EVELYN O. DAHLE, Employee, v. ELY BLOOMENSON CMTY. HOSP., SELF-INSURED, admin'd by BERKLEY ADM'RS, Employer/Cross-Appellant, and ORAL AND MAXILLOFACIAL SURGICAL ASSOCS. and CNA INS. CO., Employer-Insurer/Appellants, and DEP'T OF LABOR & INDUS./VRU and BLUE CROSS/BLUE SHIELD OF MINN., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 27, 2000

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE; PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony, the treatment records and opinions of Dr. Iammatteo, and the opinion of Dr. Litman, support the determination that the employee sustained an injury on December 3, 1989 resulting in a 3.5 percent permanent partial disability for the low back, and the judge's order awarding reimbursement to the intervenor for payments made to Dr. Iammatteo for treatment following the 1989 injury.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's findings that the employee sustained a work-related injury on March 25, 1997 while employed by OMSA, insured by CNA, and that the 1997 injury was a substantial contributing cause of the employee's temporary total disability.

PRACTICE & PROCEDURE - REMAND; MAXIMUM MEDICAL IMPROVEMENT. Where both the cross-appellant and appellants raised the defense of maximum medical improvement (MMI), and the compensation judge failed to make findings on this issue, the matter must be remanded to the compensation judge for determination of MMI and redetermination of any compensable period(s) of temporary total disability.

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee was totally disabled from and after February 18, 1999 as a result of her inability to return to work for the employer, OMSA, due to her work-related low back condition.

WAGES - FOSTER CARE PAYMENTS. Substantial evidence supports the compensation judge's finding that the employee was not disqualified from wage loss benefits by virtue of her foster care activities based on the particular evidence before him.

APPORTIONMENT; PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where both the appellants and cross-appellant argued at hearing that the other was solely liable for any workers' compensation benefits, no claim was made for apportionment or contribution prior to or at the hearing, and no evidence was submitted by any party regarding apportionment of liability among the various injuries, the compensation judge properly made no findings regarding apportionment of liability among the employers and insurers.

PENALTIES. Substantial evidence supports the compensation judge's award of penalties for assertion of a frivolous defense. The compensation judge did not abuse his discretion in awarding a 10 percent penalty against the wage loss and medical expense benefits ordered paid by OMSA/CNA following the 1997 injury.

Affirmed as modified, in part, and remanded in part.

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

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer, Oral and Maxillofacial Surgical Associates (OMSA) and CNA Insurance Company appeal from the compensation judge's findings that (1) the employee sustained a personal injury on March 25, 1997; (2) the employee was entitled to temporary total disability benefits from July 24 to September 8, 1997 and from February 18, 1998 through March 9, 1999; (3) the employee was entitled to temporary partial disability from and after March 10, 1999; (4) the employee's activities as a foster parent did not disqualify her from wage loss benefits; and (5) the employer and insurer's denial of primary liability was frivolous, entitling the employee to a penalty of 10 percent on all benefits owing due to the 1997 injury. The employer and insurer, OMSA and CNA, also appeal from the compensation judge's order directing OMSA and CNA to pay all wage loss and rehabilitation benefits awarded to the employee.[1] We affirm, in part, and vacate and remand in part.

The self-insured employer, Ely Bloomenson Community Hospital (EBCH), administered by Berkley Administrators, cross-appeals from the compensation judge's determination that the self-insured employer failed to establish any functional disability prior to December 3, 1989, and his denial of apportionment of liability for a pre-existing low back condition. EBCH and Berkley also appeal from the award of a 3.5 percent permanent partial disability for the December 3, 1989 personal injury, and the judge's order directing EBCH to reimburse intervenor Blue Cross/Blue Shield of Minnesota for payments made to Dr. Iammatteo for medical care following the 1989 injury. We affirm.

BACKGROUND

Evelyn O. Dahle, the employee, was 51 years old at the time of the hearing. She is a high school graduate, and received her certification as a licensed practical nurse (LPN) in 1966. In 1988, she began working as an LPN for the Ely Bloomenson Community Hospital nursing

[1] Although listed in their notice of appeal, findings 23 and 24 relating to the December 30, 1994 injury, were not addressed in the brief submitted by OMSA and CNA. Consideration of these findings by the court is, accordingly, waived pursuant to Minn. R. 9800.0900, subp. 1.

home, two nights a week. On December 3, 1989, the employee tripped and fell face forward at work, sustaining an admitted, work-related injury to her thoracic-lumbar spine.

The employee was seen by Dr. Kindamo at the Ely Medical Center on December 8, 1989 complaining of left-sided muscle pain after the fall. He diagnosed a left hip strain and advised her to use heat and anti-inflammatory medications. The employee was dissatisfied with Dr. Kindamo's assessment and sought treatment from Dr. Patric Iammatteo on December 12, 1989. The employee had previously received treatment from Dr. Iammatteo, beginning in 1986, for thoracic pain, low back pain and occasional right or left leg pain. On December 12, Dr. Iammatteo noted spasm and limited range of motion from T8 to L4, diagnosed a thoracic-lumbar sprain, and took the employee off work from December 14 to December 16, 1989. The employee continued to treat with Dr. Iammatteo following her return to work at the EBCH nursing home.

On May 1, 1990, Dr. Iammatteo completed a Physician's Report anticipating that maximum medical improvement (MMI) would be reached as of September 30, 1990. On October 16, 1990, the doctor completed another Physician's report assigning a 3.5 percent permanent partial disability pursuant to Minn. R. 5223.0070, subp. 1.A.(2) for the lumbar spine. In November 1990, the employee resigned from her position with EBCH and began employment, two days a week, as an anesthesia/surgical assistant with Oral and Maxillofacial Surgical Associates. The employee testified she was having problems with the lifting required by her position as night LPN at the nursing home, and was afraid she would reinjure her back. The employee further stated that she had constant low back pain and aching following the 1989 injury, but was able to do her work at OMSA and continue most of her usual activities at home.

On December 30, 1994, the employee sustained a second injury to her lumbar spine when she reached across to lift a patient, still under the affects of anesthesia, from the dental surgery chair to a chair with wheels. She was seen by Dr. Iammatteo on January 5, 1994, reporting mid and low back pain with pain down the left leg. On examination, the doctor noted tenderness and loss of range of motion from T8 to L5-S1. The employer, OMSA, then insured by CNA Insurance Company, accepted liability for the injury.

On April 10, 1995, Dr. Iammatteo completed a Health Care Provider Report indicating the employee had reached MMI as of March 30, 1995 for the December 30, 1994 injury, with no permanent partial disability anticipated. OMSA and CNA served Dr. Iammatteo's MMI report on the employee on April 21, 1995 . (Resp. Ex. 7.) On April 30, 1995, the employee and her husband, who have four adult children, became foster parents, receiving reimbursement from St. Louis County. The employee and her husband continued to provide foster care through the date of hearing.

The employee continued to receive treatment from Dr. Iammatteo, whose records reflect continuing complaints of low back pain with occasional radiation of pain into the right or left leg, and findings on examination of limited range of motion, tenderness and muscle spasm in

the low back. The employee also began to complain of neck, upper back and right arm pain.[2] On August 7, 1995, Dr. Iammatteo completed a new Health Care Provider Report, now stating the employee had not reached MMI, and that it was too early to determine permanency. On August 9, 1995, the employee underwent an MRI scan of the lumbar spine. The scan revealed disc degeneration at L4-5 and L5-S1 with degenerative changes of the facet joints at the same levels.

In December 1995, Dr. Iammatteo referred the employee to Dr. Matthew Eckman, a physical medicine and rehabilitation specialist at the Duluth Clinic, for a second opinion. Dr. Eckman examined the employee on January 11, 1996. He diagnosed a lumbar strain, without radiculopathy, with mild degenerative changes.[3] In a letter dated May 7, 1996, Dr. Eckman opined the employee's current low back problems were related to the December 30, 1994 work incident. He further stated that, in his opinion, the injury had not resolved and it would be premature to "declare MMI or PPD." (Resp. Ex. 1:4, Pet. Ex. E: 5/7/96.) The employee continued to treat with Dr. Iammatteo for her mid and low back problems through 1996 and into 1997. On July 18, 1997, Dr. Iammatteo completed a Health Care Provider Report indicating the employee had reached MMI for the December 30, 1994 injury as of February 19, 1997, and assigning a 3.5 percent permanency for the lumbar spine.

On March 26, 1997, the employee reported to the employer she had sustained a new low back injury on March 25, 1997, while reaching across a patient to perform a full body lift. The employer, OMSA, and its insurer, CNA, initially accepted liability for the injury, and paid the employee's medical expenses. The employee continued to work as a surgical assistant for OMSA, but reported increasing difficulty with her back that she related to her work activities. On July 24, 1997, Dr. Iammatteo took the employee off work for six weeks to see if her back pain would subside. The employee testified her back improved substantially while she was off work, but her pain and symptoms returned in a matter of days after returning to work on September 8, 1997. In the meantime, on August 5, 1997, OMSA and CNA served a notice denying primary liability for the March 25, 1997 injury, asserting the current time off and treatment did not appear to be causally related to the employee's work activities and alleging failure to cooperate with CNA's investigation of the claim.

On October 2, 1997, Dr. Iammatteo referred the employee back to Dr. Eckman for further assessment. Dr. Eckman examined the employee on November 28, 1997, and imposed light-duty restrictions, limiting the employee to no more than 4 to 6 hours of standing or walking, no sitting or driving more than 1 to 3 hours, only occasional bending, squatting or climbing, and

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[2] The employee also alleged a work-related neck and right arm injury in 1994. The compensation judge found the employee failed to prove that her neck and right arm problems were work-related. (Finding 32). The employee did not appeal this finding.

[3] Dr. Eckman referred the employee to Dr. David Camenga, a neurologist at the Duluth Clinic, who primarily evaluated the employee's cervical complaints. Following an examination on January 31, 1996, the doctor opined there were no significant lower extremity abnormalities. Dr. Camenga, in turn, referred the employee to Dr. Mark Glazier, a neurosurgeon, for further evaluation of her cervical spine problems. Dr. Glazier examined the employee on April 9, 1996.

no lifting over 20 pounds or carrying over 10 pounds. Both Dr. Iammatteo and Dr. Eckman advised the employee to seek other work. (Resp. Ex. 1:3, Pet. Exs. E, F.) On December 11, 1997 and January 28, 1998, Dr. Iammatteo completed Health Care Provider Reports stating that MMI had been reached for the March 25, 1997 injury as of December 4, 1997. He assigned a seven percent permanency for this injury. OMSA/CNA served the January 28, 1998 MMI report on the employee and her attorney on February 27, 1998.

The employee provided a notice of resignation to OMSA, effective January 1, 1998. Her employment actually terminated on about December 29, 1997, when she was hospitalized for an emergency hysterectomy. She was disabled following the surgery through about February 18, 1998.

The employee contacted the intervenor, the Department of Labor and Industry, Vocational Rehabilitation Assistance (DOLI/VRU) in mid-December, 1997, seeking vocational assistance. Following the surgery she met for an initial interview with a QRC on February 18, 1998. The QRC concluded the employee was eligible for rehabilitation assistance, and job placement assistance was provided though March 1999, when the employee obtained work, two days a week, at a pizza and sub shop. The appellants and cross-appellant do not dispute the employee cooperated with rehabilitation efforts. (See finding 52.)

On April 27, 1998, the employee was examined by Dr. Thomas Litman at the request of OMSA and CNA. Dr. Litman concluded the1989 injury at EBCH was a substantial contributing cause of the employee's lumbar spine problems, and the December 1994 injury was a permanent aggravation of the 1989 injury. He further concluded that the March 1997 injury was a temporary aggravation of the employee's low back condition that lasted about six months, and opined the employee had reached MMI for all of her work-related injuries. Dr. Litman imposed restrictions, that he attributed to the 1989 and 1994 injuries, of no lifting or carrying over 35 pounds occasionally or 25 pounds repetitively, avoid repeated bending and rotation, and avoid prolonged standing, climbing, stooping, kneeling and crouching. (Resp. Exs. 1:7, 5: 4/27/98.) Dr. Litman subsequently reviewed the employee's x-rays and MRI scans, and opined the employee had either a 10.5 percent or 10 percent permanent partial disability attributable to the 1989 injury, with no additional permanency due to the 1984 injury.[4] (Resp. Exs. 1:7, 5: 6/11/98). Dr. Litman's report was served on the employee and her attorney on May 6, 1998.

The employee was examined by Dr. Robert B. Hartman, at the request of the self-insured employer, EBCH, on June 11, 1998. In his report dated July 7, 1998, Dr. Hartman concluded the employee's December 3, 1989 injury was the "precipitating event" for the employee's low back symptoms, and opined the employee reached MMI within 12 weeks after the injury. He assigned zero permanency for this injury. Dr. Hartman further opined the employee suffered temporary aggravations of her pre-existing degenerative condition of the lumbar spine in 1994 and 1997, with no permanent partial disability. In his deposition taken September 30, 1998

[4] Dr. Litman assigned 10.5 percent pursuant to Minn. R. 5223.0070, subp. 1.A.(3)(b) (1989), or 10 percent in accordance with Minn. R. 5223.0390, subp. 3.C.(2), using the permanency rules in effect after July 1, 1993.

and concluded on June 14, 1999, Dr. Hartman opined the employee had pre-existing, non-work-related lumbar spine spondylosis and the December 3, 1989 injury was a temporary aggravation that did not permanently affect her pre-existing degenerative lumbar spine condition. (Resp. Ex. 6: Vol. I at 10, 46-48, 54; Vol. II at 13, 20-21.)

The employee filed a claim petition on January 29, 1998 alleging work-related injuries on December 3, 1989, December 30, 1994 and March 25, 1997, and seeking wage loss benefits from July 24 to September 8, 1997, and from and after January 1, 1998, as well as permanent partial disability benefits, rehabilitation assistance, payment of medical expenses, and penalties against CNA only. The case was heard on April 21, 1999 by a compensation judge at the Office of Administrative Hearings in Hibbing, Minnesota. The compensation judge found, *inter alia*, that the employee (1) sustained a work-related injury on March 25, 1997; (2) was entitled to a 3.5 percent permanent partial disability as a result of her December 3, 1989 injury; (3) had a permanent partial disability of 10 percent as a result of the December 30, 1994 injury (less the 3.5 percent payable for the 1989 injury); (4) was entitled to temporary total disability from July 24 to September 8, 1997 and from February 18, 1998 through March 9, 1999; and (5) was entitled to payment of temporary partial disability benefits from March 10, 1999 through the date of hearing. The compensation judge further found the employee's foster care activities did not disqualify the employee from receipt of wage loss benefits, and OMSA/CNA's assertion of a primary liability defense was frivolous. The compensation judge ordered the self-insured employer, EBCH/Berkley, to pay the 3.5 percent permanency awarded and to reimburse intervenor Blue Cross/Blue Shield of Minnesota (BCBSM) for payments made to Dr. Iammatteo for treatment of the thoracic and lumbar spine. The compensation judge ordered OMSA/CNA to pay permanency benefits equivalent to 6.5 percent (10% - 3.5%); to pay the unpaid bills of Dr. Iammatteo; to pay the temporary total and temporary partial disability benefits awarded; and to reimburse the intervenor, DOLI/VRU, for rehabilitation assistance provided to the employee. The compensation judge also imposed a 10 percent penalty on benefits owed to the employee for the 1997 injury. The employer and insurer, OMSA/CNA, and the self-insured employer, EBCH/Berkley, appeal 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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

December 3, 1989 Injury

The self-insured employer, EBCH, argues the employee's December 3, 1989 injury was a temporary aggravation of a pre-existing, non-work-related low back condition and the injury resolved without any permanent partial disability within twelve weeks. The self-insured employer therefore contends the compensation judge's findings and order awarding a 3.5 percent permanent partial disability for the 1989 injury, and reimbursement to BCBSM for payment of the employee's medical bills following the 1989 injury, are not supported by the evidence and are clearly erroneous. We affirm.

The employee testified that although she had periodic low back symptoms between 1984 and 1989, she was "pain free" between treatments. After the December 3, 1989 injury, however, she had constant low back pain and symptoms that never completely resolved. (T. 74, 85-86, 89-90, 94; Pet. Ex. A at 22, 34, 49-50, 54, 56.) The employee acknowledged Dr. Iammatteo did not provide written restrictions following the 1989 injury, but testified she was having difficulty with the lifting required by her night LPN job at the EBCH nursing home and resigned because she was afraid she would reinjure her back. (T. 72-73, 88, 93-94, 96; Pet. Ex. A at 14, 24-25, 68.) The compensation judge accepted the employee's testimony. (Findings 5, 11; see findings 3, 4, 9, 10.)

Following the 1989 injury, Dr. Iammatteo, the employee's treating physician, opined the employee had sustained a 3.5 percent permanency for a low back strain, and would continue to have low back discomfort indefinitely as a result of the 1989 injury. (Resp. Ex. 1:3, Pet. Ex. E: 5/1/90, 10/16/90, 1/21/91, 11/15-16/91.) Dr. Litman also concluded the employee's 1989 injury was a substantial contributing factor to her ongoing low back problems. (Resp. Ex. 1:3, Pet. Ex. E; Resp. Ex. 1:7, 5.) The judge found the examinations and findings of Dr. Iammatteo persuasive, and adopted his 3.5 percent permanent partial disability rating for the 1989 injury. (Findings 10, 12; Mem. at 12.)

The self-insured employer urges this court to adopt, instead, the opinions of Dr. Hartman. Dr. Hartman opined, in his deposition, that the employee had pre-existing degeneration of the lumbar spine, and the 1989 injury was a temporary aggravation of her underlying non-work-related low back condition. (Resp. Ex. 6 at 9-10, 12-15, 46.) It is the compensation judge's responsibility to resolve conflicting expert medical opinion. The judge chose the opinions of Dr. Iammatteo and Dr. Litman over those of Dr. Hartman. The opinions of Dr. Iammatteo and Dr. Litman are based on the doctors' examinations, treatment, and review of the medical record and are adequately founded. The compensation judge's choice of medical experts must, therefore, be affirmed. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The determination of whether the employee sustained a compensable personal injury, and causation for and the extent of any permanent partial disability, are questions of fact

for the compensation judge. See Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D.181 (Minn.1994); Jacobowitch v. Bell & Howell, 404 N.W.2d, 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). We acknowledge that different conclusions could be drawn from the evidence. Where, however, the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the compensation judge's findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). There is substantial evidence in the record as a whole to support the compensation judge's award of a 3.5 percent permanent partial disability as a result of the 1989 injury, and the award of reimbursement to BCBSM for payments made to Dr. Iammatteo for treatment following the 1989 injury. We, therefore, affirm.

March 25, 1997 Injury- New Injury

The appellants, OMSA and CNA, assert there is no substantial, well-founded evidence to support a finding that the employee sustained a personal injury on March 25, 1997. They argue the compensation judge erred in relying on the opinions of the employee's treating physicians, Dr. Iammatteo and Dr. Eckman, asserting their opinions lack foundation and are not reliable. The appellants contend, therefore, the opinions of Dr. Hartman and Dr. Litman must be accorded substantial, controlling weight on this issue.

However, neither Dr. Hartman's or Dr. Litman's opinion supports the appellants' position. Rather, Dr. Litman concluded the employee sustained a temporary aggravation of her low back condition as a result of a work injury on March 25, 1997. Dr. Hartman similarly opined the employee suffered a soft tissue injury to the low back on March 25, 1997, resulting in a temporary aggravation of her low back condition. An opinion that an injury is temporary addresses the duration of the injury only, and requires the conclusion, first, that an injury did occur. We, accordingly, affirm the compensation judge's finding that the employee sustained a work-related injury on March 25, 1997.

Substantial Contributing Cause

The appellants contend that any aggravation attributable to the March 25, 1997 injury ended before the period during which the employee claimed entitlement to workers' compensation benefits. They argue, based on Dr. Hartman's opinion, that the injury was temporary, lasting no longer than 12 weeks, and they, accordingly, have no liability for benefits based on the March 25, 1997 injury. We are not persuaded.

The compensation judge found that as of February 18, 1998, the employee was totally disabled "[as] a result of the cumulative effect of the three work-related injuries," and that the March 25, 1997 injury was a substantial contributing factor to the temporary total disability awarded. (Findings 55, 56.) We conclude there is sufficient evidence of record to support these findings. The employee testified she had constant pain after the 1989 injury at EBCH, but was able to keep working and continued to be active with respect to housework, yard work and recreational activities. (Pet. Ex. A at 49, 54.) The employee then sustained an admitted, work-related injury on December 30, 1994, while employed by OMSA, insured by CNA. She testified

that after the 1994 injury she could no longer mow the lawn or shovel snow; garden as much as she used to; walk 3 to 5 miles daily or bicycle; or lift as much as she could before the injury. (Finding 23; Pet. Ex. A at 32.)[5] Following the March 25, 1997 injury, the employee testified her symptoms worsened, and she could not ride for long periods in a car, could not sit for long periods of time in any chair, and had a heating pad with her at all times, at work, in church and in her car. (Finding 40; Pet. Ex. A at 32-33, 38.) The compensation judge accepted the employee's testimony.

The employee continued to treat with Dr. Iammatteo following the March 25, 1997 injury. On January 28, 1998, Dr. Iammatteo completed a Health Care Provider Report, indicating the employee's March 25, 1997 injury was causally related to her work activities, and assigning a 7 percent permanent partial disability for her low back condition. Dr. Iammatteo last saw the employee on March 25, 1999, for recurrent complaints of mid and low back pain with bilateral hip and leg pain. He noted tenderness, limited range of motion and spasm from T6 to L5 along with sacroilliac joint dysfunction. The compensation judge found the examinations and findings of Dr. Iammatteo "far more persuasive" than the reports of Dr. Litman and Dr. Hartman. (Mem. at 12.) While other inferences could be drawn from the record, based on this evidence, the compensation judge could reasonably conclude that the March 25, 1997 injury substantially contributed to the employee's total disability. We therefore affirm that determination.

Causal Relationship

The appellants contend, in the alternative, that the employee is not entitled to temporary total disability after February 18, 1998, on the basis that the employee's resignation from OMSA was due to her hysterectomy, and was not a result of her work injury. We disagree.

Following the March 25, 1997 injury, the employee reported increasing difficulty performing her work at OMSA. On July 24, 1997, Dr. Iammatteo took the employee off work for six weeks, "in hopes that her back pain might subside." (Resp. Ex. 1:3, Pet. Ex. E.) The employee was released to a work-hardening program on August 18, 1997, and returned to work on September 9, 1987 following completion of the program. The employee reported her back improved substantially while she was off work, but her pain and symptoms returned within a matter of days after returning to work. She was seen by Dr. Iammatteo on September 22, 1997, who suggested she consider retraining and get out of the work she was doing. On October 2, 1997, noting ongoing difficulty with work and continuing lumbar and cervical spine discomfort, Dr. Iammatteo referred the employee back to Dr. Eckman for his assessment. Dr. Eckman examined the employee on November 28, 1997. He diagnosed a cervical and lumbar strain with multiple level disc degeneration, and imposed light-duty restrictions. He further recommended a vocational consultation, assignment of a qualified rehabilitation consultant (QRC), and consideration of retraining. The employee returned to Dr. Iammatteo on December 4, 1997, who

[5] In their brief, the employer and insurer did not address the compensation judge's findings that the employee's condition worsened following the December 30, 1994 injury, and that she sustained a 10 percent permanent partial disability due to the 1994 injury. We therefore deem findings 23 and 24 unappealed, and the facts therein final and conclusive. (See footnote 1.)

reiterated his opinion, both verbally and in writing, that the employee needed vocational rehabilitation to prepare her for some other kind of work. (Pet. Exs. E, F.)

In mid-December 1997, the employee tendered her resignation to OMSA, effective January 1, 1998. (T. 76-79; Pet. Ex. A at 9, 37, 43-44; Pet. Ex. I: 12/17/97.) Unfortunately, the employee, who was scheduled for an elective hysterectomy in March 1998, began to hemorrhage and left OMSA on about December 29, 1998 due to hospitalization for emergency surgery. (T. 99-100; Pet. Ex. A at 43-44.) The employee was unable to work until February 18, 1998 as a result of the surgery. On this record, the compensation judge reasonably concluded the employee was unable to return to her employment with OMSA, and her total disability after February 18, 1998 was due, in substantial part, to her work-related low back condition. As there is substantial evidence to support the compensation judge's determination, we must affirm.

Temporary Total Disability - Maximum Medical Improvement

The appellants, OMSA and CNA, also contend the employee reached MMI for the March 25, 1997 injury by December 4, 1997, based on the reports of Dr. Iammatteo, and that any entitlement to temporary total disability benefits ceased 90 days after service of MMI. The compensation judge found the employee was entitled to temporary total disability benefits from February 18, 1998 to March 9, 1999, and ordered the appellants to pay the benefits awarded. Although MMI was raised as a defense to liability by both the self-insured employer, EBCH, and the employer and insurer, OMSA/CNA, the compensation judge failed to make any findings regarding MMI.

A finding of MMI is one of ultimate fact. It is the compensation judge's responsibility to evaluate the medical records and opinions, the employee's testimony and other evidence to determine if and when MMI was reached. Where, as here, there are multiple injuries, MMI must be reached on *all* compensable injuries. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639-41 (Minn. 1989). MMI is a controlling legal standard determining the rights and liabilities of the parties. Any liability for temporary total disability benefits ceases 90 days after MMI is reached and an MMI report is served. Minn. Stat. § 176.101, subd. 1(j). Since a determination of MMI may affect the duration of the employer and insurer's liability for temporary total disability benefits, we vacate solely those portions of the compensation judge's decision establishing the duration of temporary total disability, that is, from February 18, 1998 to March 9, 1999, and remand the matter to the compensation judge for a determination of whether MMI has been reached, the effective date of MMI, if any, and the periods during which temporary total disability benefits are due, if any.

Foster Care Reimbursement

The appellants argue the compensation judge erred by failing to make any findings with respect to the amount earned by the employee for foster care services. They contend the employee received substantial income from St. Louis County for foster care, and was neither totally disabled nor had any loss of earning capacity.

The employee and her husband have been foster parents since April 30, 1995, and receive reimbursement from the county for their foster children. The judge further found, based on the evidence before him, that the employee's foster care activities did not disqualify her from entitlement to wage loss benefits. Although the appellants were aware, at least from the time of the employee's deposition on April 15, 1998, that the employee and her husband provided foster care through St. Louis County, they did not raise the issue of earnings from foster care until the end of the hearing while cross-examining the employee. (T. 116-130.)[6] The sole evidence on this issue was the employee's testimony and copies of reimbursement stubs from St. Louis County from January 1996 through March 1999, submitted after the close of the hearing.

The employee testified she and her husband receive a monthly reimbursement check from St. Louis County for the children's needs including housing, transportation and travel, and food. Several of the children have special needs, resulting in a higher level of care payment. The employee was unable to provide more detail regarding expenses covered by the reimbursement check. (T. 116-117, 119; Pet. Ex. A at 6.) The reimbursement stubs show the employee and her husband had two foster children in 1996, with reimbursement totaling $20,673.52 for that year. The number of children gradually increased to three, then four and finally five children during 1997, with a total reimbursement of $58,224.79. The Dahles had four foster children for most of 1998, with reimbursement for the year totaling $56,593.56. The amount of reimbursement varies from month to month. (Pet. Ex. O.)

The appellants assert the employee received "drastic yearly increases," especially after the March 25, 1997 injury, that cannot be accounted for solely by cost-of-living increases. They contend that because the employee and her husband had increased remuneration from St. Louis County between 1996 and 1998, it must be assumed that the employee had earnings, and that, in fact, her earnings from foster care increased following the 1997 injury. Such a conclusion is pure speculation on this record. In the absence of documentation or testimony establishing any sort of earnings (that is, income over and above expenses to meet the children's needs), or that the employee had income from foster care after the 1997 injury that exceeded any pre-injury foster care income, the compensation judge properly concluded the employee was not disqualified from wage loss benefits by virtue of being a foster parent.[7] We affirm.

Apportionment /Contribution

[6] It appears that counsel for OMSA/CNA sent an authorization form to the employee's attorney's office to secure records from St. Louis County regarding the foster care. The employee acknowledged she received a letter requesting copies of the reimbursement stubs which she sent to her attorney's office. The information was not, apparently, forwarded to counsel for OMSA/CNA. OMSA/CNA, however, made no attempt to compel production of the requested information or authorizations prior to the hearing.

[7] Compare Fischer v. Clara City Nursing Home, slip op. (W.C.C.A. Dec. 29, 1994); Jones v. Personnel Pool of Minneapolis, slip op. (W.C.C.A. May 7, 1986).

The appellants argue the compensation judge erred in ordering OMSA/CNA to pay all temporary total and temporary partial disability benefits, rehabilitation expenses and medical expenses following the 1997 injury, and improperly failed to apportion liability among the injuries, including the 1989 injury. The self-insured employer, EBCH, asserts the compensation judge correctly "held" that OMSA/CNA was solely liable for all ongoing workers' compensation benefits following the 1994 and 1997 injuries. We accept neither position.

Neither the appellants nor the cross-appellant asserted a claim for apportionment or contribution prior to or during the hearing, and no evidence was submitted by any party regarding apportionment of liability between the injuries. Rather, EBCH asserted that the 1989 injury was temporary and had resolved, and it had no liability for the claimed benefits. Similarly, OMSA/CNA asserted that the 1994 and 1997 injuries were temporary and had resolved and that EBCH was solely liable for the employee's workers' compensation benefits. The compensation judge found the employee was disabled as a result of all three injuries and found the March 1997 injury was a substantial contributing cause of the employee's disability. We have affirmed these findings. Accordingly, OMSA/CNA owe benefits to the employee. The burden is on the employer and/or insurer to seek an allocation of liability among previous or subsequent employers and insurers. Hammer, 435 N.W.2d at 529, 41 W.C.D. at 640-41. In the circumstances presented here, the compensation judge properly made no findings apportioning liability among the injuries or the employers and insurers. OMSA and CNA are not precluded from bringing a claim, at a later time, for contribution or reimbursement of a portion of the benefits awarded, if appropriate.

Penalties

Finally, the appellants, OMSA/CNA, assert there is no basis for the compensation judge's award of a 10 percent penalty against OMSA/CNA for a frivolous denial of the employee's claim. The appellants argue, as they did at hearing, that the employer and insurer were refused an opportunity to make a good faith investigation of the claim, and properly denied primary liability for the employee's March 25, 1997 injury. We are not persuaded.

The employer and insurer, OMSA/CNA, initially accepted liability for the 1997 injury and paid medical expenses. In August 1997, the employee received a phone call from an agent for CNA seeking a "recorded deposition." The employee declined the request because the caller wanted to take the deposition in Virginia, Minnesota, over 40 miles from the employee's home, at a time that was inconvenient to the employee. The employee then contacted an attorney. When the claims representative called back, the employee stated she wanted to be represented, and the caller hung up. The employee then received a notice denying primary liability, asserting the "employees failure to cooperate with this investigation precludes CNA from investigating the claim. Investigation will be resumed when employee cooperates with the investigative process." (Judgment Roll: 8/5/97 Primary Liability Determination.) Thereafter, although OMSA/CNA took the employee's deposition, and the employee provided medical authorizations and attended an independent medical investigation requested by OMSA/CNA, the appellants continued to deny primary liability. The appellants' independent medical examiner, Dr. Litman, concluded the employee had sustained a temporary injury on March 25, 1997, lasting around six months, but

CNA continued to deny primary liability through the date of hearing. The compensation judge reasonably found the employer and insurer's continuing denial of primary liability was "frivolous" under these circumstances.

The appellants argue further, however, that even if a penalty is warranted, they should not be penalized on all the benefits awarded against them, but only those occurring after Dr. Litman's April 27, 1998 report opining the employee had sustained a temporary injury on March 25, 1997. Minn. Stat. § 176.225, subd. 1(a), requires imposition of a penalty of up to 30 percent "of the total amount of compensation awarded" where the employer or insurer interpose a frivolous defense. In Cassem v. Crenlo, Inc., 470 N.W.2d 102, 44 W.C.D. 484 (Minn. 1991), the supreme court noted that Minn. Stat. § 176.225, subd. 1, provides for penalties on the "total amount awarded," and held that penalties were properly calculated on the entire amount of benefits awarded, even though payment of only a portion of the benefits had been delayed. Here, the compensation judge awarded a 10 percent penalty solely on the wage loss benefits and medical expenses ordered paid by OMSA/CNA that were attributable to the 1997 injury. We cannot conclude the compensation judge abused his discretion in so doing, and affirm.