ROY T. ANDERSON, Employee/Cross-Appellant, v. EASTMAN KODAK CO., SELF-INSURED/DOUGLAS CLAIMS SERV., Employer-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 9, 1998

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, documentation of increased low back symptoms and restrictions, and the employee's testimony, supported the compensation judge's finding that the employee was entitled to benefits for an additional 2% whole body impairment following his medical inability to continue working under Minn. Stat. § 176.101, subd. 3j (repealed 1995), and that the additional permanency was attributable to the worsening of the employee's condition.

JOB OFFER - PHYSICAL SUITABILITY; JOB OFFER - ECONOMIC SUITABILITY. Substantial evidence, including expert medical opinion and evidence indicating that the employee continued working without treatment or time off for more than a year after MMI, supported the compensation judge's conclusion that the employee's initial post-injury job was physically suitable, despite the employee's increase in symptoms over time and his eventual need to change jobs. The compensation judge properly concluded that the employee's second post-injury job was not suitable because it was temporary from the outset. Given the substantially lower wages, the less generous fringe benefits and less desirable work conditions, and in the absence of vocational opinion that the employee's third post-injury job provided an economic status as close as possible to that the employee would have enjoyed without the disability, the compensation judge's conclusion that the employee's third post-injury job was not economically suitable was not clearly erroneous and unsupported by substantial evidence.

ECONOMIC RECOVERY COMPENSATION; IMPAIRMENT COMPENSATION. An employee who obtains a subdivision 3e job prior to the end of 90 days post MMI is entitled to IC, not ERC, and if the employee subsequently becomes medically unable to continue working within the meaning of Minn. Stat. § 176.101, subd. 3j, only any additional permanency attributable to the employee's worsened condition is payable as ERC if the employee subsequently fails to obtain another 3e suitable job prior to the expiration of the 90-day period following the employee's attainment of MMI, for a second time, following his 3j disablement. The form of benefits payable for the employee's initial permanent impairment, at his initial MMI, remains fixed and is unaffected by subsequent events.

REHABILITATION - SUBSTANTIAL EVIDENCE. Where the employer's only challenge to the compensation judge's award of rehabilitation assistance was that the employee's current job was physically and economically suitable, and the compensation judge's contrary conclusion as to the suitability of that job had been affirmed on appeal, the award of rehabilitation assistance was also affirmed.

Affirmed in part and reversed in part.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Janice M. Culnane.

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's failure to make an express finding as to maximum medical improvement, from the judge's finding that certain post-injury jobs were not suitable within the meaning of Minn. Stat. § 176.101, subd. 3e (repealed 1995), from the judge's award of benefits for an additional 2% whole body impairment, from the judge's award of economic recovery compensation for the employee's overall 16% whole body impairment, and from the judge's award of rehabilitation assistance. The employee cross appeals from the judge's finding that the employee's initial post-injury job with the employer was physically suitable. We affirm in part and reverse in part.

BACKGROUND

The employee began working for Eastman Kodak [the employer] in 1980. In about 1991, he transferred from his job as a copier repairman to a job in the employer's Business System Division [BIS] as a microfilm equipment repairman, or field engineer. The employee testified that his job with BIS required substantial reaching, bending, and awkward positioning and that it was very difficult to maintain proper body mechanics.[1]

On May 17, 1993, the employee sustained a work-related injury to his low back. The employer, self-insured for workers' compensation purposes, admitted liability for the injury and paid various benefits. The employee underwent a hemilaminectomy and microdiscectomy in August of 1993, and, after extensive work-hardening and a functional capacities evaluation, he returned to his usual pre-injury job on about November 22, 1993. The employee testified that the employer would not have allowed him to return to this job with any restrictions and that his doctor had released him to work without restrictions only to satisfy the employer's policy in this regard.

In a report signed on January 18, 1994, the employee's treating physician, Dr. Richard Cohan, indicated that the employee had reached maximum medical improvement [MMI] from his work injury and had a 14% whole body impairment pursuant to Minn. R. 5223.0070, subps. 1B(2)(a) and 1B(5). The employer served the employee with this report on

[1] The equipment, located on clients' premises, was often not easily accessible. The employee compared working on this kind of equipment to working on a washing machine, where you cannot get to the side of the tub [but] have to reach down and work on the inside.

February 15, 1994, and paid him impairment compensation [IC] in accordance with Dr. Cohan's rating.

In mid May 1995, the employee sought treatment for Aongoing problems with his low back, and after a follow-up examination about two weeks later, the employee was referred for a course of physical therapy. Dr. Cohan noted at that time that, while long term work guidelines were as yet uncertain, Athe field engineer job may be a type of job that [would] be too physically demanding . . . . A treatment note dated July 14, 1995, similarly indicated that the employee was to be evaluated for fusion surgery but that, without surgery, the employee Awould be on permanent light duty restrictions 20 to 30 pounds and new [job] duties [would] need to be found. After additional tests were performed, physicians advised against further surgery. The employer paid the employee temporary total disability benefits for time off work from June 6, 1995, through July 25, 1995.

The employee was unable to return to his pre-injury job as a field engineer due to the restrictions imposed following his symptom increase. In late July or early August of 1995, he was assigned to a new position with the employer, in a division known as Apple Technical Services, dealing with the employer's servicing of Apple computers. About eight months later, in late March of 1996, the employee was laid off by the employer due to corporate restructuring and the resulting elimination of his position. About four months after that, on July 30, 1996, the employer served the employee with a medical report indicating that he had once again reached MMI from the effects of his work injury.

On October 28, 1996, the employee obtained employment with Tires Plus, working first as a salesman and then as an assistant manager. The Tires Plus jobs paid less and provided fewer fringe benefits than the employee had received in his date-of-injury job with the employer.

On April 28, 1997, the employee was evaluated by Dr. Mark Engasser, who concluded in part that the employee had a 16% whole body impairment, that the employee was physically capable of performing his job at Tires Plus, and that the employee should observe certain restrictions on lifting, carrying, stooping, squatting, and static positioning. In July of 1997, after reviewing Dr. Engasser's report, the employer asked the employee's QRC to discontinue all rehabilitation services and to close the employee's file. Despite the objections of the employee's attorney, services were apparently discontinued at this time.

When the matter came on for hearing before a compensation judge on October 9, 1997, numerous issues were disputed, including the suitability of the employee's post-injury jobs, the extent of permanent impairment attributable to the employee's work injury, the form of benefits payable for the employee's permanent impairment, and the employee's entitlement to rehabilitation assistance. In a decision filed on November 21, 1997, the compensation judge concluded in part that the employee's post-injury job with the employer as a field engineer was suitable within the meaning of Minn. Stat. § 176.101, subd. 3e; that the employee's subsequent jobs, with the employer in Apple Technical Services and with Tires Plus, were not suitable; that

the employee had reached MMI following his 1995 aggravation effective with notice of MMI on July 30, 1996; that the employee was entitled to an additional 2% rating for permanent partial disability; that the employee was entitled to economic recovery compensation for his entire 16% work-related impairment; and that the employee was entitled to rehabilitation assistance. Both parties appeal.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [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). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, Aunless 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

MMI

The parties agree that the employee received temporary total disability benefits from June 6, 1995, through July 25, 1995, pursuant to Minn. Stat. ' 176.101, subd. 3j (repealed 1995), which provides in part as follows:

> Subd. 3j. **Medically unable to continue work**. (a) If the employee has started the job [2] . . . and is medically unable to

[2] The statute as written specifies that subdivision 3j benefits are payable if an employee becomes medically unable to continue working at a job qualifying as a suitable job under Minn. Stat. ' 176.101, subd. 3e (repealed 1995). However, the Minnesota Supreme Court determined that such benefits, or analogous benefits, are available whether or not the job is a 3e job. See O'Mara v. State, U of M, 501 N.W.2d 603, 48 W.C.D. 483 (Minn. 1993); Wills v. Kratz Farm, 509 N.W.2d 162, 49 W.C.D. 417 (Minn. 1993). In the present case, the employee disputes the judge's conclusion that he was medically disabled from a 3e job, contending that the job was not physically suitable. He has agreed, however, that benefits were paid under subdivision 3j.

> continue at that job because of the injury, that employee shall receive temporary total compensation pursuant to clause (b). . . .
>
> (b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall cease at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e or 3f. If no job is offered to the employee by the end of this 90-day period, the employee shall receive economic recovery compensation pursuant to this section but reduced by the impairment compensation previously received by the employee for the same disability.

The compensation judge specifically concluded that the employee had reached MMI again, following his 3j period, effective July 30, 1996, and this is undisputed on appeal. The employer argues, however, that the compensation judge erred in failing to make an express finding that the employee had initially reached MMI, prior to his symptom increase and 3j disablement, effective with service of Dr. Cohan's MMI report on February 15, 1994.

The parties never presented the employee's initial MMI date as an issue to be determined at hearing. However, all of their arguments and positions regarding the form of benefits payable for the employee's permanent impairment presumed that the employee had in fact reached MMI from his work injury effective on the date alleged by the employer. In addition, the parties agree that the employee received benefits under subdivision 3j, and application of subdivision 3j is necessarily premised on the employee's attainment of MMI, initially, prior to the date he became medically unable to continue working. Because there is no apparent controversy in this regard, and because even the employee's arguments presume an MMI date in accordance with service of Dr. Cohan's report, we hold, for purposes of clarification, that the employee initially reached MMI from the effects of his work injury effective February 15, 1994, as alleged by the employer.

Field Engineer Job - Physical Suitability

The employee returned to his pre-injury job as a field engineer on about November 22, 1993, following his recovery from surgery, and he continued working in this position, without additional medical care, for about a year and a half--until May of 1995. The employee earned the same pay and benefits for this work as he had earned prior to his injury, and there is no contention that the job was not economically suitable. The employee argues, however, that the compensation judge erred in concluding that the field engineer job was physically suitable. We are not persuaded.

There are facts, cited by the employee, that might support the conclusion that the employee's pre-injury job was not in fact compatible with his injury-related low back condition

and limitations. The employee testified, for example, that it was virtually impossible to maintain proper body mechanics in this work, that he began experiencing more and more symptoms as time went on, and that he only continued working as long as he did without additional treatment or time off because he was anticipating additional surgery and was trying to requalify for benefit eligibility under the employer's short-term disability plan. It is also true that the employee's restrictions were ultimately increased, in the summer of 1995, to the extent that he was unable to return to the field engineer job, which was then viewed by physicians as too strenuous. However, the fact that the employee's condition worsened while he was performing the job does not necessarily mean that the job duties caused the worsening or that he was in fact working beyond his legitimate capabilities. Moreover, the judge's conclusion as to physical suitability is supported by the fact that Dr. Cohan had released the employee to essentially unrestricted work in November of 1993,[3] and by the fact that the employee continued working as a field engineer for a year and a half, well beyond MMI in February of 1994. Perhaps most significantly, even Dr. Engasser, the employee's independent examiner, indicated in his April 1997 report that it had been Areasonable for [the employee] to return to that type of work on a permanent basis after his low back surgery, and there is no express medical opinion to the contrary.

A finding of suitability under Minn. Stat. ' 176.101, subd. 3e, is one of fact, which we are obligated to affirm in the face of conflicting evidence. That the employee ultimately became unable to perform the field engineer job does not necessarily compel the conclusion that the job was not physically suitable to begin with or though the end of the 90-day post-MMI period. Because the record as a whole reasonably supports the judge's decision on this issue, we must affirm it.

Apple Technical Services Job - Economic Suitability

The compensation judge concluded that the employee's second post-injury job with the employer, the Apple Technical Services job, was not suitable because it was temporary. This conclusion is consistent with the evidence and with controlling case law. Contrary to the employer's contention, the evidence supports the conclusion that this job did not simply turn out, unexpectedly, to be short term; the employee testified that the job was characterized as temporary from the outset. See Cassem v. Crenlo, 470 N.W.2d 102, 44 W.C.D. 484 (Minn. 1991). We also note that the suitability of this job is irrelevant to any benefit entitlement issues in this case, as the employee began the job well after the expiration of 90 days post his initial MMI in February

[3] The employee contends that Dr. Cohan's unrestricted release was due only to the employer's refusal to take the employee back to work as a field engineer with any limitations. However, the employee's testimony to this effect was for the compensation judge to weigh.

of 1994,[4] and he was terminated from this job well prior to reaching MMI from his subdivision 3j exacerbation in July of 1996.[5] We affirm the judge's decision on this issue as well.

Tires Plus - Economic Suitability

The employee began working for Tires Plus on October 28, 1996, the 90th day after he reached MMI from the effects of his 3j exacerbation. After comparing the wages, benefits, and work conditions of the employee's pre-injury field engineer job with the wages, benefits, and work conditions of the Tires Plus assistant manager job, the compensation judge concluded that the Tires Plus job was not economically suitable.[6] The employer contends that the compensation judge erred in this regard. We disagree, and affirm.

The compensation judge explained her analysis of the Tires Plus suitability issue as follows:

> First of all, his current salary at Tires Plus is $1,250 per month plus commissions which generally amount to $150 per week. In addition, the employee receives, because he is the Assistant Manager, a commission based on the net sales of the store. . . . His monthly salary multiplied by 12 and divided by 52 results in a weekly [wage] of approximately $532.61 which is significantly less than the $703 pre-injury wage. Importantly, this reduction in salary is not, the only significant factor . . . in calculating suitability of this job. The employee is now required to work some weekends, which disrupts not only his family commitments but his ability to volunteer. . . . With Kodak, the employee had an extremely generous

[4] In order to qualify as a subdivision 3e job, the job must be offered or obtained prior to the expiration of the 90-day post-MMI period. Minn. Stat. ' 176.101, subd. 3e.

[5] An employee who is laid off from a subdivision 3e job prior to MMI is entitled to ERC for his permanent partial disability unless the employee is offered or obtains another subdivision 3e job during the 90-day post-MMI period. See, e.g., Hankermeyer v. Kloster-Madsen, Inc., 43 W.C.D. 21 (W.C.C.A. 1990).

[6] Although the employee's initial job at Tires Plus was apparently a sales job, the parties and the judge focused on the employee's subsequent position as an assistant manager. Technically, it is the suitability of the sales job--the job obtained within the 90-day post-MMI period--that is relevant here. There is little or no evidence regarding the terms of the sales job, but the assistant manager job was apparently considered a promotion. Therefore, because the judge's decision regarding the unsuitability of the assistant manager job--a presumably better job--is supported by the record, we will not remand the matter for further findings regarding the suitability of the sales job.

> benefit package including medical, dental, life insurance plan, and a cafeteria plan which would permit the employee to obtain particular benefits which suited his family's needs. In addition, there was profit sharing and wage dividends not tied to individual performance. He also had retirement income, a 401(k) plan, as well as other savings and investment options for retirement. He was provided 11 holidays plus a floating holiday and allowed double time if he worked on holidays. Kodak also provided four weeks of vacation, which could be carried over. Although the vehicle which was provided to this employee was not considered a wage item, it certainly was a benefit which was advantageous to the employee. When he was no longer with Kodak, the employee had to obtain an additional vehicle, at considerable expense. Considering all of these factors, it cannot be said the job at Tires Plus provides the employee with an economical status as close as possible to what he would have enjoyed without disability.

In contrast to the fringe benefits offered by the employer, Tires Plus has no flexible or cafeteria-type benefit plan, provides much lower life insurance coverage, has no long-term disability plan, has no investment plan, provides only two weeks of vacation and three holidays, and has no retirement plan other than a 401(k) to which Tires Plus does not contribute. The employee also testified that he works about fifty-five hours a week at this job, to make less than he was earning from the employer for forty hours. The employer disputes none of these facts, but instead argues that the judge's ultimate conclusion as to suitability is clearly erroneous and unsupported by substantial evidence. However, whether a job is economically suitable is a fact question, Jerde v. Adolfson & Peterson, 484 N.W.2d 793, 46 W.C.D. 620 (Minn. 1992), and nothing in the record or in the employer's arguments indicates that the judge's conclusion was unreasonable or that she weighed the various pertinent facts inadequately or improperly. We cannot conclude, for example, that the judge inappropriately emphasized wage disparity to the exclusion of other factors. Moreover, we note that the employer offered no vocational opinion to support its contention that the Tires Plus job produces an economic status Aas close as possible to that the employee would have enjoyed without the disability; rather, the employer simply argues that it is so.

Another compensation judge might perhaps have reached a different conclusion on the issue, but the judge's analysis here was reasonable, supported by the record, and consistent with relevant case law. See, e.g., Jerde; Gackstetter v. Johnson/Midwest Coca Cola Bottling, 522 N.W.2d 439, 50 W.C.D. 51 (Minn. 1994); Rogholt v. Knight Elec., 511 N.W.2d 442, 50 W.C.D. 66 (Minn. 1994). We therefore affirm her conclusion that the Tires Plus job was not economically suitable.

Extent of Permanent Partial Disability

The permanent partial disability rating categories at issue in this matter provide in pertinent part as follows:

> B. Herniated intervertebral disc, single vertebral level:
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> * * *
>
> (2) condition treated by surgery:
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> (a) surgery or chemonucleolysis with excellent results such as mild low back pain, no leg pain, and no neurologic deficit, 9 percent;
>
> (b) surgery or chemonucleolysis with average results such as mild increase in symptoms with bending or lifting, and mild to moderate restriction of activities related to back and leg pain, 11 percent;
>
> * * *
>
> (5) second herniated disc at adjacent level treated concurrently, add five percent to subitem (1) or (2).

Minn. R. 5223.0070, subps. 1B(2)(a), 1B(2)(b), and 1B(5) (1993). The employer voluntarily paid the employee benefits for a 14% whole body impairment, under subparts 1B(2)(a) and 1B(5), in accordance with the rating issued by Dr. Cohan in early 1994. At hearing, the employee claimed that subpart 1B(2)(b), applicable to average results, rather than subpart 1B(2)(a), applicable to excellent results, was the appropriate rating applicable to his worsened condition. The compensation judge agreed, awarding the employee benefits for an additional 2% impairment due to a worsening of the employee's condition following his 3j medical inability to continue working in the summer of 1995.[7]

On appeal, the employer contends initially that the additional 2% rating is unsupported by substantial evidence, arguing that diagnostic test results did not change between 1993 and 1995 and that the employee's treating physicians failed to assign the employee any additional rating.[8] However, the judge's additional award is easily supported by the record as a whole. As the employee points out, a change in scan results is irrelevant to the question of whether the employee's surgical outcome is properly classifiable as an excellent result under subpart 1B(2)(a) or as an average result under subpart 1B(2)(b). Moreover, the employee had a documented increase in both his symptoms and his restrictions, and Dr. Engasser concluded that a rating under subpart 1B(2)(b) was appropriate. A finding of permanent partial disability is one

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[7] The compensation judge did not make a formal finding attributing the additional rating to a worsening of the employee's condition. However, in her memorandum, the judge wrote that Athis employee's medically worsened condition resulted in an additional 2% permanent partial disability . . . . Given the memorandum, we see no reason to remand the matter for a specific finding in this regard.

[8] In addition to Dr. Cohan, the employee was seen by Drs. Christine Cox and R. Gorman, among others.

of ultimate fact, Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987), and there are absolutely no grounds to reverse the judge's decision here.

The employer also contends that the judge erred in attributing the additional 2% rating to a worsening of the employee's condition, arguing, essentially, that, if the employee is entitled to the additional 2%, he was entitled to that 2% all along. The evidence on this issue is somewhat less concrete, and we acknowledge that there is no medical opinion expressly connecting the employee's additional permanent impairment to the worsening of his condition in the summer of 1995. However, given the employee's testimony describing his increase in symptoms over time, the substantial increase in the employee's restrictions in the summer of 1995, and Dr. Engasser's 1997 opinion that the employee's condition currently warrants the higher impairment rating, we cannot conclude that the judge erred in determining that it was the worsening of the employee's condition that justified the higher rating for only average surgical results. We therefore affirm the judge's decision on this issue as well.

IC Versus ERC

The primary legal issue at hearing was whether the employee was entitled to IC or to ERC for his permanent partial disability. Citing Minn. Stat. § 176.101, subd. 3e(b), and a case from this court called Triemert v. Artec Displays, No. *[redacted to remove SSN]* (W.C.C.A. May 9, 1997), the compensation judge concluded that the employee was entitled to ERC for his entire 16% whole body impairment. The employer contends that the compensation judge misconstrued applicable statutory provisions and case law. We agree.

As previously noted, Minn. Stat. ' 176.101, subd. 3j(b) (repealed 1995), dealing with benefits payable to an employee who has become medically unable to continue working, contemplates attainment of a second MMI[9] and specifies benefit payments as follows:

> (b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall cease at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e or 3f. If no job is offered to the employee by the end of the 90-day period, the employee shall receive economic recovery compensation pursuant to this section but reduced by the impairment compensation previously received by the employee for the same disability.

[9] See also Sabby v. Copasan, Inc., 462 N.W.2d 603, 43 W.C.D. 509 (Minn. 1990); Cassem v. Crenlo, 470 N.W.2d 102, 44 W.C.D. 484 (Minn. 1991).

(Emphasis added.) Minn. Stat. § 176.101, subd. 3s (repealed 1995), also dealing with payment of benefits for permanent partial disability, provides as follows:

> Subd. 3s. **Additional economic recovery compensation or impairment compensation**. No additional economic recovery compensation or impairment compensation is payable to an employee who has received that compensation to which the employee is entitled pursuant to subdivision 3a or 3b unless the employee has a greater permanent partial disability than already compensated.

(Emphasis added.) After citing these provisions, this court in Triemert wrote as follows:

> In general, the form of payment of permanent disability, IC or ERC, under the two-tier system, depends on whether the employee is offered a suitable job within 90 days of MMI. Minn. Stat. ' 176.101, subd. 3e. Because the employee, in the present circumstances, had originally returned to a suitable job and was properly paid IC, he is not entitled, under the statutes and case law to convert the original IC to ERC and receive additional compensation when the employee, after being unable to medically continue working, did not return to a suitable job within the new 90-day post-MMI period and was still claiming the same level of permanency. There is no claim here for additional permanent partial disability from the employee's medically worsened condition. The compensation judge erred in ordering the conversion of the employee's original 7% from IC to ERC. We therefore reverse this order.

(Emphasis added.) Apparently based on this language and on the language of the statute itself, the compensation judge in the present case concluded that, since the employee here did sustain additional permanent partial disability after his 3j disablement, the employee was entitled to convert from IC to ERC, for his entire 16% impairment, because he did not again obtain subdivision 3e suitable employment within the statutory period following his second MMI.

Given our discussion in Triemert, the compensation judge's analysis may not be unreasonable on its face, but it is not consistent with what we intended to convey in Triemert or in the other cases we have decided on this issue. Rather, as we suggested in Morris v. Methodist Hospital, 51 W.C.D. 52 (W.C.C.A. 1994), the statutory scheme operates as follows: An employee who obtains a subdivision 3e job prior to the expiration of the 90-day post-MMI period is entitled to only IC, not ERC, for permanent partial disability existing at that time. If the employee subsequently becomes medically unable to continue working within the meaning of subdivision 3j, any additional permanency resulting from the worsened condition is payable as ERC, unless the employee again obtains subdivision 3e suitable employment prior to the end of the 90-day period

after the employee's attainment of MMI, for a second time, following his 3j disability. If the employee does obtain suitable work, the additional permanent partial disability is payable as IC, rather than ERC. Id.; see also Dahn v. Sheldahl, Inc., 55 W.C.D. 232 (W.C.C.A. 1996). In either case, the form of benefits payable for the employee's initial permanent impairment, at his initial MMI, remains fixed and is unaffected by subsequent events. To hold otherwise would allow an employee who has worked at a suitable job literally for years to claim entitlement to the higher ERC, for his entire permanent partial disability, if that employee should at any point need to go off work and be unable to resume suitable employment. This result would not serve the underlying purpose of the two-tier benefit system.

The employee in the present matter was properly paid IC for his original 14% impairment when he reached MMI initially in February of 1994, because he had returned to suitable 3e employment with the employer as a field engineer,[10] and he continued working at this job well beyond the expiration of the 90-day post-MMI period The employee's additional 2% impairment, resulting from his 3j worsening, is, however, payable as ERC, because the employee did not obtain a subdivision 3e job prior to the end of the 90-day period following his second attainment of MMI in July of 1996.[11] The compensation judge's award of ERC for the employee's original 14% impairment is therefore reversed.

Rehabilitation Assistance

The employer contends that the compensation judge erred in awarding the employee rehabilitation assistance. However, the employer's entire argument is premised on its contention that the employee's job at Tires Plus is both physically and economically suitable. We have affirmed the judge's conclusion that the Tires Plus job is not economically suitable and thus does not constitute a subdivision 3e job. Therefore, since the employer makes no other argument on this issue, we also affirm the judge's award of rehabilitation assistance.

[10] As found by the compensation judge and affirmed by this court.

[11] Again, as found by the compensation judge and affirmed on appeal.