Redacted to Remove Social Security Numbers

CHARLES BEINKE, Deceased, by LEEANN BEINKE, Employee, v. HONEYMEAD PRODS. CO. and ALEXSIS, INC., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 28, 1990

No. [Redacted to Remove Social Security Number]

Determined by SHIMON, J., RIEKE, C.J., and PRANKE, J.
Compensation Judge: Tanya M. Bransford.

Affirmed in part and reversed in part.

MAJORITY OPINION

RICHARD C. PRANKE, Judge

Employer and insurer appeal from the compensation judge's finding that employee's exposure to noise at work was a substantial contributing cause of employee's hearing loss and from the award of impairment compensation and medical expenses to petitioner, the employee's surviving spouse. We affirm in part and reverse in part.

BACKGROUND

Employee began working for employer in 1956. In approximately 1960 employee began to work full-time in maintenance. He did not work in one area, but was sent to any one of the several buildings of the plant to repair machinery as needed. Employee did not wear hearing protection until 1982; from 1982 until his discharge in November 1986 employee wore ear protection at work on a regular basis.

An audiogram performed on December 18, 1981, revealed a severe deterioration in employee's hearing. Dr. Thomas Englund diagnosed bilateral sensorineural hearing loss and recommended that employee be evaluated for a hearing aid; however, no hearing aid was obtained until employee consulted Dr. Englund again on July 15, 1986. The hearing aid had broken by January 1987, and employee had not replaced the hearing aid by the time of his death in March 1987.

Petitioner filed her claim on April 28, 1988, seeking permanent partial disability and medical benefits. Prior to the hearing the parties stipulated to the following: employee was terminated from employment on November 4, 1986, for reasons unrelated to his hearing loss; no medical change occurred in employee's hearing between the time of discharge and his death on

March 30, 1987; employee's death was unrelated to his hearing loss; employee's hearing loss resulted in a 16% permanent impairment to the body as a whole; and employee and petitioner had paid $190 in medical bills and $650 for a hearing aid as a result of employee's hearing loss.

The compensation judge made the following findings relevant to this appeal: employee was exposed to excessively loud noise at work; employee's exposure to the high noise levels at work was a significant contributing factor to employee's hearing loss; and employee had not reached maximum medical improvement. The compensation judge awarded petitioner impairment compensation and ordered reimbursement by employer and insurer for the medical expenses paid as a result of employee's hearing loss. Employer and insurer appeal.

ISSUES

1. Does substantial evidence support the compensation judge's finding that employee's exposure to noise at work was a substantial contributing cause of employee's hearing loss?

2. Did the compensation judge properly determine that employee had not reached maximum medical improvement?

3. Is petitioner entitled to impairment compensation pursuant to Minn. Stat. § 176.021, subd. 3 (1988)?

ANALYSIS

1. Primary Liability

Employer and insurer contend that substantial evidence does not support the finding that employee's exposure to noise at work was a substantial contributing cause of employee's hearing loss.[1] We disagree.

Employee's job required him to be in different plant buildings for varying lengths of time over a 25 year period. Studies performed in employer's plant in 1982 revealed that the noise level in many buildings reached 70 decibels; in 11 locations the noise level exceeded

[1] Employer and insurer also claim that the 16% permanent partial disability rating does not comply with disability schedules. This rating was stipulated to by the parties prior to the hearing. This issue was first raised on appeal; as such, it is not properly before this court and will not be considered. Seward v. Product Design and Engineering, 36 W.C.D. 364 (W.C.C.A. 1983).

95 decibels. Dr. W. D. Ward noted that exposure to more than 95 decibels is considered hazardous. Hearing protection became mandatory after these studies.

From 1960 until 1982 employee wore no hearing protection. Employee's supervisors agreed that employee was exposed to high noise levels at work on a daily basis for several years. Both Dr. Ward and Dr. Englund agreed that bilateral hearing loss is consistent with exposure to high levels of noise over a period of years. This evidence was not disputed.

Employer and insurer contend that the evidence fails to establish medical causation in that it does not rule out the possibility that employee's hearing loss was hereditary or disease-based. The requisite causal link between employee's hearing loss and his employment may be established even though hearing loss may result from causes other than noise exposure. See Swanson v. Medtronics, 443 N.W.2d 534, 42 W.C.D. 91 (Minn. 1989). Dr. Englund diagnosed bilateral sensorineural hearing loss, stating: "[Employee] gave me a history of longstanding, high intensity noise exposure at Honeymead (sic). If indeed this situation existed and he used no protective device, sensorineural hearing loss could result." There is no evidence that employee's hearing loss was hereditary or disease-based.

Based on the medical evidence, employee's work environment, and the length of time employee was exposed to high levels of noise without hearing protection, we find substantial evidence to support the finding that employee's exposure to noise at work was a substantial contributing cause of employee's hearing loss. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984). We therefore affirm the compensation judge's award of medical expense benefits related to that condition.

2. Maximum Medical Improvement

The compensation judge concluded that employee had not reached maximum medical improvement (MMI) by the time of his death in late March 1987. An MMI finding is one of fact, and as such must be affirmed if supported by substantial evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989); Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.

Maximum medical improvement is "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon a reasonable medical probability." Minn. Stat. § 176.011, subd. 25 (1988). "'Medical probability' does not mean only the opinion of a physician." Hammer, 435 N.W.2d 525, 529, 41 W.C.D. 634, 639 (Minn. 1989). Other considerations "include the history of improvement, current treatment, pre-existing conditions, and proposed treatment." Id. Permanent partial disability is also usually ascertainable at the time of MMI. Id. The evidence

in this matter is not extensive; however, after considering the factors discussed in Hammer, the only reasonable inference is that employee had reached MMI.

There is no evidence in the record that any significant recovery from or significant lasting improvement in employee's hearing was reasonably anticipated after Dr. Englund's July 1986 evaluation. At that time employee received a hearing aid; the report relating to the hearing aid specifically indicates that there was no basis for any ongoing medical treatment. Dr. Englund also assigned a 16% permanent partial disability rating of the body as a whole at the time of the July evaluation.

The compensation judge's determination that employee had not reached MMI was premised in part on the fact that employee's hearing aid had broken by January 1987; in her memorandum, the compensation judge stated: "[i]t thus appears that the employee was not hearing up to his full ability . . . for several months prior to his death." The fact that employee might have been able to hear better with a hearing aid does not, however, mean that employee's underlying condition was likely to improve. Employee's decision not to replace his hearing aid is an insufficient basis upon which to conclude that MMI had not been reached.

The parties stipulated that employee's hearing did not improve between November 1986 and the date of his death. No medical treatment was recommended. The assignment of a permanency rating is further indication that no improvement was reasonably anticipated by employee's physician. Under the circumstances, the only reasonable inference is that employee had reached maximum medical improvement by the time of his death.

3. Petitioner's Entitlement to Impairment Compensation

The 1983 legislature introduced the so-called two-tier system under which the amount of benefits paid for a permanent partial disability is contingent upon whether the employee obtains suitable gainful employment prior to the end of the 90-day post-MMI period. See Minn. Stat. § 176.101, subd. 3e (1988); Guyette v. Waste Systems Corp., 447 N.W.2d 199, 42 W.C.D. 431 (Minn. 1989); Patton v. Thompson Elec. Co., 420 N.W.2d 596, 40 W.C.D. 840 (Minn. 1988). If suitable gainful employment is found, employee is entitled to impairment compensation (IC) for any permanent partial disability; if such work is not offered or otherwise obtained, employee is entitled to a larger award, referred to as economic recovery compensation (ERC). Id.

The 1983 legislature deleted many of the numerous statutory references to permanent partial compensation and permanent partial disability payments. In some cases, the new terms ERC or IC were inserted as substitutes; in others, entirely new provisions were added in an attempt to address new situations brought about by the two-tier system. Determining petitioner's entitlement to IC in this case necessitates interpretation of one of the 1983 changes.

Prior to 1983, Minn. Stat. § 176.021, subd. 3, provided for the vesting of the right to receive disability payments in the injured employee, the employee's dependents, or the employee's heirs. This subdivision read:

> The right to receive temporary total, temporary partial, permanent partial or permanent total disability payments shall vest in the injured employee or his dependents under this chapter or, if none, in his legal heirs at the time the disability can be ascertained and the right shall not be abrogated by the employee's death prior to the making of the payment.

Minn. Stat. § 176,021, subd. 3 (1982).

The 1983 legislature amended section 176.021, subd. 3, in part by deleting the reference to permanent partial disability. The legislature could have simply substituted the terms ERC and IC for the term permanent partial disability. It did not; rather, a new paragraph was added which separately addresses the conditions of entitlement to IC and ERC. The paragraph provides:

> [1][2] The right to receive economic recovery compensation or impairment compensation vests in an injured employee at the time the disability can be ascertained provided that the employee lives for at least 30 days beyond the date of the injury. [2] Upon the death of an employee who is receiving economic recovery compensation or impairment compensation, further compensation is payable pursuant to section 176.101. [3] Impairment compensation is payable under this paragraph if vesting has occurred, the employee dies prior to reaching maximum medical improvement, and the requirements and conditions under section 176.101, subdivision 3e, are not met.

Minn. Stat. § 176.021, subd. 3 (1984). The parties in this case postulate a variety of theories as to what the legislature intended by this paragraph.

Our initial observation concerning sentence 1 is that it addresses the vesting of the right to receive ERC or IC in the employee. Vesting occurs if the employee lives at least 30-days post-injury and if employee's disability can be ascertained. An employee thus has no fixed right

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[2] The numerals [1], [2], and [3] are not contained in the statute as enacted; they have been added in this opinion merely to aid in identifying each sentence to be analyzed.

to ERC or IC during the 30-day post-injury period, regardless of such factors as ascertainable disability, the attainment of MMI, or the commencement of employment. If, however, employee's disability can be ascertained and the employee survives the 30-day post-injury period, then pursuant to sentence 1, employee's right to benefits for permanency cannot be defeated by a condition precedent. Thus regardless of any other fact or circumstance, whether it be refusal of a job offer, retirement, a finding of permanent total status, or securement of employment, employee's right to receive permanent partial disability benefits, either ERC or IC, cannot be extinguished on any statutory basis. That employee has the right to receive ERC or IC, however, does not mean that employee will actually receive payment of ERC or IC at the time vesting occurs. Payment is conditional upon the occurrence of certain events; for example, an employee whose right to receive ERC or IC has vested may not receive ERC or IC concurrently with temporary total benefits. Only upon cessation of temporary total benefits will payments of ERC or IC commence. See Minn. Stat. § 176.021, subd. 3.

Sentence 2 provides that "upon the death of an employee who is receiving ERC or IC, further compensation is payable pursuant to section 176.101." Petitioner contends that sentence 2 does not limit entitlement to ongoing payments of compensation to cases where the employee was receiving periodic payments of ERC or IC at the time of death. She argues that the phrase "is receiving" should be read to mean "will receive" or "is subsequently deemed entitled to". The compensation judge agreed.

The compensation judge relied on Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 35 W.C.D. 523 (Minn. 1983), to support her conclusion that an employee need not be in receipt of periodic ERC or IC at the time of death in order for a qualified dependent to be entitled to continued benefits. Quoting Erickson, the compensation judge stated that to deny benefits on the sole ground that periodic ERC or IC was not being paid at the time of death would be to "deny benefits due to random and arbitrary happenstance [which] is contrary to [the] general policy [of the Workers' Compensation Act to compensate injured employees]."

In Erickson, the Workers' Compensation Court of Appeals had "interpreted [Minn. Stat. § 176.021, subd. 3 (1980)] to allow recovery by heirs or dependents if the employee's permanent partial disability is determined to have been capable of ascertainment prior to the employee's death and the claimant successfully established the extent of disability." Id. at 43, 35 W.C.D. at 527. The supreme court adopted this interpretation of the statute, noting that the provision had been "added, at least in part, as a legislative response to decisions of this court denying benefits to employees who died from non work-related causes prior to disability payments or determinations being made." Id. at 42, 35 W.C.D. at 526 (citations omitted). The statute, however, was not viewed as a model of clarity; the language was "ambiguous and susceptible to differing interpretations." Id.

In interpreting section 176.021, subd. 3 (1980), the supreme court used a three-factor analysis consisting of: (1) statutory language, (2) legislative intent, and (3) policy considerations. The court stated:

> The legislature specifically rejected "is ascertained" and chose instead "can be ascertained." When coupled with the provision allowing the right to payment to vest in "his dependents . . . or, if none, in his legal heirs," the provision appears to express a legislative intent to allow dependents or heirs to recover whether the disability was ascertained prior to or after the death of the employee. In addition, cases of this court addressing the death of employee issue involved situations in which the claim for disability was not made until after the employee's death. If the legislature was responding to the harshness of these cases, it seems likely that their intent was to allow recovery in the present case. The cumulative effect of the above factors supports a liberal interpretation of the statutory language.
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> A final consideration involves the general policy of the [Workers' Compensation Act] to compensate injured employees. To deny benefits due to random and arbitrary happenstance is contrary to this general policy.

Id. at 42, 35 W.C.D. at 527.

Petitioner contends that to deny benefits to the surviving dependent spouse in this case would be "due to random and arbitrary happenstance." This might be. Yet it is certain that the supreme court's interpretation in Erickson was not premised solely on the inequity which might otherwise have occurred; the policy consideration was but one factor supporting the result. As inequitable as the current eligibility requirements might be viewed, the dictates of the legislature must be followed.

The second sentence of the paragraph under review provides that compensation is payable pursuant to section 176.101. Pursuant to subdivision 3r of that section, ERC or IC is payable to qualifying dependents "if an employee receiving economic recovery compensation or impairment compensation in periodic amounts dies during the period." Minn. Stat. § 176.101, subd. 3r. (Emphasis added). The eligible dependent "shall receive the periodic economic recovery compensation or impairment compensation that the deceased was receiving before the death." Id. (Emphasis added). The meaning of the statutory language in sentence 2 and subdivision 3r is apparent and explicit: the employee must have been receiving payments of ERC or IC at the time of death in order for a dependent to qualify for continued benefits. When the

meaning of a statute is apparent from its language, additional statutory interpretation is impermissible. Minn. Stat. § 645.16 (1988); McCaleb v. Jackson, 239 N.W.2d 187 (Minn. 1976). Even if the phrase "is receiving" could arguably be construed as petitioner contends, several factors support the conclusion that it should be given its plain meaning.

The 1983 amendments to Minn. Stat. § 176.021, subd. 3, clearly evidence a legislative intent to restrict payment of benefits for permanency in ways not contemplated by prior law. The reference to permanent partial disability was deleted from the previous paragraph and a new, separate, paragraph inserted to deal with ERC and IC. The reference to vesting in dependents and heirs was deleted; the right to benefits for permanency now vests only in the injured employee. Under prior law, no minimum survival period was required; under the current provision, an employee must live at least 30 days following the injury to have a vested right to payment of these benefits. It should also be noted that none of these requirements are applicable to other kinds of benefits; that is, under Minn. Stat. § 176.021, subd. 3, temporary total, temporary partial, and permanent total benefits are treated the same under the current and former law.

Both sentence 2 and section 176.101, subd. 3r, by their terms provide for payment of IC and ERC to qualifying dependents only in cases where the employee was actually receiving such payments at the time of death. Given the other restrictions on payment of IC and ERC, it is reasonable to infer that the legislature's use of the term "is receiving" was intentional and meaningful. We therefore conclude that sentence 2 does not provide a basis for paying impairment compensation to petitioner because employee was not receiving such payments at the time of his death. See also Eaves v. Control Data Corp., No. [Redacted to Remove Social Security Number], (W.C.C.A. March 23, 1990).

Petitioner argues that sentence 3 creates an independent right to payment of IC, even if the employee was not receiving such benefits upon death. Employer and insurer dispute this contention. Because we have determined that employee had reached maximum medical improvement, sentence 3 is by its terms inapplicable to this case; employee did not die "prior to reaching maximum medical improvement." We therefore need not address petitioner's arguments.[3]

CONCLUSION

Substantial evidence supports the compensation judge's finding as to primary liability for employee's hearing loss; the award of medical expenses is therefore affirmed. The

[3] We note that sentence 3 is not a model of clarity. However sentence 3 might be interpreted, it produces a number of potential inconsistencies and any attempted even-handed application would be difficult at best.

compensation judge's finding that employee did not reach MMI is reversed; petitioner is not entitled to payment of impairment compensation pursuant to Minn. Stat. § 176.021, subd. 3.

DISSENTING OPINION

KAREN C. SHIMON, Judge

As in Ross v. Northern States Power Co., ___ N.W.2d ___, 42 W.C.D. 7 (Minn. 1989), the majority here takes the qualifying language of "is receiving" out of the context within which it is codified and reintrojects the manner of one kind of payment into the otherwise clear meaning of the statute in directing a different manner of payment in situations where "vesting [of permanency] has occurred"; in the latter situation a lump-sum payment of "impairment compensation is payable'. Minn. Stat. § 176.021, subd. 3 (1987); see also Minn. Stat. § 176.101, subd. 3b.

By interpreting "vesting" in a super-imposed context of "is receiving", the majority divests of rationality the clear meaning of to "vest". Either an employee "is receiving" periodic payments of permanency at the time of death, or he is not. If he is not, the question becomes whether the permanency has "vested"; that is, whether it has been "ascertained" or it is "ascertainable". Minn. Stat. § 176.021, subd. 3. The statute clearly sets out the disparate "manner of payment" upon the happening of the two different contingencies. If all employees are required to be "receiving", (inherently implying periodic payment of) impairment or economic recovery compensation before their heirs may receive the vested payments upon the employee's death, the legislative requirements of "vesting" and the employee continuing to sustain life for 30 days after the first requirement has been fulfilled is simply ludicrous. In enacting law, the legislature is not to have been assumed to have intended an absurd result. Minn. Stat. § 645.17(1).

Of course the permanency has vested; i.e., been ascertained, if the employee "is receiving" it at the time of death. Of course the employee is not receiving it if the legislature separately required it to have vested and the employee is required to have died before reaching maximum medical improvement, before it is payable as (lump sum) impairment compensation after his death. Minn. Stat. § 176.021, subd. 3 and Minn. Stat. § 176.101, subd. 3b.

Under the clear wording of Minn. Stat. § 176.021, subd. 3 the right to receive payment for permanent partial disability is not abrogated by the employee's death. Scheeler v. North Pine Elec. Co-op, Inc., 276 N.W.2d 648, 31 W.C.D. 377 (Minn. 1979). By avoiding the clear meaning of the words of the statute, that is exactly the result accomplished by the majority.

Whether the employee had, or had not reached maximum medical improvement prior to his death is, as the Compensation Judge points out, a determination of nonsensical and non-eventful consequences. With our limited knowledge of "life" after death, we can only infer

that no medical improvement takes place after death. As also noted by the Compensation Judge, however, the important factor in determining whether permanent partial disability is payable after death, is whether it was ascertainable either before or after death, and that that factor, by analogy, is applicable to maximum medical improvement. See Erickson v. Gopher Masonry, 329 N.W.2d 40, 35 W.C.D. 523 (Minn. 1983).

Not only does the majority divest the heirs of the employee of his permanent partial disability payment by requiring the employee to have been "receiving" it at the time of his death, but they also divest this entitlement by reversing the Compensation Judge's determination that maximum medical improvement had not yet occurred at the time of employee's death. As noted by the Compensation Judge, a determination of maximum medical improvement "is a fact question to be determined by the Compensation Judge. See Galba v. R. E. Hamann Roofing, 39 W.C.D. 954 (1987)." Memorandum at 5. It is also an issue of "ultimate fact" which is not to be reversed on appeal where substantial evidence supports the determination. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987). As required by the supreme court in Hammer v. Mark Hagen Plumbing and Heating, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1988), the Compensation Judge here considered the totality of circumstances, including the length of time since the last testing and the treatment chronology, in making this determination. And, of course, maximum medical improvement is not of legal consequence until and unless written notice of it having been reached has been served on the employee. Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987).

Lastly, the majority by avoidance of the logic and the rule of law divests the heirs of the employee of his permanent partial disability payment by requiring the employee to have lived beyond his death in order to personally collect these benefits. According to the majority, the 1983 amendments "restrict[ed] payment . . . for permanency", and this theory is supported by their interpretation that:

> The reference to vesting in dependents and heirs was deleted; the right to benefits for permanency now vests only in the injured employee.

The circumstances of this case are not the same as those in existence in Deschampe v. Arrowhead Tree Service, 428 N.W.2d 795, 41 W.C.D. 200 (Minn. 1988) where the Minnesota Supreme Court found "irreconcilable" the payment provisions for permanency and permanent total disability of Minn. Stat. § 176.101 and § 176.021, subd. 3a. 41 W.C.D. at 216. There the supreme court stated:

> The issue is . . . one of statutory construction: which of two contradictory provisions should prevail.

Id. at 217. In construing the application of the contradictory sections, the supreme court reasoned, as follows:

> We are not persuaded that the manner of payment of impairment compensation turns on such an artificial and arbitrary matter as the moment at which it can be said that the employee is permanently totally disabled.

Id; emphasis added. Here, the majority arbitrarily superimposes the requirement of "is receiving" of Minn. Stat. § 176.021, subd. 3 together with the requirement of "in periodic amounts" of Minn. Stat. § 176.101, subd. 3r to artificially defeat the intent of the legislature in stating in separate and clear language, clearly reconcilable with the other contingencies enumerated in the statute that:

> Impairment compensation is payable under this paragraph if vesting has occurred . . . .

Minn. Stat. § 176.021, subd. 3. The "manner of payment" of impairment compensation, (IC), is not defined by periodic weekly payments as is economic recovery compensation, (ERC). (See Minn. Stat. § 176.101, subd. 3a which provides that ERC is payable as a pro rata percentage of "weeks of compensation" varying from 600 to 1200 weeks). Hence, the requirement of section 176.021 that "payments for permanent partial disability shall be governed by section 176.101" mandates that impairment compensation "is payable" as follows:

> An employee who suffers a permanent partial disability . . . and receives impairment compensation . . . shall receive compensation in an amount as provided by this subdivision.

Minn. Stat. § 176.101, subd. 3b. This section goes on to statutorily require lump sum payment in sum-certain dollars of the pro rata percentage of permanency assessed based on a sum certain dollar "amount" ranging from the "Amount" of $75,000.00 to $400,000.00.

The majority, however, would have us believe that employees can receive lump sum or periodic payments of impairment or economic recovery compensation prior to their death, but if the employer or insurer delays in making that payment until after the employee dies, the legislature intended payment need be made only if the employee was receiving periodic payments of permanency at the time of his death and only if the employee is survived by persons dependent on him.

Such a construction artificially superimposes in all death situations a wage loss basis to the payment of permanency which is contrary to law:

> [R]ecovery of permanent partial disability compensation is not dependent upon loss of wages but upon functional loss of impairment.

Schroeder v. Highway Services, 403 N.W.2d 237, 39 W.C.D. 723, 726 (Minn. 1987); accord for injuries occurring after January 1, 1984: Flint v. American Can Co., 426 N.W.2d 190, 41 W.C.D. 68 (Minn. 1988). The analysis of the majority defeats the legislature's use of the legal term of art of "vesting" following 1983 and simultaneously defeats the holding of the supreme court that payment of permanency has been since 1974 considered to be in the nature of general damages, and hence, where ascertained and vested, inheritable.[4]

Minn. Stat. § 176.101, subd. 3r, contrary to the analysis of the majority, dictates only the manner of payment of permanency to dependents where the separately included contingency provided in section 176.021, subd. 3a of "is receiving" mandates correlation to the continuing "periodic" and in lieu of wage loss benefit payment provisions of Minn. Stat. § 176.101, subd. 3r. The latter dictates only the manner of payment and not whether an heir is entitled to payment. See Woodwick v. Shamps Meat Market, 425 N.W.2d 816, 41 W.C.D. 674 (Minn. 1989) where the Minnesota Supreme Court reversed this Court in construing Minn. Stat. § 176.101, subd. 6 and where we held that the section governs entitlement as well as the manner of calculation of the payment due to a minor employee.

In the absence here of the contingency of employee having been "receiving" permanency in the periodic manner at the time of employee's death, Minn. Stat. § 176.021, subd. 3 governs entitlement and Minn. Stat. § 176.101, subd. 3r does not govern the manner of payment of that permanency which vested and "is payable" as impairment compensation to employee's heirs in a lump sum dollar amount pursuant to Minn. Stat. § 176.101, subd. 3b. See Sallie A. Eaves (deceased employee) by Hubert Eaves, III v. Control Data Corporation, W.C.C.A. decision served and filed March 23, 1990; dissenting opinion of Shimon, Judge.

I therefore dissent from the reasoning, analysis and conclusion of the majority. The determination awarding payment by lump sum of the stipulated 16% permanent partial disability of the deceased employee to the petitioning dependent spouse by the Compensation Judge should be affirmed in its entirety.

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[4] See discussion in Moes v. City of St. Paul, 402 N.W.2d 520, 39 W.C.D. 675 (Minn. 1987) and discussion therein of Ahoe v. Quality Park Products, 258 N.W.2d 885, 30 W.C.D. 69 (Minn. 1977).