objection, it waived any defenses concerning the compensability of the intervenor's claim once the employee prevailed on his claim of injury. Here, the employee was found to have been injured so the intervenor's claim should have been granted in its entirety.

b. St. Paul Radiology, P.A.

St. Paul Radiology was served with a notice of the employee's claim and of its right to intervene in the matter by letter dated June 8, 2000. The hearing in this case was held on August 2, 2000, and the record closed on that date. On September 22, 2000, St. Paul Radiology first filed an application to intervene in the case. The compensation judge found that "it would prejudice the parties to reopen the record and delay this decision." She denied the application as untimely and denied reimbursement. The employee appeals from the denial of the application for intervention.

Pursuant to Minn. Stat. § 176.361, subd. 2(a), an application for intervention is untimely unless it is filed within 30 days of receipt of notice that a workers' compensation claim has been filed. An untimely application "is subject to denial under subdivision 7." Id. Subdivision 7 of the statute states that failure to comply with the requirements of this section "*shall not result in a denial of the claim for reimbursement* unless the compensation judge . . . determines that the noncompliance has *materially* prejudiced the interests of the other parties." (Emphasis added.) The compensation judge summarily found that "it would prejudice the parties to reopen the record and delay this decision." However, we note that the services provided by St. Paul Radiology consisted solely of the costs related to MRI scans and discography and that the reports of these radiological examinations, as well as the records of the physicians who requested that the scans be conducted, were already in evidence. Based solely on the record available to us, we see no clear reason why intervention by St. Paul Radiology necessarily would have required that the record be reopened or that the issue of their right to reimbursement could not have been determined on the evidence already admitted, with an opportunity afforded to the parties to provide any written objections to the charges and any responses to the objections. However, there may be factors of which we are unaware which could justify the finding of material prejudice.

As it is unclear whether material prejudice would in fact result from the noncompliance with the time requirements for intervention, we vacate the denial of the application for intervention and remand for reconsideration by the compensation judge. If the judge finds that material prejudice will result from granting the application, the judge should set forth the basis for that finding in greater detail. If the judge finds that material prejudice will not result from the noncompliance, the judge should then to determine whether St. Paul Radiology is entitled to reimbursement.

4. Second Surgical Opinion

On the date of the hearing below, the employee was permitted to add as an issue the question of approval for referral to the Low Back Institute for a second surgical opinion.

Minn. Stat. § 176.135, subd. 1(a), provides that:

> The employer is required to furnish surgical treatment, pursuant to subdivision 1 when the surgery is reasonably required to cure and relieve the effects of the personal injury or occupational disease. An employee may not be compelled to undergo surgery. If an employee desires a second opinion on the necessity of surgery, the employer shall pay the costs of obtaining the second opinion. Except in cases of emergency surgery, the employer or insurer may require the employee to obtain a second opinion on the necessity of the surgery, at the expense of the employer, before the employee undergoes surgery. Failure to obtain a second surgical opinion shall not be reason for nonpayment of the charges for the surgery. The employer is required to pay the reasonable value of the surgery unless the commissioner or compensation judge determines that the surgery is not reasonably required.

The employer and insurer argued that a second surgical opinion was neither reasonable nor necessary. The compensation judge found that the employee was not in need of further medical care and treatment, including surgery, and that accordingly a second surgical opinion was not needed.

While we might agree with the compensation judge's reasoning that a request for a second surgical opinion not yet rendered should be denied where proposed surgery has been properly found not to constitute reasonable or necessary treatment, that was not the situation in this case. In addition to the request for a second surgical opinion, the only issues before the compensation judge were those of the appropriate rating for the employee's permanent partial disability, a claim for penalties, and reimbursement of certain past medical treatment. The employee had not sought approval of the surgery proposed by Dr. Kennedy nor had he raised any claim regarding the appropriateness of future care and treatment generally. It was an improper expansion of the issues for the compensation judge to make a determination of whether the proposed surgery was reasonable or necessary.

The statutory language quoted above grants an employee the right to a second opinion with a physician of his choice, at the expense of the employer and insurer, without qualification when surgery has been proposed for the condition resulting from his work injury. We reverse the compensation judge's denial of a second opinion.

5. Date of Issuance of the Findings and Order

As his final argument, the employee argues that the compensation judge's findings and order should be vacated in their entirety on the basis that the findings and order were not timely served and filed pursuant to Minn. Stat. § 176.371. That statute provides, in pertinent part, that "[a]ll questions submitted to a compensation judge at the hearing shall be disposed of and the judge's decision shall be filed with the commissioner, except where expedited procedures require

a shorter time, within 60 days after the submission, unless sickness or casualty prevents a timely filing, or the chief administrative law judge extends the time for good cause."

The record in this case closed on August 2, 2000 at the close of the hearing below. The compensation judge's decision was served and filed on Monday, October 2, 2000, which is the 61st chronological day following the close of the record. If the 60th day falls on a holiday or weekend, those days are omitted from the computation. Minn. Stat. § 645.15. As a result, the decision was served on the 60th legal day and was timely.