MARIA MARTIN, Employee, v. AM. SPIRIT GRAPHICS CORP. and AM. STATES INS. CO., Employer-Insurer, and AM. SPIRIT GRAPHICS CORP. and AM. COMP. INS./RTW, Employer-Insurer, and AM. SPIRIT GRAPHICS CORP. and EBI COS., Employer-Insurer/Appellants, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 13, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE; CAUSATION - GILLETTE INJURY; APPORTIONMENT - EQUITABLE. Substantial evidence, including lay testimony, medical records, and expert medical and vocational opinion, supported the compensation judge's determinations as to the dates and apportionment for the employee's Gillette injuries and the finding that the employee was permanently and totally disabled.
Affirmed.

Determined by: Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Harold W. Schultz, II

OPINION

STEVEN D. WHEELER, Judge

The employer, American Spirit Graphics Company, and its insurer, EBI Companies, appeal from the compensation judge's determinations that the employee was permanently and totally disabled since December 5, 1996; that the employee did not sustain a Gillette[1] injury between November 26, 1994 and November 25, 1995; that the employee did sustain Gillette injuries culminating on January 9, 1996 and on December 5, 1996; and that workers' compensation benefits subsequent to January 9, 1996 should be apportioned between insurers American States Insurance and EBI on a 50/50 basis. The appellants also appeal from the judge's order appointing EBI as paying agent and from the lack of certain specific findings relating to the calculation of benefits. We affirm.

BACKGROUND

The employee, Maria Martin, is over 51 years old with limited formal education. She was born and raised in the Azores Islands and Portuguese is her native language. She was educated in the Azores where she attended school from age eight until age twelve. After coming to this country in 1980, she worked in a variety of jobs including cleaning weekend cabins, filing and sanding parts for alternators, and working as a machinist's helper. In 1987 the employee received some vocational training in California in the field of printing. The employee's work

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

history consists of manual labor with approximately the last 10 years in the field of printing. (T. 64-68, 92; 10/20/99 F & I: Finding 38 [unappealed].)

On March 1, 1988, the employee was hired as a full-time press helper by the employer, American Spirit Graphics, at an hourly wage of $9.77. Her work duties consisted principally of gathering printed material off the presses, tying it into bundles and lifting and stacking the bundles onto pallets. (T. 70-73; 7/20/92 F&O: Findings 1-2.)

The employee continued to perform these work duties until the end of July 1991, when she was seen at the Lakeview Memorial Hospital emergency room with flank and abdominal pain. She was seen at the Stillwater Clinic in August 1991 for "hematuria, possible ureteral stone," as well as possible mechanical back pain. She was off work from approximately July 30, 1991 until September 22, 1991 because of these problems. (7/20/92 F&O: Finding 4.)

In approximately mid October 1991, the employee began working seven days a week. She experienced back pain each day at work and a little bit more after each shift. On October 28, 1991, the employee was taken to the hospital emergency room. She was taken off work. An MRI scan of the employee's lumbar spine done at Lakeview Memorial Hospital on November 27, 1991 was interpreted as showing minimal dehydration, degenerative changes, and minimal broad-based disc herniation at L4-5. (7/20/92 F&O: Findings 5, 7.)

The employee was eventually released to return to light work duties by Dr. Thomas V. Reiser on December 9, 1991 but was again entirely off work from January 1992 until the end of March 1992. The employee then returned to work for the employer in a light-duty capacity. (7/20/92 F&O: Finding 8.)

Following a prior hearing on May 22, 1992, a compensation judge determined that the employee's work activities at the employer were a substantial contributing factor to her back difficulties which arose from a Gillette injury culminating on October 27, 1991. (7/20/92 F&O: Finding 12.)

The employee continued to treat with Dr. Keith V. Chilgren while working on a part-time basis at American Spirit Graphics. She suffered a flare-up of her back symptoms at work on or about August 14, 1992, and she began to receive temporary total disability benefits effective August 17, 1992. (2/28/94 F & I: Findings 2, 3.)

The employee was referred by Dr. Chilgren to Dr. Douglas Harden, a chiropractor, who saw her on September 14, 1992. Dr. Harden diagnosed "L5-S1 intervertebral disc syndrome with neuropathy as well as subluxations and lumbar sprain." (2/28/94 F & I: Finding 4.)

The employee testified that she obtained relief from some symptoms, including left leg numbness, within the first couple of weeks of treatment from Dr. Harden. She was able to return to light-duty job duties at American Spirit Graphics in early December 1992 on a work-

hardening program. Dr. Harden indicated that chiropractic treatment would be provided on an as-needed basis. (2/28/94 F & I: Findings 8, 9.)

The employee had another flare-up at work about June 1, 1993, and the employer and insurer initiated the payment of temporary total disability benefits to the employee in June 1993. During the summer of 1993, the employee was treating with Dr. John Stark, an orthopedic surgeon, who recommended surgery. Prior to the surgery, the employee's symptoms consisted of low back pain slightly below the beltline, pain in the left leg, and problems with the left leg giving out causing her to fall. On October 7, 1993, the employee underwent a two level anterior interbody reconstruction at L4-5 and L5-S1, performed by Dr. Stark. (T. 77-78; 2/28/94 F & I: Findings 12, 13.)

Following the October 7, 1993 surgery, the employee remained under the care of Dr. Stark. On December 4, 1993, the doctor signed a functional capacities evaluation which permitted her to work with physical restrictions on a half-time basis advancing to full time. On December 6, 1993, Dr. Stark wrote a report which stated that the employee had some pain as expected at that point and would be seen in follow-up in three months. (Exh. A:6; 10/20/99 F & I: Findings 2, 3 [unappealed])

The employee returned to American Spirit in December 1993 in the shipping and receiving department in a lighter job which consisted of running a forklift/power dolly and shrink-wrapping loads on pallets eight hours a day. The shrink wrapping involved twisting and bending because the employee had to criss-cross the plastic wrapping on the top and bottom of the pallets while positioned on her hands and knees at the bottom of the pallet. Most of the lifting was not over 20 pounds, but occasionally it could be up to 30 pounds. (10/20/99 F & I: Finding 4.)

The employee testified that when she returned to work following the surgery she had no pain at all. She had no back problems in 1994 other than some stiffness. She was seen by Dr. Stark in follow-up in March 1994 and the doctor rated her with a 22.5 percent whole-body impairment. The employee received no further treatment in 1994 and well into 1995 while she continued with performing her duties in the shipping and receiving department. (T. 77, 119-120; EBI Exh. 1; 10/20/99 F & I: Findings 5 - 7 [unappealed].)

The employee testified that towards the fall of 1995, she experienced some increased soreness in the back within two to three hours of being on the job. She self-medicated with over-the-counter medication in order to reduce the pain. She stated that her condition improved on the weekends when she did not have to work and was able to rest. (T. 119; 10/20/99 F & I: Finding 8.)

The employee's complaints of soreness and backaches increased to the point that in late 1995 the employee sought medical treatment. On December 7, 1995 she returned to Dr. Stark, who noted that she "returns with complaints of localized pain immediately over the midline low back . . . for approximately two months. The pain and difficulty is consistent with the

presence of metal . . . the most likely and simplest solution is to remove the internal fixation." (EBI Exh. 2: 12/7/95; 10/20/99 F & I: Finding 10.)

On December 9, 1995, Dr. Stark performed surgery to remove the internal fixation and explore the prior fusion. The employee was off work for approximately two months after the surgery, and during that time was treated with physical therapy. She testified that the surgical removal of the hardware was not successful in reducing her symptoms. On February 7, 1996, Dr. Stark opined that the employee probably could not return to the heavy work that she had performed in the shipping and receiving department. (EBI Exh. 4; 10/20/99 F & I: Findings 12-13 [unappealed].)

The employee attempted a return to her job in the employer's shipping and receiving department for a few days in March 1996 but was not physically able to perform those duties. In late March 1996, the employee was transferred to the employer's film department, where she could sit or stand as needed. The job involved removing plastic sheets from film, cutting film, sorting, and placing film in envelopes. (10/20/99 F & I: Findings 13, 14 [unappealed].)

A new functional capacity evaluation (FCE) was signed by Dr. Stark on June 6, 1996, but its restrictions were essentially the same as those given in her prior December 1993 FCE. Among other things, the FCE recommended that the employee change positions on the job frequently. The employee continued to perform the film department job at the employer late into 1996, but with increasing difficulty. The employee testified that by December 1996, the employee complained to Dr. Stark that her back pain was significantly interfering with her ability to work. As a result, Dr. Stark ordered diagnostic studies.

The employee underwent three-level lumbar discography at CDI on December 5, 1996, which produced concordant back, right buttock and leg pain from the L3-4 level, non-concordant pressure from the L2-3 level with abnormal morphology, and non-concordant pressure at L1-2 with normal morphology. A lumbar myelograph on the same date was read as a normal post-fusion lumbar myelogram with no evidence of arachnoid disease, disc herniation or central canal neural compression. Finally, a post-myelograph CT scan of the lumbar spine on the same date was read as showing solid fusion of L4 through the sacrum both anteriorly and posteriorly, slight dorsal annular bulging of the T12-L1 disc with small spurs but no evidence of spinal cord or nerve root compression, internal derangement of the L3-4 and L2-3 discs, and mild, relative narrowing of the right L3-4 foramen. (Exh. A:6; Exh. L; 10/20/99 F & I: Findings 16-19 [unappealed].)

Shortly after arriving home following the diagnostic studies on December 5, 1996, the employee suffered a seizure. She was taken by paramedics to the emergency room at Fairview Riverside Medical Center where she was diagnosed with "opisthotonos, tonic clonic seizure." The employee was also evaluated there by Dr. Stark later that day and he diagnosed a "dye reaction following myelogram with seizure." (10/20/99 F & I: Finding 20 [unappealed].)

Over the next few months, the employee experienced episodes of painful shakiness and spasm and was treated by a neurologist. She was evaluated at the Ramsey Clinic Department of Psychiatry in February 1997. Following psychological testing, a licensed psychologist, Chris Johnston, Ph.D., noted that the evaluation revealed "low average overall intellectual ability . . . Full scale IQ = 81, with a relative weakness in discrimination of visual detail and visual spatial reasoning, and an atypical pattern of performance on certain memory tests . . . There is an hysterical, but not premeditated, quality to her signs and symptoms, reminiscent of a conversion disorder." It does not appear that there was any specific treatment rendered as a result of the evaluation. (Exh. A: 18;10/20/99 F & I: Finding 21 [unappealed].)

The employee did not return to work for the employer or in any other employment after December 5, 1996 through the date of hearing below, August 3, 1999. (10/20/99 F & I: Finding 22 [unappealed].)

The employee continued to treat with Dr. Stark and received vocational rehabilitation services from Michelle Theis, RN. In 1996, Ms. Theis functioned as a disability case manager, but in 1997 she worked as a QRC for the employee. (10/20/99 F & I: Finding 23 [unappealed].)

In a letter written on September 4, 1997, Dr. Stark offered the opinion that the October 7, 1993 fusion surgery had predisposed the employee to additional changes at the L3-4 level and that the employee's repetitive bending and twisting activities as a component of her employment following the 1993 fusion surgery had contributed to a further Gillette-type injury subsequent to the initial fusion. He considered the employee's current disability apportionable 50 percent to the original injury and 50 percent to work activities subsequent to the 1993 fusion. (Exh. A:6.)

The employer's workers' compensation insurance carrier at the time of the initial injury was American States Insurance Company, which has paid various workers' compensation benefits. From November 26, 1994 through November 25, 1995, the insurer on the risk was American Compensation Insurance Company/RTW. From November 26, 1995 and at all material times thereafter the insurer was EBI Companies. On April 6 and April 28, 1998 the employer and American States Insurance Company filed a petition and an amended petition seeking contribution and reimbursement for portions of these benefits against American Compensation Insurance and EBI, both of which answered denying liability. (Judgment Roll; 10/20/99 F & I: Findings 9, 37.)

The employee's back symptoms continued and further surgery was performed on November 18, 1997, consisting of a "complex subarticular zone decompression above fusion" at the L3-4 level. Following the surgery the employee continued to report significant back symptoms and problems and in early 1998 she was referred by Dr. Stark to Dr. Richard Salib at the Low Back Institute for a second opinion. Dr. Salib did not recommend further surgery but did suggest that a facet block injection be given. (Exh. A: tab 6; 10/20/99 F & I: Findings 25, 26 [unappealed].)

The employee was treated with facet nerve block injections in the summer of 1998. The employee did not receive relief and has testified that overall the surgery of November 1997 was not successful. (Exh. A:6;10/20/99 F & I: Findings 28, 29 [unappealed].)

On August 24, 1998, Dr. Stark opined, based on a diagnosis of untreatable transitional level changes at the L3-4 spinal level, that the employee "is no longer employable . . . further employment is precluded permanently." (Exh. A:6; 10/20/99 F & I: Finding 30 [unappealed].)

The employee underwent an independent medical evaluation by Dr. Jack Drogt on November 24, 1998. Dr. Drogt offered the opinion that the employee has chronic low back pain with left lower extremity symptoms without neurologic loss. He attributed causation to the 1991 injury. He considered the employee to be capable of employment in a clerical sedentary position, starting on a part-time basis and progressively increasing as indicated. (Exh. A:21; 10/20/99 F & I: Finding 31 [unappealed].)

The employee was also evaluated by Dr. Andrew Leemhuis of the Midwestern Neurologic and Psychiatric Consultants, on September 4, 1998. Dr. Leemhuis thought that further testing would be necessary in order to determine proper allocation of the causation of the employee's problems. He concluded that she "is fairly intact physically and the neurologic evaluation is essentially within normal limits, that there is no atrophy, specific weakness, reflex disturbance or objective sensory loss." (Exh. A: 20; 10/20/99 F & I: Finding 32 [unappealed].)

The employee was seen by Dr. Mark Thomas for an independent medical examination on July 2, 1998. He thought that she was capable of employment within restrictions but at best was limited to sedentary work. (Exh. A: 2; 10/20/99 F & I: Finding 33 [unappealed].)

On March 1, 1999 the employee filed a claim petition alleging injuries on October 27, 1991 and December 5, 1996 and alleging permanent total disability since the date of the latter claimed injury. The March 1, 1999 claim petition and the amended petition for contribution and/or reimbursement of April 28, 1998 were consolidated for hearing by an order issued on March 16, 1999. (Judgment Roll.)

Vocational testing was administered to the employee by L. David Russell on March 8, 1999. Mr. Russell testified that the employee had scored at the sixth grade level in reading ability and spelling and at the fifth grade level in arithmetic. He considered these to be borderline scores falling just below the low average level. On aptitude testing, the employee scored just below average in mechanical reasoning, perceptual speed and accuracy and manual speed and dexterity, and well below average in spatial relations. (American States Exh. 3 at 6-7; 10/20/99 F & I: Finding 34 [unappealed].)

Following a hearing before a compensation judge of the Office of Administrative Hearings on August 3, 1999, the judge determined, among other things, that the employee had been permanently and totally disabled since December 5, 1996; that the employee did not sustain

a Gillette injury between November 26, 1994 and November 25, 1995; that the employee did sustain Gillette injuries culminating on January 9, 1996 and on December 5, 1996; and that workers' compensation benefits subsequent to January 9, 1996 should be apportioned between insurers American States Insurance and EBI on a 50/50 basis. The judge ordered that insurer EBI should act as the paying agent and that the calculations of the apportionment be governed by the principles expressed in the Kaisershot and Kirchner cases. The judge further ordered that attorney fees for the employee's attorney be withheld and that the employee's attorney submit a statement of attorney fees. The employer and insurer EBI appeal from these findings and orders.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they "are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Factfindings may not be disturbed, even though this court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

Permanent Total Disability

"[A] person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C. H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967).

The compensation judge found that the employee had been permanently and totally disabled since December 5, 1996. In reaching this finding, the judge accepted the medical opinion of Dr. John G. Stark (see Amer. States Exh. 2) and the vocational opinion of John B. Hjelmeland, a vocational rehabilitation consultant (Pet. Exh. C).

The employer and insurer EBI argue on appeal that the compensation judge's finding was unsupported by substantial evidence. First, they point to the absence of any job search or placement efforts since December 5, 1996, and suggest that a finding of permanent total disability is premature. We note, however, that it is well established that a diligent job search is

not a legal *prerequisite* to being found totally disabled in a workers' compensation proceeding. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 188, 30 W.C.D. 426, 432 (Minn. 1978); see also Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1988) However, evidence of a post-injury job search, or the lack thereof, may still go to the evidentiary *weight* of the employee's claim that she is totally disabled. See Scott, 267 N.W.2d at 188-189, 30 W.C.D. at 432.

The appellants next refer to a surveillance videotape taken in March 1999 which showed the employee running a snowblower and cleaning away snow from walks and from a parked car. They argue that this videotape demonstrated that the employee had a greater degree of physical capacity than found by the compensation judge. The judge, however, viewed this videotape and, although noting that "[t]he surveillance tape does show activities inconsistent with the test results at the FCE's" the judge further noted that "the surveillance tape does not show vigorous snow shoveling or operation of the snow blower. There are slow movements by the employee for a short period of time in respect to these activities." Mem. at 9. The question of the weight of the surveillance evidence in relation to the other evidence in the case, including the medical records and opinions and the testimony of the employee and others, was for the compensation judge. We cannot say that the judge clearly erred in giving the videotape only modest weight in comparison with the other evidence relating to the employee's disability.

The appellants next argue that opinions of some other physicians, and of their vocational expert, David Russell, support the conclusion that the employee would be capable of at least sedentary work. They contend that, in the current labor market, such work would likely be available to her. While the evidence in this case was mixed, and could have also supported a finding contrary to that reached by the compensation judge, the judge's finding was supported by the expert vocational opinion of John B. Hjelmeland, who in turn based his opinion on such factors as the employee's age, her limited education, the nature of her prior work experience, her physical restrictions, and her borderline IQ and vocational aptitude scores. The judge's determination was also supported by the medical opinion of her treating physician, Dr. Stark. Neither Mr. Hjelmeland's nor Dr. Stark's opinions were without sufficient foundation. This court will not reverse a compensation judge's choice between the divergent opinions of medical or vocational experts unless the opinion(s) relied upon lack adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985)

Gillette Injuries

The compensation judge found that the employee sustained Gillette injuries culminating on January 9, 1996, when she was taken off work and surgery was performed to remove the hardware inserted at the time of the 1993 surgery, and again on December 5, 1996, when the employee sustained a clonic reaction and developed seizures after diagnostic tests. After the latter date, the compensation judge found the employee became permanently and totally disabled. Both these dates of injury fall within the period during which appellant insurer EBI was on the risk. The appellants argue that these findings are not supported by substantial evidence.

A Gillette injury is a result of repeated trauma or aggravation of a preexisting condition which results in a compensable injury when the cumulative effect is sufficiently serious to disable an employee from further work. Gillette v. Harold, Inc., 257 Minn. 313, 321-22, 101 N.W.2d 200, 205-06, 21 W.C.D. 105 (1960); *see also* Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981). In order to establish a Gillette injury, an employee must "prove a causal connection between [his] ordinary work and ensuing disability." Steffen v. Target Stores, 517 N.W.2d 579, 581, 50 W.C.D. 464, 467 (Minn. 1994).

The appellant employer and insurer make several arguments on appeal. First, they argue that the employee's worsened condition in late 1995 and in 1996 and thereafter was simply a natural result of the effects of the 1991 injury, causally unrelated to her work activities after her first surgery. This view was supported by the opinion of their medical expert, Dr. Drogt. The compensation judge, on the other hand, accepted the opinion of Dr. Stark, who opined that the employee had sustained a Gillette injury subsequent to the 1993 surgery, and that both the work in the employer's shipping and receiving department, which the employee performed following that first surgery, and the much lighter work in the employer's film department, which she performed beginning in March 1996, were substantial contributing causes to the further injury and aggravation of the employee's back. (Amer. States Exh. 2.)

The opinion of Dr. Stark, in conjunction with the other evidence in the case, was a sufficient basis to meet the employee's burden of proof of a work-related Gillette injury subsequent to the 1991 work injury. While the appellants argue that Dr. Stark's opinion was insufficient in failing to prove that specific work caused specific symptoms which led cumulatively and ultimately to disability, we note that, pursuant to Steffen, supra, 517 N.W.2d 579, 50 W.C.D. 464, while evidence of specific work activities causing specific symptoms leading to disability "may be helpful as a practical matter," determination of a Gillette injury "primarily depends on medical evidence."

The appellants further point to testimony concerning the duties of the film job. They contend that Dr. Stark misunderstood the nature of this position, believing that it involved somewhat more bending, twisting and stooping than may have been involved. We note, however, that Dr. Stark's medical opinion that the employee's activities in this job were contributory to injury and aggravation to her spine condition was predicated on his medical observation of the worsening of her symptoms and on his view that, at that point, "[t]he decrease in the activity level [when the employee was transferred to the film job] was not adequate to help her. At that point, virtually anything that she did would cause symptoms, so it appeared to me that that, too, was significant." (Amer. States Exh. 2 at 28.) Although various interpretations are possible, we cannot say that it was unreasonable for the compensation judge to accept Dr. Stark's opinion as adequately founded. As such, this court must affirm the judge's choice of that opinion over those of the other experts. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

The appellants further argue that the judge erred in determining that the employee's ultimate breakdowns from these Gillette processes occurred during its period of coverage, rather than earlier, when the employee was beginning to experience increased symptoms in mid-1995.

The appellants further argue that, contrary to the employee's testimony that she was largely pain free between 1993 and mid-1995, she must have been experiencing pain during this period, and an earlier culmination date for the post-1993 Gillette processes should have been determined. Finally, they argue that the compensation judge erred in finding these dates of injury where none of the medical experts offered any opinion giving these dates for the culmination of Gillette injury processes.

We disagree, and affirm. Selection of a date of injury of a Gillette injury is not a medical decision, but a question of fact to be determined by the compensation judge. Ellingson v. Western Insurance Co., 42 W.C.D. 565, 574 (W.C.C.A. 1989). In general, "[I]njuries resulting from repeated trauma or aggravations of a pre-existing condition result in a compensable personal injury when their cumulative effect is sufficiently serious to disable the employee from further work." Carlson v. Flour City Brush Co., 305 N.W.2d 347, 350, 33 W.C.D. 594, 598 (Minn. 1981); Gillette v. Harold, Inc., 257 Minn. 313, 321-22, 101 N.W.2d 200, 205-06, 21 W.C.D. 105 (1960). Here, the medical history was complicated, but the compensation judge reasonably found that the employee sustained culmination of the Gillette processes on the dates at which she was disabled from work.

The judge's determination that the employee did not sustain culmination of a Gillette injury during the coverage period of the insurer on the risk prior to November 26, 1995, when EBI assumed the risk, is entirely reasonable in light of the absence of medical treatment or time lost from work during this prior period of coverage. We affirm.

In Gillette cases, "the employer and insurer on the risk at the time the employee becomes disabled are responsible for workers' compensation benefits," provided that employment is a substantial contributing factor in causing the disability. Benike v. Alvin Benike, Inc., 36 W.C.D. 557 (W.C.C.A. 1984). Although apportionment is available between the effects of the different Gillette injuries in this case, apportionment of liability between periods of coverage during which work activities contributed to a *single* Gillette injury is not available unless there is *uncontroverted* medical evidence which would allow a precise allocation of liability. Michels v. American Hoist & Derrick, 31 W.C.D. 55 (W.C.C.A. 1978). No precise allocation was possible under the evidence in this case for the respective contributions of the employment during the various periods of coverage after the 1993 surgery to the January 9, 1996 and December 5, 1996 Gillette injuries. As the culminating dates for both injuries fell within the period of EBI's coverage, and as the judge reasonably found that the work activities during EBI's coverage were a substantial contributing cause of these injuries, the judge properly placed liability for these injuries on the employer and EBI.

The judge apportioned liability for the employee's medical treatment, wage loss and rehabilitation after January 9, 1996, 50 percent on the initial Gillette injury of 1993 and 50 percent on the two 1996 Gillette injuries. The appellants argue that this apportionment was not adequately supported in the record.

Equitable apportionment is not to be based on any precise formula but on all the facts and circumstances of the case. Goetz v. Bulk Commodity Carriers, 303 Minn. 197, 226 N.W.2d 888, 27 W.C.D. 797 (1975). In determining apportionment, factors to be considered include the nature and severity of the injuries, the employee's physical symptoms following each injury, and the period of time between injuries. Id. at 200, 226 N.W.2d at 891, 27 W.C.D. at 800. While the appellants contend that the employee's initial injury should bear the largest share of any apportionment, we note that the 1996 injuries are those subsequent to which the employee became permanently and totally disabled. We note, further, that the 50/50 apportionment is consistent with the medical opinion on apportionment offered by Dr. Stark. This case was not one in which the appropriate level of apportionment is transparently clear. We conclude that the apportionment reached by the compensation judge is supported by substantial evidence in the record and therefore must affirm. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Other Matters

The appellants next argue that the compensation judge erred in failing to make findings on various matters related to the calculation of benefits. Specifically, the appellants contend that the compensation judge should have made specific findings regarding the amount of benefits paid to date, the employee's wage rates on the various dates of injury, and the method of application of the Kaisershot and Kirschner[2] formulas, as well as the amounts and allocation of any supplementary benefits. The appellants argue that if this court affirms the compensation judge's findings on the dates of injuries and on apportionment, that the case should be remanded and the compensation judge be required to make findings on these matters.

We disagree. The issues raised on appeal concerning wage rates and the amounts of benefits previously paid were not clearly raised as issues for determination by the compensation judge in the pleadings or at the hearing, and it was not error for the judge to make no findings on them.[3] As to the application of the appropriate benefit formulas, workers' compensation insurers make benefit calculations using these formulas on a regular basis and presumably are able to do so without assistance in the calculations by the judge. If the parties subsequently do not agree about the wage rates, prior benefits paid, or other aspects of the calculation of payments, these issues may be raised before a compensation judge for resolution at that time.

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[2] Kirchner v. County of Anoka, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983); Kirchner v. County of Anoka, 410 N.W.2d 825, 40 W.C.D. 197 (Minn. 1987); Kaisershot v. Archer Daniels Midland Co., 23 W.C.D. 706 (Indus. Comm'n 1966). These cases provide methods for determining the respective benefit liabilities of successive employers/insurers where an employee sustains a work injury which results in a partial reduction in earning capacity and subsequently sustains a second injury which results in total disability.

[3] The hearing transcript reveals that there was a brief discussion on the record about wage rates during the parties' opening arguments, but that the parties would not stipulate to the rates. An off-the-record discussion was then held, but there is nothing in the record to indicate that the parties had asked that the compensation judge determine the issue of disputed wage rates. The judge does not list this among the issues recited in his findings and order.

The appellants also object to the compensation judge's order appointing EBI as the paying agent for benefits. They argue that, since American States Insurance Company has already paid benefits to the employee arising from the initial Gillette injury in 1991, it would be more efficient and more economical if American States were to continue as the paying agent.

As this court has previously stated, a compensation judge's choice of paying agent is discretionary, and will rarely be disturbed by this court except in unusual circumstances. *See*, *e.g.*, Malikowski v. Hitchcock Indus., slip op. (W.C.C.A Nov. 28, 1995); Lindberg v. Target Stores, slip op. (W.C.C.A. Apr. 13, 1993). As we have previously observed, it is in fact the usual practice to make the last insurer responsible for administering the claim. *See* Sanchez v. Land O' Lakes, Inc., 43 W.C.D. 113, 125 n.10 (W.C.C.A. 1990), summarily aff'd (Minn. July 16, 1990). Thus we see no circumstances present to warrant modification to the judge's appointment of EBI as paying agent.