RODNEY I. GROTH, Employee, v. DOTSON CO. and AM. MUT. LIABILITY/MIGA, Employer-Insurer, and DOTSON CO. and AM. COMP. INS. CO./RTW, INC., Employer-Insurer/Appellants, and DOTSON CO. and TRAVELERS INS. CO., Employer-Insurer, and MII LIFE, INC., ORTHOPAEDIC AND FRACTURE CLINIC, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenors and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 14, 2000

No. [REDACTED SSN]

HEADNOTES

JURISDICTION - SUBJECT MATTER. Where the employee had multiple injuries covered by multiple insurers, one of which was insolvent and its claims administered by MIGA, the compensation judge had jurisdiction to apportion liability to the remaining solvent insurers.

APPORTIONMENT - EQUITABLE. The portion of liability assigned to MIGA is not assigned to the next injury after the MIGA injury, but is proportionately divided amongst the remaining solvent insurers.

APPORTIONMENT - CALCULATION. Where the employee was not receiving temporary partial disability benefits at the time of the injury resulting in total disability, and the record does not establish that the employee was entitled to temporary partial disability benefits at that time, Kirchner does not apply. Therefore the Kaisershot formula is appropriate calculation method.

ATTORNEY FEES - .191 FEES. Award of .191 fees was appropriate where apportionment of liability was the significant issue in the case.

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

Determined by: Rykken, J., Johnson, J., and Pederson, J.
Compensation Judge: Gary P. Mesna

OPINION

MIRIAM P. RYKKEN, Judge

The employer and American Compensation Insurance Company appeal the compensation judge's apportionment determination and the application of the Kirchner and Kaisershot formulas.[1] We affirm in part, modify in part, and vacate in part.

[1] The employer and American Compensation Insurance Company also appealed findings regarding apportionment of permanent partial disability under Minn. Stat. § 176.101, subd. 4(a) and the proper wage rate to apply for calculation of temporary disability benefits, but did not brief

BACKGROUND

Rodney Groth, the employee, began working for Little Giant Corporation, predecessor to Dotson Company, the employer, in March 1955. The Dotson Company is a jobbing foundry which molds gray iron casting. Born on June 5, 1935, the employee was 19 years old when he commenced working for the employer, and continued working there until February 1999. While working for the employer, the employee sustained numerous injuries to his low back, beginning in 1959, including the three injuries at issue herein, on December 4, 1964, March 11, 1994, and November 5, 1998. The Dotson Company was insured for workers' compensation liability by various insurers on those injury dates: American Mutual Insurance Company (1964), American Compensation Insurance Company/RTW (1994), and Travelers Insurance Company (1998). American Mutual has since been declared insolvent, and the Minnesota Insurance Guaranty Association (MIGA) has assumed administration of claims against American Mutual pursuant to the provisions of the Minnesota Insurance Guaranty Association Act, Minn. Stat. ch. 60c.

In 1959, while working as a sand slinger helper, the employee injured his low back while carrying a flask with a coworker. Following this first injury, the employee obtained chiropractic treatment, and returned to his regular job for the employer. He noticed intermittent symptoms in his low back and leg following this initial injury. On December 4, 1964, the employee experienced a flare-up of his low back pain while at work, following which the employer's insurer at that time, American Mutual Insurance Company (American Mutual), admitted liability and paid various workers' compensation benefits. On December 4, 1964, the employee earned an average weekly wage sufficient to entitle him to a maximum compensation rate of $45. The employee was hospitalized from December 7 - 14, 1964, and thereafter consulted Dr. Paul Gislason for additional treatment recommendations.

In January 1965, the employee underwent surgery in the nature of a partial laminectomy, at the recommendation of Dr. Gislason. He was disabled from work for five months and returned to his job. The employee testified that he had symptoms "off and on over the years" following this surgery, experienced many minor flare-ups or minor aggravations (T. 16), and was periodically hospitalized due to pain in his lower back. Following the employee's surgery in 1965, he was rated as having a 10 percent permanent partial disability of the back, and was paid permanency benefits by American Mutual.[2]

Between 1968 and 1991, the employee sustained reaggravations of his back on at least 11 occasions. On December 5, 1968, the employee aggravated his back while manually

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these issues. Issues raised in the notice of appeal but not addressed in the appellate brief are deemed waived. Minn. R. 9800.0900, subp. 1.

[2] The employee apparently was paid permanency benefits based upon a 5 percent rating pursuant to an Award on Stipulation, served and filed January 5, 1966 (Finding No. 5), which presumably closed out the employee's claim to the extent of 10 percent permanent partial disability to the body as a whole.

turning over a mold. On March 17, 1971, he reaggravated his back again, while rolling over a large mold. He experienced pain in his low back and left hip, and remained off work for one week as a result of this injury. He was initially prescribed pain medication, and by April 1971 was hospitalized for eight days as a result of this aggravation. In January 1975, the employee again sustained a work-related injury to his back; on March 3, 1975, he again injured his back while setting cores into a mold on the slinger floor. On February 15, 1977, the employee aggravated his low back while reaching for an object. He noticed right hip and right leg symptoms, and was hospitalized for seven days following this injury, to receive conservative treatment.

On March 12, 1979, the employee noticed an onset of low back pain after shoveling sand and was hospitalized for five days. On July 23, 1981, the employee sustained an additional injury to his low back while shoveling sand at work. He remained off work for approximately two weeks as a result of this aggravation. On June 24, 1984 the employee again injured his low back while rolling a mold, and remained off work for two weeks following this injury. On August 16, 1985, the employee reinjured his low back while lifting boards out of a jammed machine at work. The employee underwent a lumbar CT scan on August 27, 1985, which showed grade I spondylolisthesis at the L5-S1 level with bilateral pars defects and marked narrowing of the intervertebral space, along with degenerative changes at the L4-5 and L3-4 levels. (Er/RTW Ex. 2.) The employee again injured his low back on November 6, 1989, while hauling patterns at work. (T. 79.) Again, on May 30, 1991, the employee injured his back at work while bending over to pick up a core.

On March 11, 1994, the employee reinjured his low back when removing a pattern from a molding machine (T. 50), and remained off work until approximately June 1, 1994. (T. 52.) The employer and American Compensation Insurance Company (American Compensation) admitted liability for this injury, and paid various workers' compensation benefits based upon a stipulated average weekly wage of $770.67. (Finding No. 7.) The employee was served with maximum medical improvement (MMI) on August 8, 1994, and was released to return to his previous job, working ten hours per day. (Finding No. 7.) According to a Notice of Intention to Discontinue filed on July 18, 1994, American Compensation paid intermittent temporary partial and temporary total disability benefits through July 17, 1994, prior to the employee's return to work at full wage on July 18, 1994. (Judgment Roll.) American Compensation also paid impairment compensation based on .75 percent permanent partial disability of the body as a whole. (Finding No. 13.)

On March 12, 1997, the employee again injured his low back when he slipped off of a ladder step. He remained off work for approximately one month following this injury, during which he was paid temporary total disability benefits by the employer and Travelers Insurance Company, and returned to work thereafter. On November 5, 1998, the employee experienced increased low back pain and left leg pain while working, which was adjudicated to be a Gillette-

type[3] injury culminating on that date.[4] On that date, the employee earned a stipulated weekly wage of $566.62. (Finding No. 9.)

On November 5, 1998, the employer was insured by Travelers Insurance Company (Travelers). On November 12, 1998, Travelers denied primary liability for the employee's condition, alleging that the employee's current need for treatment was not related to current work activities, but instead related to his pre-existing back condition, specifically to his 1965[5] back injury. On December 4, 1998, the employer and Travelers filed a Petition for Temporary Order pursuant to Minn. Stat. § 176.191, in which they referred to a March 12, 1997 injury during Travelers' period of coverage, and to a later injury on November 5, 1998. That petition also stated as follows:

> That prior to the March 12, 1997 work injury and the apparent November 5, 1998 exacerbation, the employee had sustained multiple other low back injuries while working for Dotson Company. It appears that the employee sustained a low back injury in 1965 [sic], as a result of which the employee had a partial laminectomy. The employee also had a low back work related injury in 1994 at which time RTW was the insurance company on the risk. It is believed that RTW admitted the low back injury and paid various amounts of benefits both to and on behalf of the employee.

(Judgment Roll.)

Due to the employee's symptoms, he worked only intermittently for the employer between November 1998 and March 1999. Pursuant to the Temporary Order, served and filed December 4, 1998, Travelers paid temporary total disability benefits through January 9, 1999, temporary partial disability benefits for seven weeks until late February 1999, and almost two weeks of temporary total disability benefits, paid through March 15, 1999. On March 19, 1999, upon recommendation of the employee's treating physician, Dr. Sebring, the employee underwent a four-level fusion surgery from the L3 level to the S1 level. On March 18, 1999, Travelers filed a Notice of Intention to Discontinue Workers' Compensation Benefits (NOID), in which it stated as follows:

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[3] Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

[4] In an unappealed finding, the compensation judge herein determined that the employee "sustained a Gillette injury to his low back as a result of his work activities from 1994 to 1998." (Finding No. 11.)

[5] Although the notice of insurer's primary liability determination, filed on November 16, 1998, indicates a 1965 date of injury, the medical records consistently refer to a December 1964 work-related injury. The employee underwent surgery in January 1965, which may explain this and later references to a 1965 work-related injury.

> Travelers Insurance originally issued a primary denial of liability on this claim but initiated benefits pursuant to a Temporary Order. Benefits are now being discontinued as the employee's primary treating physician has apportioned 75% of the current condition to a pre-existing 1965 [sic] injury and 25% to a 1994 exacerbation (See attached 2/10/99 medical opinion.) Thus there is no indication of an 11/5/98 injury or exacerbation sustained while Travelers Insurance carried the coverage for this employer.

(Judgment Roll.)

To that NOID was attached the February 10, 1999 report of Dr. Paul Matson, the employee's treating physician at that time.

The employee objected to the discontinuance; that objection was addressed at an administrative conference on April 15, 1999. A compensation judge at the St. Paul Settlement Division of the Office of Administrative Hearings determined that the employer and Travelers had grounds for discontinuance of temporary total disability benefits, and allowed discontinuance as of March 18, 1999. The employee has not yet reached MMI from his 1998 injury, nor has he been released to return to work following his 1999 surgery. (Finding No. 10.)

On April 26, 1999, the employee filed a claim petition claiming benefits due as a substantial result of injuries to his low back occurring on December 4, 1964, March 11, 1994, and November 5, 1998. The employee claimed entitlement to an underpayment of temporary disability benefits between November 9, 1998 and March 15, 1999; temporary total and/or temporary partial disability benefits from March 15, 1999 to the present and continuing; permanent partial disability benefits; payment of medical expenses; and provision of rehabilitation services. MIGA, administering claims on behalf of the insolvent insurer, American Mutual, insurer at the time of the 1964 injury, admitted liability but alleged that all compensable benefits had been paid for the 1964 injury.[6] The insurer for the 1994 admitted injury, American Compensation, denied liability for the claims, as did the insurer for the 1998 injury, Travelers.

On July 13, 1999, the employee was examined by Dr. Mark C. Engasser at the request of the employer and American Mutual/MIGA. Dr. Engasser reviewed the employee's extensive medical history, and determined that the employee's work activity from March 11, 1994 through November 5, 1998 constituted a Gillette-type injury to his low back culminating on or

[6] MIGA argued that the employee's claims related to his 1964 injury had settled in 1965 on a full, final and complete basis, with claims remaining open solely for medical expenses causally related to that injury. However, the parties were able to produce only a copy of an award on stipulation dated January 5, 1966, but no copy of a 1965 stipulation for settlement, and none was included in the employee's file with the Minnesota Department of Labor and Industry. In an unappealed finding, the compensation judge found that the "preponderance of the evidence does not establish that the 1965 stipulation for settlement closed out all future benefits for the employee except medical." (Finding No. 19.)

about November 5, 1998. Dr. Engasser also determined that the employee's March 11, 1994 and the Gillette-type injury of November 5, 1998 both were substantial contributing factors to the employee's low back condition. Dr. Engasser determined that all liability for medical care and disability from work between November 5, 1998 until surgery in March 1999 would be entirely due to the Gillette-type injury on November 5, 1998, and that the liability for the employee's condition post-surgery would be apportioned one-third each to the employee's injuries on December 4, 1964, March 11, 1994 and November 5, 1998. (Er/MIGA Ex. 4.)

On July 15, 1999, the employee was examined by Dr. Peter Daly, at the request of the employer and American Compensation. In Dr. Daly's opinion, the employee had not sustained a Gillette-type injury to his low back, but instead stated that the employee's "clinical course is a typical one for the natural history of degenerative disc disease in the lumbar spine," and that "the 1994 and 1998 exacerbations simply represent manifestations of his degenerative disc disease condition." Dr. Daly believed that the 1994 exacerbation was temporary in nature, and that it ultimately resolved with the employee returning to his regular work activities, without restrictions, on a full-time basis. Dr. Daly identified no permanency related to the 1994 exacerbation, and apportioned no responsibility for the employee's disability from employment nor need for medical treatment to the 1994 injury. In addition, Dr. Daly stated that the employee's "1998 worsened symptoms relate to the natural progression of his degenerative disc disease condition, and are not related to his work from a Gillette standpoint." (Er/RTW Ex. 8.)

On July 19, 1999, the employee was examined by Paul A. Cederberg, at the request of the employer and Travelers. In his report dated July 26, 1999, as revised September 28, 1999, Dr. Cederberg outlined his opinion that the employee's 1964 and 1994 low back injuries were substantial contributing factors leading to the employee's underlying condition and ultimate need for surgery in March of 1999, and apportioned the need for that surgery as one-half due to each of the 1964 and 1994 injuries. In Dr. Cederberg's opinion, either the employee's injury on November 5, 1998, was temporary in nature, or his symptoms were the "direct result of the natural progression of his underlying and pre-existing low back condition." (Er/Travelers Ex. 1).

A hearing was held before a compensation judge on September 28, 1999. The employee's claims were addressed at the hearing, as were the issues of whether liability could be apportioned to MIGA and whether the Special Compensation Fund was liable for payment of supplementary benefits. Also addressed at the hearing was the issue of whether the stipulation for settlement purportedly entered into by the parties following the employee's 1964 injury precluded further liability for any benefits except for medical expenses.

The compensation judge found that the employee sustained a Gillette-type injury to his low back as a result of his work activities from 1994 to 1998; this finding was not appealed. The compensation judge found that the employee's work injuries in 1964, 1994, and 1998 were equally responsible for the employee's disability and need for medical treatment from and after November 5, 1998, relying primarily on Dr. Engasser's opinion. The compensation judge determined that since he had no jurisdiction to address claims against MIGA, he found that American Compensation, the 1994 insurer, was liable for its one-third share plus the one-third

share of pre-existing liability relative to the 1964 (MIGA) injury, and that Travelers was liable only for its one-third share related to the employee's 1998 injury. The compensation judge determined that the employee is entitled to payment of temporary disability benefits based upon his 1994 average weekly wage, $770.67, as opposed to his lower 1998 wage, $566.62. The compensation judge also determined that calculation of the liability for temporary total and temporary partial disability should be based on both the Kaisershot[7] and Kirchner[8] formulas. The employer and American Compensation appeal.

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 (1998). 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).

A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Jurisdiction

American Compensation first argues that the compensation judge did not have jurisdiction to apportion liability amongst the insurers in this case because MIGA was administering claims for one of the insurers. The Minnesota Insurance Guaranty Association Act, Minn. Stat. ch. 60C, was enacted "to provide a mechanism for the payment of covered claims . . . and to avoid financial loss to claimants or policyholders because of the liquidation of an insurer." Minn. Stat. § 60C.02, subd. 2 (1998). Where, as here, MIGA has assumed responsibility for claims against an insolvent insurer, MIGA is "deemed the insurer to the extent of its obligation on the covered claims." Minn. Stat. § 60C.05, subd. 1(a). MIGA's board of directors determines whether a claim is a "covered claim," and the Act sets out specific appeal and review procedures that a

[7] Kaisershot v. Archer-Daniels Midland Co., 23 W.C.D. 706 (Indus. Comm'n 1966).

[8] Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983).

claimant may use to contest the board's determination. Minn. Stat. § 60C.10, 12. The Workers' Compensation Court of Appeals does not have subject matter jurisdiction to interpret chapter 60C, to determine whether a claim is "covered" pursuant to that chapter, or to decide a contribution/reimbursement claim by an insurer against MIGA. Taft v. Advance United Expressway, 464 N.W.2d 725, 44 W.C.D. 35 (Minn. 1991); see also Ast v. Har Ned Lumber, 483 N.W.2d 66, 46 W.C.D. 495 (Minn. 1992). However, this does not prevent the compensation judge from apportioning liability amongst the remaining insurers. The cases cited by American Compensation which indicated that equitable apportionment was not allowed only involved two insurers, one of whose claims were being administered by MIGA. In those cases equitable apportionment did not apply because the compensation judge only had jurisdiction over one insurer. In this case, there are two insurers over which the compensation judge has jurisdiction. Therefore, the compensation judge had jurisdiction to equitably apportion liability for the employee's disability.

Apportionment of Liability

The compensation judge assigned liability for the one-third share apportioned to American Mutual/MIGA, the 1964 insurer, to American Compensation, the 1994 insurer. The compensation judge reasoned that where an employer and insurer's liability had terminated because of insolvency, the next employer and insurer are liable for the preceding share, citing Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W.2d 617, 18 W.C.D. 244 (1955) and Webeck v. Mochinski Gen. Contractor, 41 W.C.D. 1063 (W.C.C.A. 1989), summarily aff'd, (Minn. June 9, 1989). However, those cases involved situations where the next employer and insurer were the only other parties involved. These cases do not address the issue of assessing liability where there are several work injuries involving multiple potentially responsible insurers, and therefore provide no basis for assigning all of American Mutual/MIGA's one-third share to American Compensation.

The identical apportionment issue was addressed in Gumiela v. Kraft, slip op. (W.C.C.A. Mar. 14, 1995) and Ast v. Har Ned Lumber, 483 N.W.2d 66, 46 W.C.D. 495 (Minn. 1992). In Gumiela, this court affirmed the compensation judge's denial of CIGNA's request for reimbursement from another insurer, Aetna, for MIGA's share, where the employee's injuries were apportioned as follows: 10% assigned to a 1980 injury covered by MIGA, 20% assigned to a 1982 injury insured by Aetna, and 70% assigned to 1988 and 1991 injuries insured by CIGNA. The compensation judge awarded CIGNA reimbursement from Aetna for the 1982 injury, but denied CIGNA's request for reimbursement from Aetna for the portion of liability assigned to MIGA for the original 1980 injury. This court affirmed, relying upon Ast v. Har Ned Lumber, 483 N.W.2d 66, 46 W.C.D. 495 (Minn. 1992), and holding that there was "no good reason to arbitrarily transfer responsibility to Kraft/Aetna merely because Kraft/Aetna happens to be liable for the employee's second injury." Similarly, there is no basis in this case to assign all of the responsibility for the MIGA injury's share of liability due to the first injury to American Compensation just because American Compensation was liable for the employee's second injury. Therefore we reverse the compensation's judge assignment of all liability for the MIGA injury to American Compensation.

In Gumiela, the court also noted that the parties did not suggest "other possible alternatives that may appear on the surface more equitable," for example, holding all available solvent insurers responsible for a portion of MIGA's injury's share of responsibility, according to the insurers' overall percentage of liability for benefits as apportioned by the compensation judge. We adopt this approach in this case. The compensation judge found that American Compensation and Travelers were each liable for one-third of the employee's disability. Based on the compensation judge's factual determination that each of the 1994 and 1998 are equally liable, we hold that each is legally responsible for a proportionate share of the MIGA's injury's responsibility, in this case one-half of the percentage assigned to MIGA. As a result, each insurer is liable for one-half of the employee's disability. We modify the compensation judge's assignment of liability for the employee's injury consistent with this opinion.

American Compensation also argues that the compensation judge erred by apportioning liability in this case because there was not "substantial and almost uncontroverted medical testimony" to permit a "precise allocation of responsibility between or among different employers or insurers for the employee's disability" relative to a single Gillette injury as required by Michels v. American Hoist & Derrick, 269 N.W.2d 57, 59, 31 W.C.D. 55 (Minn. 1978). However, this case does not involve a single Gillette injury, but involves a specific injury in 1964, a specific injury in 1994 when the employee injured his back while taking a pattern off a molding machine, and a Gillette injury to his low back as a result of his work activities from 1994 to 1998 which culminated in disability on November 5, 1998. Compare Atkinson v. Northern States Power Co., 55 W.C.D. 347, 351-52 (W.C.C.A. 1996) (case involving a single Gillette injury), summarily aff'd (Minn. Oct. 29, 1996). Therefore, as the standard required by Michels is not applicable in this case, the compensation judge did not err by failing to apply the "almost uncontroverted medical testimony" standard, and we affirm.

Calculation of Apportioned Payments

The compensation judge also ordered that "the liability for temporary total and temporary partial benefits shall be based on the Kaisershot and Kirchner formulas." (Finding No. 12.) Where an employee sustains a work injury which results in a loss of earning capacity and is receiving or is entitled to temporary partial disability benefits at the time he sustains a second injury, which results in total disability, the employee is entitled to temporary partial disability benefits paid by the initial employer/insurer, based on the diminution in wages between the initial and second injury, in addition to temporary total disability benefits paid by the second employer/insurer. The employee's benefit payments are subject to the statutory maximum for total disability benefits in effect at the time of the totally disabling injury. Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983). "Kirchner . . . prescribes a method for computing the amount of, and determining responsibility for, payment of temporary total benefits owed to an already partially disabled employee." Nybeck v. H.S. Kaplan Scrap Iron, 42 W.C.D. 1169, 1174 (W.C.C.A. 1990) summarily aff'd (Minn. Oct. 18, 1990). Employers/insurers between whom apportionment is assigned therefore pay an employee's ongoing benefits proportionate with their respective liabilities and wage rates.

The policy underlying the Kirchner formula is to ensure that an employee receives benefits representative of his total loss of earning capacity due to all work-related injuries. Another underlying policy is to provide an incentive to employers to hire partially-disabled employees because the second employer would be responsible for payment of benefits not in excess of the wage rate that the second employer was paying. See Kirchner.

By contrast, the Kaisershot formula is applied in an equitable apportionment context where an employee is not receiving, nor would be entitled to, temporary partial disability benefits at the time he sustained his subsequent injury. See Kaisershot v. Archer-Daniels Midland Co., 23 W.C.D. 706 (Indus. Comm'n 1966). In cases where an employee has sustained two or more injuries which substantially contribute to his disability, and where equitable apportionment is appropriate, the Kaisershot formula is applied to calculate the proportionate contribution of each employer and insurer.

American Compensation argues that Kirchner is not applicable herein because the employee was not receiving temporary partial disability benefits at the time of his last totally disabling injury in 1998, citing Nybeck, 42 W.C.D. 1169, 1175 (W.C.C.A. 1990). Although in this case the employee was not receiving temporary partial disability benefits at the time of his 1998 injury, actual receipt of benefits is not determinative; instead, eligibility for temporary partial disability benefits is the determinative factor for application of the Kirchner formula. See Geller v. Curran-Houston, Inc., 58 W.C.D. 66 (W.C.C.A. 1997). The parties agreed that at the time of his 1994 injury, the employee's weekly wage was $770.67 and that at the time of his 1998 injury, the employee's weekly wage was $566.62. (Findings 7 & 9.) However, no claim was made for temporary partial disability owed at the time of the employee's 1998 injury, and we are unable to discern from the record whether the employee was eligible for temporary partial disability benefits at the time he sustained an injury in 1998, and therefore whether Kirchner was applicable. Therefore, we believe that the Kaisershot formula is the appropriate calculation method to apply to the facts of this case, to determine the parties' proportionate liabilities for temporary disability benefits. We vacate the last sentence of Finding No. 12 which refers to calculation of the payments for temporary total and temporary partial disability benefits using both the Kirchner and Kaisershot formulas, and modify the judge's order by ordering payments of those benefits to be calculated by utilizing the Kaisershot formula. Payments of other non-indemnity benefits, such as medical expenses, are to be divided equally between insurers.

Attorney Fees

The compensation judge ordered the employer and insurers to pay costs, interest, and attorney fees under Minn. Stat. § 176.191, as apportioned under the same formula as were the temporary disability benefits and medical expenses. American Compensation argues that the compensation judge erred by awarding attorney fees under Minn. Stat. § 176.191. A reasonable attorney fee may be assessed under Minn. Stat. § 176.191 where a dispute exists between two or more employers or two or more insurers, and the dispute as to which is liable is a primary issue in the case. Sundquist v. Kaiser Eng'rs, Inc., 456 N.W.2d 86, 42 W.C.D. 1101 (Minn. 1990). American Compensation argues that the dispute was not primarily between the insurers, but that

the primary issue in the case was causation, in view of American Compensation's argument that the employee's condition was degenerative, and Traveler's denial of primary liability and its argument that the employee's post-1998 condition was causally related to his 1964 and 1994 injuries.

The compensation judge found that while there were other issues, "one of the most significant issues in this case was the dispute over which insurer was liable for the benefits," and awarded attorney fees pursuant to Minn. Stat. § 176.191. Based upon our review of the record, including medical records submitted into evidence, testimony presented at the hearing and deposition testimony presented by Dr. Leslie Sebring, we agree that the issue of determination of apportionment of liability between the employee's three injuries was the significant issue addressed by the parties.

A dispute existed in this matter concerning causation for the employee's disability and need for medical treatment following his November 5, 1998, injury and each insurer presented medical evidence to support its respective defenses. The employer and American Compensation argued at hearing that the employee's series of injuries could be best viewed overall as a Gillette-type injury from 1959 until November 1998, with 14 or 15 individual episodes and an cumulative Gillette-type injury culminating in November 1998. The employer and Travelers denied primary liability for any injury in 1998, whether a specific or Gillette-type injury, and argued that the employee's condition in November 1998 was more in the nature of a manifestation of symptoms from the employee's long-standing low back condition. However, on February 10, 1999, Dr. Paul Matson, whose report served as the medical basis for Travelers's discontinuance of benefits, outlined his opinion that the employee's condition related to two earlier work-related injuries. There was recognition by at least that point that the employee's condition resulted from work-related injuries, even though the parties disagreed as to which insurer was liable.

In addition, the compensation judge determined that the employee sustained a Gillette-type injury which culminated on November 5, 1998, and apportioned one-third liability to this injury. The compensation judge also apportioned one-third liability to this injury for payment of the employee's costs and attorney's fees pursuant to Minn. Stat. § 176.191. The employer and Travelers did not appeal from that apportionment determination nor from the compensation judge's order that they pay a proportionate share of costs and attorney fees.

Based upon substantial evidence of record, it was not unreasonable for the compensation judge to determine that apportionment of liability was "one of the most significant issues" in this case. Attorney fees are proper, even though the compensability of an injury was at issue, where the dispute was "'primarily' between the insurers" and the "sole issue of real importance" was apportionment of liability. Patnode v. Lyon's Food Prods., Inc., 312 Minn. 570, 572, 251 N.W.2d 692, 693 (1977). We therefore affirm the compensation judge's award of attorney's fees pursuant to Minn. Stat. § 176.191.

As to the apportionment of payment for these attorney fees, where the liability for compensation benefits is equitably apportioned between two or more insurers, attorney fees

awarded under Minn. Stat. § 176.191 should be apportioned as well. See Lee v. Hauenstein & Burmeister, Inc., slip op. (W.C.C.A. Apr. 28, 1992). Accordingly, we modify the compensation judge's Order No. 10 to reflect that payments of costs, interest and attorney fees pursuant to Minn. Stat. § 176.191 are to be divided equally between American Compensation and Travelers.