

JUDY J. CLAY, Employee/Appellant, v. AM. RESIDENTIAL MORTG. CORP., UNINSURED, Employer, and FAIRVIEW SOUTHDALE HOSP., NORTHBROOK PROP. & CASUALTY CO., NW. ANESTHESIA, NEUROPHYSIOLOGICAL INST., PAIN ASSESSMENT & REHAB. CTR., CTR. FOR DIAGNOSTIC IMAGING, ALLINA HEALTH SYS./ABBOTT-NW., CONSULTING RADIOLOGISTS, and METRO. ORTHOTIC LAB, Intervenors, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
APRIL 20, 2000

No. [REDACTED]

HEADNOTES

**WAGES - CALCULATION.** Substantial evidence supports the compensation judge's finding that the employee began work for the employer on January 10, 1995. Where the employee worked only 12.8 weeks prior to the work injury and was paid on a commission basis, the compensation judge erred in excluding from consideration commissions paid for loans originated by the employee prior to April 7, 1995, the date of injury, but not closed by the employer until sometime after that date. The compensation judge also erred in failing to determine whether the employee was entitled to additional amounts based on one-half of any "overages" on mortgages she originated for the employer.

**PERMANENT PARTIAL DISABILITY - NECK; PERMANENT PARTIAL DISABILITY - VASCULAR HEADACHES.** Substantial evidence, including the opinion of two medical experts, supports the compensation judge's denial of an additional three percent permanent partial disability for upper extremity radicular pain and an additional two percent permanency claimed by the employee for vascular headaches.

**APPORTIONMENT - PERMANENT PARTIAL DISABILITY.** The evidence is insufficient to prove "persistent objective clinical findings" as required by Minn. R. 5223.0390, subp. 3.C.(1)(1993), and the compensation judge's apportionment of permanent partial disability to a rateable, pre-existing lumbar spine condition must be reversed. Substantial evidence does, however, support the apportionment of the permanency for the employee's cervical spine condition to a pre-existing condition.

**MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE.** Substantial evidence supports the compensation judge's decision that the employee has reached maximum medical improvement for both her cervical and lumbar spine injuries.

**PENALTIES - SUBSTANTIAL EVIDENCE.** Substantial evidence supports the compensation judge's denial of penalties for interposition of a defense that does not present a real controversy but is frivolous, or a frivolous denial of a claim.

Affirmed in part, reversed in part, and remanded in part  
Determined by: Johnson, J., Rykken, J., and Pederson, J.

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's findings regarding weekly wage, apportionment of permanent partial disability under Minn. Stat. § 176.101, subd. 4a, and maximum medical improvement, and the judge's denial of claims for certain permanent partial disability benefits, medical expenses and penalties under Minn. Stat. § 176.225, subd. 1.

FACTUAL BACKGROUND

On January 10, 1995, Judy J. Clay, the employee, entered into an employment agreement with American Residential Mortgage Corporation, ARMC, setting forth the terms of employment as a loan officer. (Pet. Ex. A.)<sup>1</sup> ARMC is a mortgage broker that obtains mortgages for customers. A loan officer, also called a mortgage loan originator, is responsible for locating and bringing into the mortgage broker customers interested in obtaining a mortgage. The loan originator prepares and presents for the customer's signature all necessary loan applications and other documents.<sup>2</sup> The originator then turns the completed documents over to others who process and place the loan and finally close the transaction. (T. 63-66.) The loan originator is paid a commission based, in part, on the size of the mortgage. This fee is not paid until after the loan is closed. (T. 177.)

The employment agreement provided the employee would start work for ARMC on February 1, 1995, or before if necessary. (Pet. Ex. A.) The employee testified she was working for North American Mortgage Corporation as a loan originator on January 10, 1995, the date she signed the employment agreement with ARMC. The employee stated she resigned from North American effective January 25, 1995. She further testified that at the time she resigned she had clients in the mortgage application process with North American whose applications were not yet finalized. The employee testified she contacted these clients after January 25, 1995 and told them they could stay with North American or go with the employee to ARMC. Some of these clients did decide to move their mortgage business. The employee then met with these clients and prepared a new application to ARMC for a mortgage. (T. 68-71.) In some cases, the employee stated the application was back dated to the date the employee first met with the applicant. (T. 225-227.) The employee testified, however, that she did no work for ARMC prior to January 25, 1995. (T. 230-231.)

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<sup>1</sup> Petitioner's Exhibit A has an effective date of January 10, 1994 and a start date of February 1, 1994. The parties, however, agree the agreement was entered into on January 10, 1995.

<sup>2</sup> Other documents might include employment verification, truth-in-lending documents, loan estimates, appraisal and credit reports and other federally required loan documents. (T. 324.)

The employment agreement was drafted by ARMC's then president and now board chairman, Lawrence R. Shedd, Jr. Mr. Shedd testified the agreement was drafted to provide a flexible starting date of February 1, 1995 or before if necessary. Since loan originators are not paid until the loan closes, the agreement gave the employee some flexibility regarding when she left North American to ensure she would be paid for all loans she originated for North American. (T. 243-245.) The agreement further provided the employee was to be paid a commission of 90 basis points or 90 percent of the loan origination fee on all mortgages originated during her first three months of employment and 75 basis points thereafter. In addition, ARMC agreed to pay the employee one-half of any overages. (Pet. Ex. A.) The employee defined an "overage" as a "premium being paid from the lender mortgage company to the broker company as an incentive to - - to use their products." (T. 75.) The employee stated an overage was the same as a yield differential. (T. 84.) Mr. Shedd testified an "overage" was any amount earned by the company on a loan that was in excess of 200 basis points or a two percent profit to the mortgage broker. (T. 247-248.) According to Mr. Shedd, an overage is not the same as a yield differential, and he asserted the employee was not automatically entitled under the agreement to receive one-half of all yield differentials on mortgages closed. (T. 259-268.)

The commissions earned by the employee were paid to her fifteen days after the month in which the loan closed. (T. 249-250.) Petitioner Exhibit C is a compilation of Loan Officer Production Reports prepared by ARMC reflecting commission payments to the employee. The exhibit refers to each loan closed by ARMC referenced by a loan number and sets forth the amount of each loan, the date originated and the date closed. Respondent Exhibit 1 consists of payroll records for the employee reflecting payment of commissions to the employee. The employee was paid \$4,393.00 on March 15, 1995 for loans closed in February 1995 and \$6,689.00 on April 12, 1995 for loans closed in March 1995, totaling \$11,082.00 in commissions paid by ARMC to the employee between January 10 and April 7, 1995. Mr. Shedd testified that no loans originated by the employee closed between April 1 and April 7, 1995, the date the employee was injured. (T. 249-51; Resp. Ex. 2.) The employee testified that certain loans she originated prior to April 7, 1995 did not close until after April 7, 1995. She stated the commissions paid on these loans are reflected in Petitioner Exhibits D and E. The compensation judge made no factual findings regarding the amount of commissions paid to the employee for these loans.

On April 7, 1995, the employee was injured in an automobile accident in Richfield, Minnesota. The employee testified the accident occurred after she had left the home of a client and was going home. The vehicle the employee was driving that day was registered in the name of H. L. Clay Leasing Company and was insured by Northbrook Property & Casualty Company. The insurance policy issued by Northbrook provided business automobile coverage and listed the insured's business as real estate. (Northbrook Ex. 1.) The employee testified she intended to start a real estate company when she obtained the insurance policy but never did so. (T. 220.) Northbrook paid no-fault benefits to the employee.

ARMC prepared a First Report of Injury on or about April 10, 1995. (Pet. Ex. F.) Blaine Cooper, a senior claims examiner with the Special Compensation Fund, received the claim

in May 1995.<sup>3</sup> (T. 348.) Thereafter, Mr. Cooper retained TeleServe Investigations. Ms. Amy Coombs of TeleServe interviewed Mr. Shedd on May 22, 1995 and transcribed the questions and answers. (Pet. Ex. J.) Mr. Shedd stated the employee commenced working for ARMC on February 16, 1995, as a loan officer and provided Ms. Coombs a copy of the employment agreement. Mr. Shedd stated ARMC furnished the employee a fax machine and a base for her computer so that she could work out of her home, explaining it was better public relations for loan originators to work outside the office. Mr. Shedd acknowledged that driving to customer locations would be part of the employee's job with ARMC. He stated he had no knowledge about the facts surrounding the employee's car accident other than what he was told, but said he had no reason to believe the accident did not arise out of the employee's normal work duties. (Pet. Ex. J.) After receiving Exhibit J, Mr. Cooper spoke in his office with the employee and indicated to her that he believed her claim for workers' compensation benefits was compensable and asked the employee to provide him with income documentation. The employee provided 17 pages of information in June 1995, which Mr. Cooper reviewed with fellow claim managers. Following that review, Mr. Cooper concluded there was an issue whether the employee was employed by ARMC or was an independent contractor. On August 2, 1995, the Special Compensation Fund issued a denial of primary liability. (Pet. Ex. K; T. 349-353.)<sup>4</sup>

### Medical Background

Dr. Mark Friedland, an orthopedic surgeon, first saw the employee on September 19, 1988. His office notes reflect the employee complained of an onset of acute low back pain with pain radiating into her legs down to her knees and muscle spasm. The employee stated this occurred while tossing out a bucket of water on Labor Day weekend. On examination, the doctor noted limited range of lumbar flexion, negative straight leg raising and a normal neurologic examination. X-rays showed calcification of the L4-5 disc and narrowing of the L5-S1 disc space. Dr. Friedland diagnosed L5-S1 degenerative disc disease without evidence of radiculopathy. The doctor prescribed an anti-inflammatory medication and recommended exercises. (Pet. Ex. P.)

On April 21, 1990, the employee was involved in a motor vehicle accident, injuring her cervical spine. She received chiropractic treatment off and on for two years thereafter. The employee testified the chiropractic treatment helped for about seven months but then her neck condition worsened. (T. 188-190.)

The employee returned to see Dr. Friedland on May 20, 1992. The doctor recorded a history of the 1990 motor vehicle accident resulting in the onset of neck pain, headaches and radicular pain into her left arm with numbness and tingling of the left hand. An x-ray showed evidence of C5-6 degenerative disc disease with disc space narrowing and osteophyte formation.

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<sup>3</sup> ARMC was uninsured for workers' compensation liability on April 7, 1995.

<sup>4</sup> The Notice of Denial of Liability stated: "The Special Compensation Fund regretfully denies liability based on MN. Rule 5224.0230. Ms. Clay has satisfied all the criteria listed which qualify her as an independent contractor." (Pet. Ex. K.)

On examination, Dr. Friedland noted evidence of cervical tenderness and muscle spasm, limited range of cervical motion, diminished left triceps reflex and weakness of wrist flexion. The doctor diagnosed a probable disc herniation secondary to the car accident and scheduled an MRI scan. The scan, taken on May 20, 1992, showed an annular tear and moderate central disc herniation at C4-5 with some displacement of the spinal cord, an annular tear and contained disc herniation at C3-4 and chronic moderate central and right-sided osteophyte formation at C5-6 with C6 nerve root encroachment. The employee returned to see the doctor on June 1, 1992. Dr. Friedland diagnosed a C4-5 right-sided disc herniation with chronic C5-6 degenerative disc disease and foraminal stenosis and a small contained C3-4 disc herniation. (Pet. Ex. P; Resp. Ex. 4.)

Dr. Friedland re-examined the employee on January 18, 1993. In the interim, she had received epidural injections into the cervical spine from Dr. Kim and had undergone a second cervical MRI scan. Dr. Friedland reviewed the January 16, 1993 MRI scan which he concluded showed a possible slight decrease in the size of the C4-5 disc herniation. Dr. Friedland diagnosed probable nerve root irritation with causalgic pain of the left arm and recommended a Medrol Dosepak. (Resp. Ex. 4.)

On April 16, 1993, the employee was examined by Dr. Maland Hurr, a neurologist, at the request of Dr. Friedland. The employee complained of increasing cervical symptoms with burning pain and tingling into her left arm and hand and headaches. The employee told the doctor she previously had low back problems with radiculopathy but these symptoms resolved completely. Dr. Hurr diagnosed multi-level degenerative disc disease with some cervical radiculopathy into the left arm and hand and causalgic-like symptoms representing some element of reflex sympathetic dystrophy. The doctor prescribed Amitriptyline. (Pet. Ex. P.)

On April 7, 1995, the employee was involved in the automobile accident which is the subject of this proceeding. She was taken to Fairview Hospital where she was treated and released. (T. 100-102.) That same day, the employee sought treatment from Dr. A.V. Anderson, a specialist in pain management. The employee complained of headaches, head, neck and left arm pain. On examination, Dr. Anderson noted cervical spine pain with foraminal encroachment on the right, limited range of cervical motion and muscle tenderness. The doctor diagnosed an acute musculoligamentous strain/sprain and a stretch injury to the neck, mid and lower back with post-traumatic muscle contracture headaches. On April 25, 1995, the employee complained of blurring in her left eye, muscle spasm in the neck and back and radiating pain into her left arm. Dr. Anderson was concerned the employee was developing a migraine problem. The employee was referred for physical therapy. (Pet. Ex. N.)

On May 5, 1995, a third cervical MRI scan was obtained. The scan showed multi-level degenerative disc disease with a central posterior disc herniation at C5-6 resulting in mild to moderate ventral cord impingement and narrowing of both C5-6 intervertebral nerve root canals, a central posterior annular tear at C3-4 with mild impingement and a central posterior disc protrusion at C4-5 with mild impingement of the ventral margin of the cord. A lumbar MRI scan on July 21, 1995 showed degenerative disc disease at L5-S1 with a full thickness annular tear and

severe dehydration of the L5-S1 disc without protrusion, stenosis or nerve root impingement. (Pet. Ex. P.)

On May 17, 1995, the employee was examined by Dr. Edward G. Hames, III, a neurosurgeon. The doctor recorded a history of the April 1995 car accident with increasing cervical pain, headaches and pain and tingling into the left arm. The doctor reviewed the May 5, 1995 cervical MRI scan which he noted demonstrated some degenerative disc disease at C5-6. However, Dr. Hames stated he found nothing of any profound pathological form based on the scan. On examination, the doctor found reduced range of motion with no objective evidence of radicular pain. His neurologic examination was essentially normal. Dr. Hames concluded he found “very little in the way of any firm pathology explaining the plethora of Judy’s pain.” (Pet. Ex. P.)

The employee continued to treat with Dr. Anderson. He provided physical therapy and corticoid steroid injections. In November 1997, Dr. Anderson determined the employee’s pain complex was becoming more complicated and concluded the employee should be evaluated by an orthopedic surgeon. He referred the employee to Dr. Timothy A. Garvey. (Pet. Ex. N.)

Dr. Garvey examined the employee on November 24, 1997. The employee gave a history of neck and low back pain, with paresthesia and numbness in both hands and the right upper arm. On examination, motor strength and reflexes were normal and pulses in the lower legs were diminished but present. Dr. Garvey reviewed the x-ray and MRI films the employee had with her. The doctor concluded the employee had both cervical and lumbar spondylosis with cervical and lumbar degenerative changes and mechanical neck and low back pain. Dr. Garvey also reviewed the cervical MRI films taken before and after the April 1995 incident and concluded the size of the disc protrusion and amount of encroachment was greater in 1995 at the C3-4 and C5-6 levels. The employee returned to see Dr. Garvey on December 15, 1997, following a discography. The doctor then concluded the employee was a candidate for a single-level fusion. The employee elected to proceed with the surgery. (Pet. Ex. M.)

The employee was admitted to Abbott Northwestern Hospital and Dr. Garvey performed an anterior lumbar interbody fusion at L5-S1 on February 20, 1998. Dr. Garvey used bone from the employee’s left iliac crest for the fusion. Dr. Garvey re-examined the employee on April 20, 1998, and concluded the employee had made excellent progress. Dr. Garvey again saw the employee on August 26, 1998. He opined she had not reached maximum medical improvement by that date but anticipated maximum medical improvement within 18 months of surgery. (Pet. Exs. P and M.)

A cervical myelogram performed on April 5, 1999 showed central canal stenosis and right-sided stenosis at C5-6 with mild effacement of the exiting left C6 nerve. There was evidence of contouring of the spinal cord at C4-5 with mild canal stenosis at that level. A post-myelogram CT scan on April 5, 1999 showed multi-level degenerative changes with moderate stenosis at C5-6, a moderate-sized central disc herniation at C4-5 with displacement and contouring of the spinal cord and a central-left herniated disc at C3-4 with mild stenosis. Finally,

cervical discography showed concordant pain at C4-5 and C5-6. On May 3, 1999 another cervical discography showed concordant pain at C3-4 and C2-3. (Pet. Ex. P.)

### Medical Testimony

Dr. Garvey's deposition was obtained on March 23, 1999. The doctor testified the automobile accident of April 7, 1995 aggravated the employee's pre-existing cervical spondylosis and degenerative process. The doctor rated a ten percent permanent partial disability relative to the cervical spine injury. With respect to the lumbar spine, the doctor rated a twelve percent whole body disability. Finally, Dr. Garvey opined the employee had not yet reached maximum medical improvement but probably would achieve that state within 18 months of the lumbar fusion surgery. The parties were unable to complete the deposition of Dr. Garvey and it was adjourned. (Pet. Ex. M., Vol. I.)

Dr. Garvey's deposition was recommenced on May 4, 1999. He testified he re-examined the employee on April 26, 1999 and reviewed the recent myelogram, CT scan and discography. The doctor concluded the employee might be a candidate for a cervical fusion. He opined the employee had reached maximum medical improvement relative to her lumbar spine condition as of March 29, 1999, but had not yet reached maximum medical improvement from her cervical spine injury. (Pet. Ex. M, Vol. II.)

The deposition of Dr. Anderson was taken on June 10, 1999. Dr. Anderson described his care and treatment of the employee and listed the medical records he had reviewed regarding the employee. The doctor reviewed the April 1999 myelogram and post-myelogram CT scan which he compared with the 1995 cervical MRI scan. He concluded the 1999 studies showed evidence of more compression of the spinal cord and more irritation of the C6 and C7 nerve roots. Dr. Anderson opined the April 1995 work injury permanently aggravated the employee's pre-existing cervical condition. The doctor rated a ten percent permanent cervical disability under Minn. R. 5223.0370, subp. 3.C.(2), plus an additional three percent for chronic radicular pain or paresthesia under subpart D.(1). Dr. Anderson opined the employee had reached maximum medical improvement for her cervical injury if no surgical intervention was done. The doctor further opined the April 1995 work injury permanently aggravated the employee's pre-existing lumbar spine condition. The doctor rated seven percent under Minn. R. 5223.0390, subp. 3.C.(1), plus an additional five percent under subpart 5.A. The doctor testified the employee had not yet reached maximum medical improvement for her lumbar spine injury. Dr. Anderson also diagnosed migraine headaches which he causally related to the employee's injury of April 7, 1995. The doctor rated a two percent permanent disability for that condition under Minn. R. 5223.0360, subp. 7.H. (Pet. Ex. N.)

On January 28, 1998, Dr. Friedland examined the employee at the request of ARMC. The doctor's deposition was taken on June 14, 1999. On examination, the doctor noted limited range of cervical and lumbar motion with evidence of lumbar muscle spasm. His neurologic examination was normal. The doctor diagnosed C3-C6 and L5-S1 degenerative disc disease which he concluded pre-existed the April 7, 1995 injury. Dr. Friedland rated a ten percent

permanent partial disability of the cervical spine due to multi-level cervical degenerative disc disease. He rated a seven percent permanent partial disability due to the L5-S1 degenerative disc disease and an additional five percent for the anterior interbody fusion at L5-S1. Dr. Friedland opined that seven percent of the employee's permanent disability of her cervical spine pre-existed her April 1995 injury. Dr. Friedland based this opinion on the MRI scan showing multiple level degenerative disc disease and his findings on examination prior to April 1995. The doctor opined seven percent of the employee's disability of the lumbar spine pre-existed April 1995. This opinion was based on the x-ray findings and his findings on examination. Finally, Dr. Friedland opined the employee reached maximum medical improvement with respect to her cervical spine on January 28, 1998 and from her lumbar spine condition one year after the L5-S1 fusion performed by Dr. Garvey. (Resp. Ex. 4.)

## PROCEDURAL BACKGROUND

On July 31, 1995, the employee filed a claim petition seeking temporary total disability benefits from April 7, 1995 and continuing. ARMC filed an answer contending, among other things, that Ms. Clay was an independent contractor and not an employee of ARMC and denying the injury arose out of and in the course of employment. On September 28, 1995, ARMC filed a motion for disposition of the independent contractor issue pursuant to Minn. R. 5220.2605.<sup>5</sup> Following a settlement conference, a settlement judge at the Department of Labor and Industry denied ARMC's request for a full hearing on the issue and issued an Order Determining Employment Status concluding Ms. Clay was an employee of ARMC. ARMC appealed to the Workers' Compensation Court of Appeals. By decision dated December 11, 1996, a panel of this court vacated the Order of the settlement judge and referred the matter to the Office of Administrative Hearings for a hearing. Clay v. American Residential Mortgage Corp., 56 W.C.D. 37 (W.C.C.A. 1996). The case was heard on May 13, 1997, before Judge Barnett and was rescheduled for a second day of hearing in June. Before commencing the second day of hearing, the parties entered into a stipulation for settlement in which they agreed Ms. Clay was an employee of ARMC, not an independent contractor. A Partial Award on Stipulation was filed on July 31, 1997.

On January 30, 1998, a hearing was held before Judge Barnett at the Office of Administrative Hearings on the issue of whether ARMC was insured for workers' compensation liability on April 7, 1995. In a Findings and Order filed April 13, 1998, the compensation judge found the employer was uninsured for purposes of workers' compensation liability on April 7, 1995. By decision dated November 6, 1998, this court affirmed the findings and order of the compensation judge. Clay v. American Residential Mortgage Corp., 58 W.C.D. 629 (W.C.C.A. 1998).

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<sup>5</sup> Minn. R. 5220.2605, subp. 1, provides:

Motion. If an answer filed under Minnesota Statutes, section 176.321, raises an issue related to independent contractor or employment status, a party may move to bifurcate the issue or issues for immediate and expedited resolution upon affidavit or, if requested by any party, an oral hearing.

The employee's claims for benefits were ultimately scheduled for hearing in June 1999. Prior thereto, the employee, ARMC and the Special Compensation Fund (SCF) entered into a partial settlement in which ARMC and the Special Compensation Fund admitted the employee was in the course and scope of her employment at the time of the accident on April 7, 1995. The stipulation further provided: "The parties are maintaining all claims and defenses on the issues of Average Weekly Wage and any post-injury earnings and temporary total or temporary partial disability benefits claimed for the calendar year 1995." (Judgment Roll: June 14, 1999 Stip.) The SCF agreed to pay temporary total and temporary partial disability benefits under a Temporary Order, based on a minimum weekly wage of \$879.57, pending a determination of the compensation judge as to liability and weekly wage. The parties further agreed that certain medical expenses were reasonable, necessary and causally related to the April 7, 1995 injury. An Award on Partial Stipulation and Temporary Order was served and filed June 15, 1999.

The remaining issues in the case were heard by Compensation Judge Joan G. Hallock on June 16 and 17, 1999. In a Findings and Order served and filed September 23, 1999, the compensation judge found the employee's weekly wage on the date of injury was \$879.57, that the employee reached maximum medical improvement for her cervical injury on March 12, 1998, and from the effects of her lumbar injury on June 14, 1999, and found that certain medical treatment at Fairview Southdale Hospital was not causally related to the admitted work injury. The compensation judge found the employee had a ten percent permanent partial disability of the cervical spine, but denied the employee's claims for a three percent permanent partial disability for radicular symptoms into the left arm and a two percent permanent partial disability for vascular headaches. The compensation judge apportioned to a pre-existing condition the employee's cervical and a portion of the lumbar permanency under Minn. Stat. § 176.101, subd. 4a. Finally, the compensation judge denied the employee's claim for penalties. The employee appeals each of these findings.

## STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

## DECISION

## Weekly Wage

The compensation judge found that commissions in the mortgage industry are earned when the loan closes and there is a substantial failure rate for loans which are originated but never close. The judge found the earnings actually paid to the employee during her employment with the employer, ARMC, were the proper measure of her weekly wage rather than her anticipated earnings. (Finding No. 45.) The compensation judge further found the employee commenced employment on January 10, 1995, and earned commissions of \$11,082.70 through the date of injury, April 7, 1995, a period of 12.8 weeks. The judge, accordingly, found the employee's weekly wage was \$879.57. (Finding No. 46.) The employee contends the compensation judge's calculation of her weekly wage is unsupported by substantial evidence and is legally erroneous.

The employee first asserts there is insufficient evidence to support the compensation judge's finding that the employee commenced work for the employer on January 10, 1995. The employee contends the wage calculation should be based on a starting date of February 16, 1995, the date Mr. Shedd stated the employee began working for ARMC. We are not persuaded.

The February 16, 1995 date comes from a statement given by Mr. Shedd on May 25, 1995 to the investigator employed by the Special Compensation Fund. (Pet. Ex. J.) At the hearing, Mr. Shedd testified this was an incorrect starting date. (T. 290.) Mr. Shedd reviewed Petitioner Exhibit E and testified that loan A from Exhibit E reflected a lock-in agreement by ARMC dated January 11, 1995. Loan D contained a lock-in agreement by ARMC dated January 10, 1995. Mr. Shedd stated ARMC could not issue a lock-in agreement unless the employee brought the loan to ARMC and such activity by the employee constituted employment activity. He further testified ARMC's policy prohibits back dating loan agreements. (T. 279-284.) Mr. Shedd's testimony constitutes substantial evidence supporting the compensation judge's finding that the employee commenced her employment for the employer on January 10, 1995. That finding is affirmed.

The employee's second contention is that the compensation judge erroneously computed the weekly wage by failing to include in the calculation commissions earned by the employee on loans originated before April 7, 1995 but closed after the date of injury. The employee contends the amount she actually earned through April 7, 1995 was \$17,351.75 and she asserts her weekly wage should be calculated based on these total earnings. (App's Brief, p. 23.)

Minn. Stat. § 176.011, subd. 3, states: "If the amount of the daily wage received . . . was irregular or difficult to determine, . . . the daily wage shall be computed by dividing the total amount the employee actually earned in such employment in the last 26 weeks, by the total number of days in which the employee actually performed any of the duties of the employment. . . ." Since the employee did not work for the employer for 26 weeks prior to her injury, it is not possible to calculate the employee's weekly wage under the statutory formula. Where the evidence necessary to comply with the statutory wage calculation is not available, the compensation judge may use another method to calculate the employee's wage, as long as that method reasonably reflects the

employee's injury-related loss of earning power. Decker v. Red Wing Shoe Co., 41 W.C.D. 763 (W.C.C.A. 1988).

The respondent contends the compensation judge properly excluded from the wage calculation commissions paid on loans which closed after April 7, 1995. The employer argues that a loan officer's commissions are nothing more than anticipated earnings until the loan actually closes. When the loan closes, the commissions then become "actual earnings" within the meaning of Minn. Stat. § 176.011, subd. 3. The employer contends it is a "hard and fast rule in the mortgage origination business" that commissions are not earned until the mortgage closes. (Resp. Brief, p. 11.) Accordingly, the employer argues the compensation judge properly included in the wage calculation only the commissions paid to the employee by April 7, 1995. Based on the facts in this case, we cannot agree.

Were this a situation where the employee had worked at least 26 weeks prior to her injury, ARMC's position might have more merit. In such a hypothetical 26-week period, the employee would likely have been paid commissions on loans originated before the commencement of the 26-week period. Similarly, the employee would likely not yet have been paid commissions on some loans which were originated during the 26-week period but had not yet closed. In such a case, using only commissions actually paid during the 26 weeks prior to injury would more likely provide a realistic method of averaging the employee's earnings. In this case, however, the employee worked for the employer for only 12.8 weeks before her injury. Given the short period of employment, the exclusion of commissions earned but unpaid prior to April 7, 1995 unrealistically understates the employee's earning capacity. We, therefore, conclude the employee's actual earnings should include all commissions paid for work she performed between January 10 and April 7, 1995. That is, the employee's actual earnings for the purpose of weekly wage calculation should include all commissions paid on loans originated by the employee on or before April 7, 1995.

The employer argues that including earned but unpaid commissions in the wage calculation does not reasonably reflect the employee's probable earning power which has been impaired by the injury. See Knotz v. Viking Carpet, 361 N.W.2d 872, 37 W.C.D. 452 (Minn. 1985). The employer contends such inclusion would instead result in an artificially high weekly wage. We disagree.

The compensation judge found the weekly wage was \$879.57 which, over 52 weeks, totals \$45,737.64. Assuming, arguendo, the commissions paid the employee on loans originated prior to April 7, 1995 totaled \$17,351.75, as she contends, the weekly wage would be \$1,255.61.<sup>6</sup> Over 52 weeks, the employee's earnings would be \$70,491.48. In 1994, the employee earned \$60,673.00 from her work as a loan originator. (Resp. Ex. 3.) Mr. Shedd testified he expected the employee would earn over \$60,000.00 a year as a loan originator with ARMC because of her experience. (T. 291.) The employment contract provided for a 90 percent commission during the first three months of employment and 75 percent thereafter. The employee testified this commission scale was considerably more than she received at North American Mortgage where

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<sup>6</sup> \$17,351.75 ÷ 12.8 weeks = \$1,255.61.

she worked in 1994. (T. 74.) The inclusion of the post-injury commissions does not, therefore, unreasonably inflate the employee's injury-related loss of earning power.

Finally, the employee contends the employer underpaid commissions that she was due. The employee contends the employment agreement entitled her to one-half of the "overages" on each mortgage. She contends the employer failed to pay these sums and asserts the compensation judge failed to include these extra commissions in the wage calculation. The employer responds the employee is incorrect in her definition of "overage" and denies that it owes additional commissions to the employee. The compensation judge made no findings of fact resolving this issue and nowhere in her memorandum even acknowledges the dispute.

We, accordingly, reverse findings No. 45 and 46, and remand the case to the compensation judge to determine the employee's weekly wage on the date of injury. The compensation judge should determine the amount of all commissions paid to the employee for loans originated prior to April 7, 1995. The compensation judge should determine the amount of earned but unpaid commissions to which the employee may be entitled, if any. The judge's decision should include specific findings of fact resolving all of the contested issues concerning weekly wage.

#### Permanent Partial Disability Benefits: Radicular Pain

The compensation judge found the employee had a 10 percent permanent partial disability of the cervical spine under Minn. R. 5223.0370, subp. 3.C.(2) but denied the employee's claim for three percent permanent partial disability benefits under Minn. R. 5223.0370, subp. 4.D.(1). The employee contends the medical records reflect consistent complaints of pain and numbness in her left arm. (See Pet. Ex. M, p. 90-91.) Dr. Anderson rated an additional three percent permanent partial disability for radicular pain or paresthesia secondary to the cervical spine injury. The employee argues the compensation judge failed to consider the employee's radicular symptoms and erred in failing to award the three percent permanent disability.

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). Both Dr. Garvey and Dr. Friedland were aware of the employee's complaints of radicular pain in her left arm and both reviewed the MRI scans. Both doctors rated the employee's cervical condition as a ten percent whole body disability. Neither doctor rated any additional permanent disability for radicular symptoms. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. See Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Substantial evidence supports the compensation judge's decision, and it is therefore affirmed.

#### Permanent Partial Disability Benefits: Vascular Headaches

The compensation judge concluded the employee failed to prove she is unable to perform activities of daily living as defined in Minn. R. 5223.0310, subp. 5.<sup>7</sup> The compensation judge further found the employee failed to meet the criteria of Minn. R. 5223.0360, subp. 7.H.<sup>8</sup> Accordingly, the compensation judge denied the employee's claim for an additional two percent permanent partial disability due to vascular headaches. The employee contends this finding is clearly erroneous and unsupported by substantial evidence.

The employee testified that she experienced recurring vascular headaches accompanied by nausea and vomiting. She further testified she often had to skip appointments and days of work because of her headaches. Dr. Anderson, one of the employee's primary treating physicians, rated an additional two percent permanent partial disability for the vascular headaches. The employee argues that no medical examiner opined the employee did not sustain permanency as a result of her migraine headaches. For these reasons, the employee seeks reversal of the compensation judge's denial of her permanent partial disability claim.

Although the employee testified about the effects of her headaches on her activities of daily living, the compensation judge, as finder of fact, was free to determine the weight to be given that testimony. "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). The contrary medical testimony of Dr. Garvey and Dr. Friedland supports the compensation judge's decision.

Dr. Garvey began treating the employee on November 24, 1997. The employee told Dr. Garvey she was suffering from headaches, among other things. In a hypothetical question, Dr. Garvey was asked to assume that following her April 1995 injury, the employee had, for the first time, frequent migraine headaches which caused her to be nauseous and vomit. Dr. Garvey then opined the employee sustained a 10 percent permanent partial disability of the cervical spine

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<sup>7</sup> "Activities of daily living" means the ability to perform all of the following:

- A. self cares: urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, and eating;
- B. communication: writing, seeing, hearing, and speaking;
- C. normal living postures: sitting, lying down, and standing;
- D. ambulation: walking and climbing stairs;
- E. travel: driving and riding;
- F. nonspecialized hand functions: grasping and tactile discrimination;
- G. sexual function: participating in usual sexual activity;
- H. sleep: ability to have restful sleep pattern; and
- I. social and recreational activities: ability to participate in group activities.

<sup>8</sup> Minn. R. 5223.0360, subp. 7.H. states:

H. Recurring vascular headaches characterized as throbbing in nature, accompanied by nausea and vomiting, and associated with an inability to perform activities of daily living, as defined in part 5223.0310, subpart 5, in excess of 12 hours, two percent.

due to her 1995 injury. The doctor based his rating on the fact that the employee has multi-level degenerative changes with restricted range of motion, but without radiculopathy or myelopathy. Dr. Garvey further opined the employee would be able to return to full work activities by March 1999. (Pet. Ex. M.) Dr. Friedland also diagnosed a 10 percent permanent partial disability of the cervical spine. Dr. Friedland further found evidence of a functional overlay which he defined as a psychological component to the experience of pain above and beyond what can be explained on physical grounds alone. Finally, the doctor opined the employee was capable of returning to work full-time as a mortgage banker.

From this evidence, the compensation judge could reasonably conclude the employee failed to prove entitlement to permanent partial disability due to vascular headaches, above and beyond the 10 percent permanent partial disability awarded. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge must be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

### Statutory Apportionment

The compensation judge found the employee presently has a 10 percent permanent disability for her cervical condition and a 12 percent permanent disability for her lumbar condition. The compensation judge further found apportionment of the employee's cervical and lumbar permanent partial disability was appropriate under Minn. Stat. § 176.101, subd. 4(a), finding a pre-existing 10 percent impairment of the cervical spine and a pre-existing 7 percent impairment of the lumbar spine.<sup>9</sup> Accordingly, the compensation judge awarded the employee no permanent disability benefits for the cervical spine and awarded 5 percent permanent disability for the lumbar spine injury.

Minn. Stat. § 176.101, subd. 4a(a), permits apportionment to a pre-existing disability if that disability is "clearly evidenced in a medical report or record made prior to the current personal injury" and if the disability functionally disabled the worker prior to the current personal injury. See Giese v. Green Giant Co., 426 N.W.2d 879, 881, 41 W.C.D. 286, 289 (Minn. 1988) (apportionment of a permanent partial disability is made only if the pre-existing disability is clearly evidenced in a medical report); Beck v. Dick & John's Price Rebel, 40 W.C.D. 254, 256 (W.C.C.A. 1987) (apportionment is available only when the pre-existing condition causes loss of use or impairment of function prior to the personal injury). Minn. R. 5223.0315, subp. A, (1993) provides that the pre-existing impairment must be rated under parts 5223.0300 to 5223.0650 of the disability schedules.

### Lumbar spine

The employee received treatment for low back pain from Dr. Friedland in 1988 following an incident on Labor Day weekend when she tossed a bucket of water. The employee contends her low back pain resolved following this incident, she was able to work prior to 1995,

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<sup>9</sup> See Minn. R. 5223.0390, subp. 3.C.(1).

and the employer failed to prove she had any functional loss prior to 1995. Accordingly, the employee contends the compensation judge's findings regarding apportionment are unsupported by substantial evidence.

Dr. Friedland opined the employee had degenerative disc disease at L5-S1 that pre-existed her April 1995 injury. The doctor gave a 7 percent rating for this pre-existing condition under Minn. R. 5223.0070, subp. 1.A.(3)(a). This rule was, however, superceded effective July 1, 1993. Minn. R. 5223.0315, subp. A, requires use of the new schedules to rate a previously unrated pre-existing condition. The compensation judge rated the pre-existing condition under Minn. R. 5223.0390, subp. 3.C.(1) which provides:

C. Radicular pain or radicular paresthesia, with or without lumbar pain syndrome, with persistent objective clinical findings confined to the region of the lumbar spine, 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:

(1) single vertebral level, seven percent.

We conclude the compensation judge's apportionment rating is not supported by substantial evidence.

The employee saw Dr. Friedland on September 19, 1988, following the Labor Day incident. On examination, the doctor noted some limitation of forward flexion but noted no muscle spasm or tenderness. Straight leg raising was negative and sensory and motor examination of the legs was normal. Dr. Friedland found no objective evidence of radicular pain or radicular paresthesia. We find no medical records of any further care for the employee's low back until after the April 1995 personal injury. The employee testified her low back condition resolved and she did not have any continuing symptoms. (T. 103-107.) The evidence is insufficient to prove "persistent objective clinical findings confined to the region of the lumbar spine" as required by the rule. Dr. Friedland assigned no restrictions in 1988 nor did he instruct the employee to limit her activities in any way. The evidence does not support a conclusion that the employee had any loss of use or impairment of function subsequent to the 1988 incident. For these reasons, we conclude substantial evidence does not support the compensation judge's apportionment of 7 percent of the employee's lumbar permanent disability. The judge's decision is reversed.

### Cervical Spine

The compensation judge found the employee had a 10 percent permanent disability of the cervical spine under Minn. R. 5223.0370, subp. 3.C.(2),<sup>10</sup> but found it pre-existed the 1995

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<sup>10</sup> Minn. R. 5223.0370, subp. 3.C.(2) states:

personal injury. The employee asserts the employer failed to prove she had any loss of use or impairment of cervical function prior to the 1995 personal injury. Accordingly, the appellant contends the compensation judge's cervical apportionment decision is unsupported by substantial evidence. We disagree.

The employee was involved in a car accident in April 1990 and received chiropractic treatment off and on for two years thereafter. On May 20, 1992, the employee saw Dr. Friedland complaining of headaches and neck pain with pain radiating into her left arm. On examination, the doctor noted cervical tenderness, muscle spasm and limited range of cervical motion with a slightly diminished left triceps reflex. An MRI scan that same day showed an annular tear with moderate central disc herniation at C4-5 displacing the spinal cord. The scan also showed osteophyte formation and a disc herniation at C5-6 and a small annular tear at C3-4 with a small central disc herniation. Dr. Friedland diagnosed a right-sided C4-5 disc herniation with chronic C5-6 degenerative disc disease and foraminal stenosis with a small C3-4 disc herniation. On June 1, 1992, Dr. Friedland recommended the employee see Dr. Mark Kim for epidural steroid injections into the cervical spine. On June 8, 1992, Dr. Kim examined the employee and noted limitation of cervical motion and weakness of grip strength in the left hand. Dr. Kim provided a cervical epidural block. On April 16, 1993, the employee was examined by Dr. Hurr. She then complained of tingling in her left arm and occasionally into the right arm. The employee complained of difficulty driving or reaching with her left arm, felt her arm was weak and stated she often dropped things. The doctor diagnosed chronic pain due to degenerative cervical disc disease with production of symptoms following the 1990 car accident. (Pet. Ex. P.)

Dr. Friedland re-examined the employee on January 28, 1998 and his deposition was taken on June 14, 1999. Prior to his deposition, Dr. Friedland reviewed all the recent MRI scans. The doctor concluded the employee had C3 to C6 degenerative disc disease which predated the April 1995 injury. The doctor testified the basis for his opinion was "the two prior MRI scans that were accomplished of her neck in May of 1992 and January of 1993 showing degenerative disc disease from C3 to C6 with the small disc herniations noted on those prior scans, and her complaints of cervical and, essentially, bilateral upper extremity symptomology predating her motor vehicle accident of April of 1995." He also noted the employee's subjective complaints were in the same distribution before and after the April 1995 injury. Finally, Dr. Friedland concluded the employee had rateable permanent partial disability prior to April 1995 based on the "MRI scan findings of multiple levels of degenerative disc disease with findings of limited range of motion, muscular spasm and rigidity on examination prior to April of 1995." (Resp. Ex. 4.)

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C. Symptoms of pain or stiffness in the region of the cervical spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paracervical muscle or decreased passive range of motion in the cervical spine, and with any radiographic, myelographic, CT scan or MRI scan abnormality not specifically addressed elsewhere in this part:

(2) multiple vertebral levels, ten percent.

Medical records in existence prior to April 7, 1995, document persistent objective clinical findings in the cervical spine. The 1992 and 1993 cervical CT scans reflect degenerative disc disease from C3 to C6. The medical records document the employee had continued symptoms and complaints in her neck and left arm after the 1990 car accident. Based on this evidence, the compensation judge could reasonably conclude the employee's cervical permanent disability pre-existed the 1995 injury. The compensation judge's decision regarding apportionment is affirmed.

### Maximum Medical Improvement

The compensation judge found the employee reached maximum medical improvement (MMI) from her cervical injury on March 12, 1998 and from her lumbar injury on June 14, 1999. The employee asserts these findings are unsupported by substantial evidence. She points to Dr. Garvey's opinion that the employee had not reached MMI because he was still actively evaluating her for possible cervical surgery. (Pet. Ex. M.) Dr. Anderson testified the employee had reached MMI for her cervical condition only if no surgical intervention was performed in the future. (Pet. Ex. N, p. 66-67.) Based on this testimony, the employee contends she has not reached maximum medical improvement from all injuries and is entitled to continuing temporary total disability benefits.

Whether MMI has been reached is a question of ultimate fact for the compensation judge to decide based upon 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, 41 W.C.D. 634 (Minn. 1989). Dr. Garvey testified the employee had reached MMI from the effects of her lumbar spine injury as of March 29, 1999. (Pet. Ex. M, p. 95-96.) Dr. Friedland stated in his January 28, 1998 report that the employee would reach MMI relative to her lumbar spine on February 20, 1999, one year after the fusion surgery. Dr. Friedland further opined the employee had reached MMI from her cervical spine injury as of the date of his examination on January 28, 1998. (Resp. Ex. 4.) His report dated January 28, 1998, was served on the employee on March 12, 1998. At his deposition on June 14, 1999, Dr. Friedland testified he reviewed the recent discogram and scans. He testified these radiographic studies showed only a natural progression of cervical disc disease and "did not show anything particularly new or different and, therefore, in my opinion her condition is not significantly changed from an objective standpoint since January of 1998." Dr. Friedland opined a multi-level cervical fusion was not appropriate and again stated the employee reached MMI from her cervical condition by January 28, 1998. (Resp. Ex. 4.) Substantial evidence of record supports the compensation judge's decision that the employee has reached maximum medical improvement for both her cervical and lumbar injuries. We affirm.

### Medical Expenses

On March 13, 1996, the employee was treated at Fairview Southdale Hospital for an acute episode of bloody diarrhea and was diagnosed with lymphocytic colitis. On March 30, 1996, the employee was again admitted to Fairview Hospital with complaints of severe left-sided

pain. The compensation judge found the employee had pre-existing ulcerative colitis and the treatment at Fairview Southdale Hospital was for that condition. The compensation judge accordingly found the treatment on March 13 and March 30, 1996 was not causally related to the employee's claimed injuries. The employee contends these findings are unsupported by substantial evidence, relying on the testimony of Dr. Anderson who opined the treatment in question was causally related to the employee's work injury of April 7, 1995. The employee asserts there was no medical evidence to the contrary so the compensation judge improperly concluded the employer and insurer had no liability for the medical expenses. We are not persuaded.

On February 22, 1996, the employee was examined by Dr. Agnes Han, who noted the employee had a history of ulcerative colitis diagnosed in 1988. A sigmoidoscopy was consistent with a nonspecific colitis. Dr. Han saw the employee again on March 13, 1996, and diagnosed lymphocytic colitis, slowly improving. On March 30, 1996, the employee was seen by Dr. Schemel, complaining of left upper quadrant pain over the last eleven days. The employee stated the pain was referred to her back. The doctor ordered an abdominal CT scan. The employee was later seen by Dr. Lohstrater, who noted the CT scan was negative. The doctor stated he did not have an exact cause for the employee's abdominal pain but felt it would clear. (Pet. Ex. P-G.)

Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). Based upon the records from Fairview Southdale Hospital, the compensation judge could reasonably conclude the treatment on March 13 and March 30, 1996 was for the employee's diagnosed colitis. Substantial evidence supports the compensation judge's findings and they are affirmed.

### Penalties

The employee made a claim for penalties under Minn. Stat. § 176.225. The compensation judge found there was a dispute whether the employee's injury arose out of and in the course of her employment, and that penalties were not appropriate. The compensation judge further found the employer, as of the date of hearing, was under no order to pay benefits so penalties against the Special Compensation Fund were not warranted. The employee contends these findings are unsupported by substantial evidence. She asserts ARMC and the Special Compensation Fund failed to conduct a good faith investigation and had no evidence to support their contention the employee was an independent contractor and she was not in the course and scope of her employment on the date of her car accident.

Minn. Stat. § 176.225, subd. 1, states the compensation judge shall award additional compensation of up to 30 percent where an employer or insurer "(a) instituted a proceeding or interposed a defense which does not present a real controversy but which is frivolous or for the purposes of delay; or, . . . (e) frivolously denied a claim. The statute defines frivolous as meaning "without a good faith investigation of the facts or on a basis that is clearly contrary to fact or law."

Minn. Stat. § 176.225, subd. 1 (1995).<sup>11</sup> The employee has the burden of proving by a fair preponderance of the evidence all of the elements necessary to establish entitlement to the claimed workers' compensation benefits. Minn. Stat. § 176.021, subd. 1a; Sullivan v. Hagstrom Constr. Co., 244 Minn. 271, 60 N.W.2d 805, 18 W.C.D. 279 (1955).

Upon receipt of the employee's claim petition, Blaine Cooper of the Special Compensation Fund investigated the claim by obtaining a recorded statement from Lawrence Shedd, interviewing the employee and reviewing employment records provided to the SCF by the employee. Thereafter, the Fund filed a Notice of Denial of Liability which stated in detail the reasons why the claimed injury was being denied as required by Minn. Stat. § 176.221, subd. 1.<sup>12</sup> Whether the employee was an independent contractor or an employee of ARMC for purposes of Minn. R. 5223.0230 was a factual and legal dispute. The employee presented no evidence that the independent contractor defense was frivolous and did not present a real controversy. The compensation judge could reasonably conclude the Fund made a good faith investigation of the facts and did not assert a frivolous defense.

After settlement of the independent contractor issue, ARMC and the SCF continued to deny the employee's claim, alleging the injury did not arise out of and in the course of the employment with ARMC. Whether this defense was based on a good faith investigation and presented a real controversy is a much closer question. Based on the existing record, however, we affirm the compensation judge's conclusion that the employee failed to prove entitlement to penalties. ARMC contends the fact that the employee's vehicle was registered to H. L. Clay Leasing Co. suggested the employee had another employer for whom she may have been working on April 7, 1995. Beyond this assertion, however, there is no evidence of an employment relationship between Ms. Clay and H. L. Clay Leasing Co. The deposition of the employee was apparently taken on March 17, 1999 and the deposition of Barbara Diehl was taken on June 2, 1999. (Resp. Brief, p. 32.)<sup>13</sup> Once these depositions were taken, the employer agrees the dual employer and arising out of issues were resolved and the parties entered into the partial stipulation for settlement. (Resp. Brief p. 32.) The compensation judge stated in her memorandum that the arising out of issue was "not resolved until June 2, 1999 when Barbara Diehl, the client whom the employee was visiting just before her injury, was deposed." (Memo at p.12.) The employee contends these depositions should have been taken much earlier and the failure to do so constituted a failure to make a good faith investigation.

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<sup>11</sup> Although the date of injury predated the effective date of the 1995 statute, the "controlling event" in penalty cases may be conduct by an employer and insurer subsequent to the date of injury. Hop v. Northern States Power Co., slip op. (W.C.C.A. Sept. 12, 1996).

<sup>12</sup> Minn. Stat. § 176.221, subd. 1 provides in part:

A. Notice of Denial of Liability must state in detail specific reasons explaining why the claimed injury or occupational disease was determined not to be in the scope and course of employment . . .

<sup>13</sup> Neither deposition was offered in evidence at the hearing.

An employer or insurer is not necessarily required to depose the employee and all material witnesses to satisfy the statutory obligation of a good faith investigation of the facts. Such an investigation may be accomplished by any reasonable methods, depending on the facts of the particular case. Beyond the two depositions, the record is devoid of any evidence of what ARMC did to investigate the facts of the case, if anything. Since the arising out of defense was never litigated, there is no record for this court to review to determine whether ARMC's defense was factually supported or was frivolous. The employee has the burden of proving entitlement to penalties. The compensation judge could reasonably conclude she failed in her burden of proof. The compensation judge's decision is affirmed.