DOUGLAS ROERS, Employee, v. JENNIE-O FOODS, SELF-INSURED/ALEXSIS, INC., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 26, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY. An employee's workers' compensation benefits from another state cannot be construed to constitute wages for purposes of calculating temporary partial disability benefits in Minnesota, and, where the employee was not employed during the benefits period at issue, the compensation judge erred in awarding temporary partial disability benefits based on the difference between the employee's date-of-injury wage and his benefits from the other state.

TEMPORARY PARTIAL DISABILITY; EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Where, in an earlier proceeding, the employee had been found to have permanent restrictions due to his work injury, the compensation judge's conclusion that the employee was temporarily partially disabled due to his work injury and that his earning capacity was reflected by his actual earnings at his post-injury job was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that over a year had passed between issuance of the restrictions and the benefits period at issue.

CREDITS & OFFSETS. Where, while working disabled at his post-injury job, the employee was being paid temporary partial disability benefits from another state pursuant to an earlier injury to a different part of his body, the compensation judge improperly calculated the employee's temporary partial disability benefits by construing the employee's workers' compensation benefits from the other state as wages, and the employee's benefits were properly to be calculated instead based on the employee's actual earnings at his post-injury job with a dollar-for-dollar credit for the benefits paid by the other state.

PENALTIES. The statutory fourteen-day time limit for payment of benefits upon order of the Workers' Compensation Court of Appeals is not extended by the statutory time limit for further appeal to the supreme court where no further appeal was taken. Where no evidence was presented to justify the employer's five-week delay in payment of some of the benefits ordered paid pursuant to an affirmance of a prior compensation judge's decision, and where as of the date of the more recent hearing the employer had only recently paid the balance of benefits and had yet to pay the statutory interest there ordered paid, the compensation judge did not abuse her discretion in awarding penalties to the employee.

PENALTIES. Where the employer had indicated at hearing that it had recently issued payment of both certain benefits earlier ordered due together with a 30% penalty for delay in paying those

benefits, the compensation judge's imposition of a $500 penalty for the employer's failure to file an NOID at the time payment of the benefits became due and was withheld constituted a double penalization not clearly authorized by the statute, regardless of whether or not the employer should properly have filed an NOID upon withholding part of, as opposed to actually discontinuing payment of, the benefits that had been ordered paid.

PENALTIES. Where the employer had delayed for over five months its payment of medical expenses ordered due under a previous decision, the employee was not without standing to claim, and the compensation judge did not abuse her discretion in awarding, a penalty to the employee for the employer's failure to pay medical expenses in a timely manner.

Affirmed in part and reversed in part.

Determined by Pederson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Cheryl LeClair-Sommer.

OPINION

The self-insured employer appeals from the compensation judge's findings awarding temporary partial disability benefits and penalties. We affirm in part and reverse in part.

BACKGROUND

In September of 1966, Douglas Roers [the employee] sustained multiple injuries when he was involved in a work-related motor vehicle accident while working for a North Dakota employer. The employee's injuries included a subdural hematoma that required a craniotomy, an intraventricular hemorrhage, and a severe foot injury that required multiple surgeries in subsequent years. The employee also underwent surgical repair of his aorta, and as a result of his head injury he experienced seizures and short-term memory problems.

On December 17, 1994, the employee sustained another injury, to his lower back, while employed by Jennie-O Foods [the employer], which was self-insured against workers' compensation liability. On the date of his injury, the employee was forty-seven years old and was earning a weekly wage of $348.92. The employer initially denied liability for the injury, but the dispute was resolved in the employee's favor at a hearing on November 8, 1996, before Compensation Judge Paul Rieke. In his Findings and Order issued on December 2, 1996, Judge Rieke determined that the employee had sustained a work-related permanent aggravation of a pre-existing condition in the nature of a Gillette injury[1] culminating on December 17, 1994; that the employee had sustained a 7% whole-body permanent impairment as a result of that December 17, 1994, injury; that the employee was entitled to temporary total and temporary partial disability

[1] See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

benefits through the date of hearing as claimed; that the employee was entitled to ongoing temporary partial disability benefits as his disability and circumstances warranted, subject to statute; and that medical treatment in dispute was causally related as well as reasonable and necessary. The self-insured employer appealed from Judge Rieke's decision.

At the time of the November 8, 1996, hearing before Judge Rieke, the employee had been employed at the Holiday Inn as a night cleaner/security person at $5.10 an hour. He continued in this position until December 7, 1996, five days after Judge Rieke's decision. On December 9, 1996, the employee's family doctor, Dr. Steven Longbotham, recommended that the employee remain off work until he could see his neurologist, pursuant to complaints of problems with balance and persistent left forehead pressure. On December 27, 1996, the employee was seen by neurologist Dr. Irfan Altafullah, to whom he reported constant pressure over his left temporal region and severe dizziness and imbalance intermittently and unpredictably. Dr. Altafullah indicated that the employee ought to be able to work for a full eight-hour work day, but he limited him to light duty, restricting him from lifting over twenty pounds and from working around swimming pools. The doctor also recommended that the employee work the day shift only. On January 29, 1997, Dr. Altafullah reported these restrictions to the North Dakota Workers' Compensation Bureau and opined that the employee's headaches, dizziness, and imbalance were "sequelae of his prior head injury."

Shortly after receiving Dr. Altafullah's report of January 29, 1997, the North Dakota Workers' Compensation Bureau commenced payment of temporary total disability benefits to the employee, which continued in the amount of $188.39 per week for a period of about eleven months beginning December 9, 1996. About the same time, the employee began receiving rehabilitation assistance through the CorVel Corporation at the request of the North Dakota Workers' Compensation Bureau.

At the request of Dr. Longbotham, the employee was seen in neurological consultation by Dr. Lawrence Jedlicka. Dr. Jedlicka examined the employee on four occasions between March and August of 1997, relative to the employee's dizziness and dysequilibrium. The doctor performed an EEG, altered the employee's medications, and referred him to the Minnesota Epilepsy Group, but he was not able to identify a cause for the employee's symptoms. On April 14, 1997, responding to an inquiry from the employee's CorVel rehabilitation consultant, Dr. Jedlicka released the employee to return to work, with restrictions that he sit 75% of the time and change positions every twenty minutes. Dr. Jedlicka also recommended no strenuous activity and no working at heights or with dangerous equipment.

On June 23, 1997, the Workers' Compensation Court of Appeals issued a decision affirming Judge Rieke's December 1996 Findings and Order in their entirety, including the judge's order that permanency and ongoing temporary benefits be paid to the employee. No appeal was taken from this decision, and on July 22, 1997, counsel for the self-insured employer sent a letter to the employee's attorney requesting wage information so that his client could pay the balance of the temporary partial disability benefits ordered by Judge Rieke. By letter of August 1, 1997, the requested wage information was sent to the employer's counsel.

In late July 1997, the employee had attempted a job at the Alexandria Golf Course doing grounds keeping, but he discontinued this position after only two days due to difficulties with his head and low back. On August 19, 1997, the employee also attempted a job stocking grocery shelves at Elden's Food Fair, but again he was unable to tolerate the physical requirements of the job and discontinued work after one week. Finally, on November 6, 1997, the employee began employment as part-time on-call driver for Aabra Delivery and Transport [Aabra] on an independent contractor basis. On December 9, 1997, CorVel discontinued rehabilitation services, concluding that the employee's position with Aabra constituted a successful return to work. Since November 6, 1997, the employee has been receiving temporary partial disability benefits from North Dakota based on his wages at Aabra.

On December 18, 1997, the employer issued a Notice of Benefit Payment, indicating that payment of $18,457.10 had been made to the employee on August 13, 1997, pursuant to Judge Rieke's order. This payment represented the permanent partial disability, temporary total disability, and temporary partial disability benefits ordered by the judge, but only through August 31, 1996. On December 29, 1997, the employee filed a Claim Petition, seeking temporary partial disability benefits continuing from September 1, 1996, as well as penalties pursuant to Minn. Stat. § 176.225.

The employee's Claim Petition came on for a hearing about a year later, on December 17, 1998, before Compensation Judge Cheryl LeClair-Sommer. At hearing, counsel for the employer advised the judge that payment of temporary partial disability benefits had recently been issued for the period August 28, 1996, through December 7, 1996, together with a 30% penalty. Counsel also advised the judge that his client would be paying statutory interest on those benefits, on the lump sum paid on August 13, 1997, and on payments made to the healthcare providers.

In Findings and Order issued February 22, 1999, and Amended Finding and Order issued March 12, 1999, Judge LeClair-Sommer ordered payment of temporary partial disability benefits from and after December 9, 1996, with the employee's North Dakota workers' compensation benefits treated as "wages" for calculation of Minnesota temporary partial disability compensation. In addition, the judge ordered the employer to pay penalties pursuant to Minn. Stat. § 176.225, subd. 1, for unreasonable delay in paying benefits following this court's June 23, 1997, affirmance of Judge Rieke's Findings and Order. The judge also ordered the employer to pay a $500.00 penalty for its failure to file a Notice of Intention to Discontinue [NOID] benefits when it discontinued payment of temporary partial disability benefits following its August 13, 1997, payment. The employer appeals.

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

DECISION

Temporary Partial Disability from December 9, 1996, through November 5, 1997

The compensation judge determined that the employee continued to experience a reduction in earning capacity from December 9, 1996, to the date of the hearing due to his December 17, 1994, Gillette injury. Invoking the principles enunciated in Kirchner v. Anoka County, 339 N.W.2d 908, 36 W.C.D. 335 (Minn. 1983), the compensation judge determined that an award of temporary partial disability benefits in Minnesota concurrent with the employee's receipt of temporary total disability benefits in North Dakota would fairly address the total diminution of earning capacity experienced by the employee as a result of his 1994 injury. In order to avoid a double recovery for the employee, the compensation judge elected to treat the North Dakota disability payments as "wages" and ordered temporary partial disability benefits against the employer based on those wages. The employer contends that the employee's workers' compensation benefits from North Dakota clearly are not wages. Further, they argue that the employer has no legal liability for temporary partial disability benefits during a period in which the employee is not working. We agree.

Minn. Stat. § 176.101, subd. 2(b) (1992), provides in relevant part that "temporary partial compensation may be paid only while the employee is employed, earning less than the employee's weekly wage at the time of the injury." Statutory revisions and case law applicable to the case before us limit the employee's entitlement to temporary disability benefits. Temporary total disability benefits are not payable beyond ninety days after maximum medical improvement, and temporary partial disability benefits are payable only to a worker who is employed. Parson v. Holman Erection Co., 428 N.W.2d 72, 41 W.C.D. 129 (Minn. 1988); Morrissey v. Country Club Mkts., Inc., 430 N.W.2d 169, 41 W.C.D. 402 (Minn. 1988); Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 41 W.C.D. 410 (Minn. 1988); Patrin v. Progressive Rehab Options, 497 N.W.2d 246, 48 W.C.D. 273 (Minn. 1993). Clearly, the employee was not employed during the period he was receiving temporary total disability benefits under North Dakota law.

Kirchner principles are inapplicable to the facts of this case. The Kirchner decision provides a method of calculating temporary total disability benefits for an employee who is already receiving temporary partial disability benefits at the time of a second and totally disabling injury. This court has stressed on several occasions that Kirchner does "not create an independent right to temporary partial disability benefits," but rather "simply specifies how to calculate the respective responsibilities of the various employers." Clausen v. Dotson, 58 W.C.D. 153, 157 (W.C.C.A. 1997); Nyreen v. Industrial Custom Prods., slip op. (W.C.C.A. Apr. 23, 1999). Moreover, specification of the respective contributions of various employers, as contemplated by Kirchner, can only be accomplished if both injuries are subject to Minnesota jurisdiction.

We cannot construe the employee's North Dakota workers' compensation benefits as somehow representing wages for purposes of calculating temporary partial disability benefits in Minnesota. As the employee was not employed during the period in question, we reverse the compensation judge's award of temporary partial disability benefits for the period December 9, 1996, through November 5, 1997.[2]

Temporary Partial Disability After November 7, 1997 - Liability and Earning Capacity

The employer also argues that the compensation judge erred by awarding temporary partial disability benefits for the period following the employee's return to work for Aabra on November 7, 1997. The employer contends that the employee has not proven that he has sustained a continued loss of earning capacity due to his work injury or, if he has, that the employee's current earnings do not reflect his actual earning capacity. We do not agree.

The employer contends that the compensation judge, in awarding benefits subsequent to November 7, 1997, erroneously relied on restrictions imposed by Dr. Kraker in September of 1996, without any evidence that these restrictions remained in effect over a year later during the period claimed. We note, however, that Judge Rieke in his December 1996 decision had found that the employee has permanent restrictions causally related to his December 17, 1994, injury. No evidence was presented at the more recent hearing indicating a change in the employee's restrictions or diagnosed condition. Judge LeClair-Sommer's conclusions on these issues is further supported by CorVel's rehabilitation records and the employee's unsuccessful attempts to work at the Alexandria Golf Course and Elden's Food Fair. The compensation judge

[2] At the hearing, the employer also contended that the employee was not entitled to compensation for this period because his disability was due to a superseding intervening cause related to a previous head injury in North Dakota. The compensation judge determined at Finding 17 that "[t]he evidence fails to prove that the employee sustained an intervening and superseding cause of the disability from December 1996 through November 1997." The self-insured employer has appealed this finding. Because we have reversed the compensation judge's award of benefits on other grounds, we will not address this issue, but the employer's appeal from Finding 17 is preserved.

reasonably concluded that the employee continues to have restrictions related to his 1994 work injury and that these restrictions limit the type and number of jobs that the employee might be able to obtain and maintain.

An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage he is subsequently able to earn in his partially disabled condition. Minn. Stat. § 176.101, subd. 2. The employee's post-injury wage is presumed to be representative of the employee's reduced earning capacity. The employer can rebut this presumption with evidence that the employee has an ability to earn different from his actual post-injury wage. Schwan v. Fabcon, 45 W.C.D. 209, 211 (W.C.C.A. 1991). Rebuttal of this presumption takes a showing by the employer of "something more than a theoretical possibility" of a different position or wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 875 (W.C.C.A. 1989). A determination of earning capacity is a factual decision for the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989). The employer did present testimony from employment expert Richard VanWagner. It is clear from reading the compensation judge's Memorandum that Mr. VanWagner's opinions were carefully considered and rejected. The employee's employment options are limited not only by his back injury but also by his head injury and the medications that he is taking for that head injury. After the employee obtained his job with Aabra, his North Dakota rehabilitation professionals closed his file on the basis that he was successfully rehabilitated. Substantial evidence supports the compensation judge's finding that the employee is entitled to temporary partial disability benefits based on his actual earnings at Aabra.

Credit

When the employee returned to work in November of 1997, the North Dakota Workers' Compensation Bureau, which had previously been paying temporary total benefits, commenced payment of temporary partial disability benefits based on the employee's earnings at Aabra. As she had done with the temporary total benefits for the previous period, the compensation judge considered the employee's temporary partial disability benefits from North Dakota as actual wages for purposes of calculating temporary partial disability benefits in Minnesota. The employer contends again that workers' compensation benefits paid by North Dakota cannot be construed as wages and that, if the employee is entitled to temporary partial disability benefits, benefits should be calculated based upon the difference between the employee's current earnings and his preinjury average weekly wage, with a dollar-for-dollar credit for compensation received from the North Dakota Workers' Compensation Bureau. We agree.

The compensation judge reasonably concluded that the employee's low back injury was a substantial contributing factor in his wage loss after returning to work for Aabra in November of 1997. Evidence offered at the hearing demonstrates that the employee is also being compensated for at least a portion of his wage loss as a result of an unrelated injury in the state of North Dakota. The question here presented is whether a Minnesota employer is entitled to a credit for compensation being paid in another state for an unrelated condition but for the same period of disability. Under the facts of this case, we believe that a credit is appropriate.

In Pierce v. Robert D. Pierce, Ltd., 363 N.W.2d 761, 37 W.C.D. 514 (Minn. 1985), the supreme court allowed a Minnesota employer to take a credit for benefits paid to the employee under an Alaska workers' compensation settlement where the employee had sought similar benefits against both employers based on the same disabling condition. Citing Follese v. Eastern Airlines, 271 N.W.2d 824, 829, 31 W.C.D. 198, 203 (Minn. 1978), and others,[3] the court stated, "We have recognized as 'a settled rule' that an award or settlement obtained in one state does not bar 'a successive award in another state, deducting the award or settlement received in the first proceeding from the second.'" Pierce, 363 N.W.2d at 762, 37 W.C.D. at 516. Referring to the cases cited, the court in Pierce stated, "In all these cases the common requirement that benefits previously received by the employee, whether through settlement, award, or voluntary payment in another state, be credited against compensation he receives in this state is clearly intended to avoid the injustice of double recovery." Pierce, 363 N.W.2d at 763, 37 W.C.D. at 517. The circumstances in the present case are clearly distinguishable from the circumstances that existed in Pierce, which involved successive awards in different states for essentially the same condition. In this case, the disabling condition that resulted from the employee's 1966 injury in North Dakota is clearly not the same disabling condition as that that resulted from the employee's 1994 Minnesota injury. Nevertheless, we believe that Pierce is supportive of a credit under the facts of this case, in that both conditions here are substantially contributing to the same period of disability from work.

The theory advanced by the compensation judge in this case is an effort to equitably compensate the employee without providing a double recovery. The employee's entitlement to temporary partial disability benefits is based on the difference between his wage on December 17, 1994, and the wage he is able to earn in his partially disabled condition. There are essentially only three ways that compensation might reasonably be calculated in this case. A first method would be to ignore the North Dakota payment entirely. This could provide the employee with two sources of compensation for the same wage loss, resulting in excessive recovery. A second method would be to adopt the theory of the compensation judge - - i.e., to treat the employee's North Dakota benefit as wages. This, however, results in the employee receiving more than two-thirds the difference between his date-of-injury wage and his diminished post-injury wage, another inequitable result. The third method is to calculate the employee's full entitlement under Minnesota law and then allow a dollar-for-dollar credit for benefits paid to the employee by North Dakota. This method results in the employee receiving exactly the amount of benefits to which he is entitled under Minnesota law. Although the disabling condition is different for the two injuries, payments from both states to the employee are for a single wage loss. The determination

[3] The court directed, "See also Cook v. Minneapolis Bridge Constr. Co., 231 Minn. 433, 43 N.W.2d 792, 16 W.C.D. 198 (1950) (prior award in North Dakota did not bar Minnesota proceeding, with credit given for the North Dakota award); Houle v. Stearns-Rogers Mfg. Co., 279 Minn. 345, 157 N.W.2d 362, 24 W.C.D. 485 (1968) (receipt of compensation in South Dakota in giving of a release there did not bar subsequent Minnesota proceeding, with credit given for the amount previously paid employee in South Dakota)."

of the Minnesota employer's liability is made without regard to the laws of another state. Our decision does not impact the payment of benefits in North Dakota or affect issues between the North Dakota Workers' Compensation Bureau and the employee. Nor are we seeking to interpret North Dakota workers' compensation law. We are simply taking notice of the fact that an employee's single wage loss is being partially compensated by another state. Giving the Minnesota employer a credit for the North Dakota payment simply results in the employee receiving exactly what he would normally be entitled to under Minnesota law.

Therefore, for the benefits period subsequent to November 7, 1997, we reverse the compensation judge's calculation of temporary partial disability benefits based on construing North Dakota workers' compensation benefits as wages, and we award instead temporary partial disability benefits based on the employee's actual earnings at Aabra, allowing the employer a dollar-for-dollar credit for workers' compensation benefits paid in North Dakota.

Penalties - Delay in Payment of Benefits

The compensation judge determined that payment of benefits awarded pursuant to Judge Rieke's Findings and Order was due within fourteen days of the June 23, 1997, affirmance by the WCCA. Concluding that the employer's payment of $18,457.10 on August 13, 1997, constituted unreasonable and neglectful delay pursuant to Minn. Stat. § 176.225, subd. 1(b) and (c), the judge awarded the employee a twenty-five percent penalty of $4,614.28. The employer argues that the amount of the penalty awarded by the compensation judge bears no reasonable relationship to the length of the delay in issuing payment and therefore amounts to an abuse of discretion by the compensation judge. The employer contends that, allowing time for an appeal to the supreme court from this court's June 1997 affirmance of Judge Rieke's decision, pursuant to Minn. Stat. § 176.471, subd. 1, payment under Judge Rieke's Findings and Order was not due until August 7, 1997. Therefore, the employer argues, payment was made only one week late. In addition, the employer contends that the employee offered no testimony relating to that one-week delay or any assertion that that delay was unreasonable or vexatious. We do not agree.

Minn. Stat. § 176.221, subd. 8, clearly requires that an order for payment of compensation, unless appealed, shall be paid within fourteen days. Since the employer did not appeal from the June 23, 1997, decision of this court affirming Judge Rieke's award of benefits, payment was due within fourteen days after the filing of that decision. The employer's argument that the fourteen-day time limit does not begin to run until after the time for appeal has expired was rejected by this court in Valine v. Harbor City, 50 W.C.D. 296 (W.C.C.A. 1993). We agree with the compensation judge's determination that benefits in this case were payable as of July 7, 1997. As noted by the judge in the Memorandum accompanying her Findings and Order, "[n]o evidence was presented on the reason for the delay in payment." In the absence of any explanation by the employer, we concur with the compensation judge, that a five-week delay in issuing payments is a substantial period of time and a substantial delay to the employee. We further note that, as of the date of the hearing of this matter, the employer had only recently paid the balance of the temporary partial disability benefits ordered by Judge Rieke, covering the period of August 28, 1996, through December 7, 1996, and had yet to pay the statutory interest ordered

by the judge. We cannot conclude that the penalty awarded by the compensation judge amounted to an abuse of discretion.

Failure to File an NOID

At Finding 8, the compensation judge determined that the employer failed to file an NOID on or about July 7, 1997, when it discontinued payment of temporary partial disability benefits ordered by Judge Rieke. Consequently, the judge ordered a penalty of $500.00 payable to the employee pursuant to Minn. Stat. § 176.225, subd. 1(e).[4] The employer argues that on or about July 7, 1997, it was not discontinuing any temporary partial disability benefits, that the employee did not stop or start working at that time, and that, in fact, the employee had been off work since December 1996. We note also that, at the time of trial, the employer indicated that it had already issued payment of both benefits for the period August 28, 1996, through December 7, 1996, and a 30% penalty on those benefits for its delay in paying them. Regardless of whether or not the employer should properly have filed an NOID upon withholding part of, as opposed to actually discontinuing payment of, the benefits that had been ordered due, we conclude that the judge's imposition of a $500 penalty in addition to the 30% penalty already paid voluntarily by the employer constituted a double penalization not clearly authorized by the statute. Therefore we reverse the judge's imposition of that $500 penalty for the employer's failure to file an NOID on or about July 7, 1997.

Delay in Payment of Medical Expenses

In Findings 9 and 10, the compensation judge determined that $2,334.37 in medical expenses awarded by Judge Rieke to two medical providers was not paid until December of 1997. In addition, interest awarded by the compensation judge had not been paid. In Finding 11, the compensation judge determined that the delay in payment of medical expenses was unreasonable and neglectful and awarded a penalty of $583.59 payable to the employee, pursuant to Minn. Stat. § 176.225, subd 1(b) and (c). The employer argues that the employee's claim for penalties relating to medical benefits must be denied, on grounds that the employee has no standing to assert that he is entitled to interest and penalties as a result of any late payment to his medical providers. We do not agree. Just as the employee's indemnity benefits were due by July 7, 1997, so too was payment to the health care providers. Moreover, an employee is not without standing to claim penalties for late payment of his medical expenses. See Spawn v. Northern Castings, 53 W.C.D. 167, 174 (W.C.C.A. 1995). The compensation judge's award of a penalty for the employer's failure to pay medical expenses in a timely manner is affirmed.

[4] At the time of the employee's injury, § 176.225, subd. 1(e), provided for a penalty award where an employer or insurer has "unreasonably or vexatiously discontinued compensation in violation of §§ 176.238 and 176.239." This language is currently found in Minn. Stat. § 176.225, subd. 1(f) (1995).