DESSA LUKAT, Employee/Cross-Appellant, v. NORTH STAR HOME CARE and AM. COMP. INS. CO., Employer-Insurer/Appellants, and MEDICAL ADVANCED PAIN SPECIALISTS, NORTH MEMORIAL HEALTH CARE and MINNEAPOLIS ADVANCED RADIOLOGY ASSOC., LTD., Medical Providers, and MN DEP'T OF HUMAN SERVS. and MN DEP'T OF LABOR & INDUS., Intervenors, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 25, 2001

No. [REDACTED SSN]

HEADNOTES

WAGE - CALCULATION. The compensation judge erred in including mileage reimbursements to the employee in the calculation of the weekly wage where the reimbursements were based on actual miles traveled and were not a discretionary allowance to the employee.

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical records and expert medical opinion, supported the compensation judge's finding that the employee had reached maximum medical improvement.

CAUSATION - PSYCHOLOGICAL CONDITION. Substantial evidence, including medical records and expert medical opinion, supported the compensation judge's finding that the employee's depression was not the result of the physical effects of her work injury.

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's own testimony, supported the compensation judge's finding of a less than reasonably diligent job search.

PENALTIES. Under the unusual circumstance of this case, the evidence adequately supported the compensation judge's denial of penalties.

Affirmed in part and reversed in part

Determined by Wheeler, C.J., Wilson, J., and Pederson, J.
Compensation Judge: Gary M. Hall

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the inclusion of mileage reimbursements in the calculation of the employee's weekly wage. The employee cross-appeals from the findings that the employee reached maximum medical improvement effective August 15, 2000, that the employee failed to perform a reasonably diligent job search between August 1, 2000 and the date of hearing, and that the employee's psychological condition was not causally related to the work

injury. The employee also cross-appeals from the judge's denial of penalties under Minn. Stat. § 176.225. We affirm in part and reverse in part.

BACKGROUND

The employee, Dessa Lukat, completed training as a licensed practical nurse at Hennepin Technical College in Brooklyn Park, Minnesota, in March 1998. From October 1998 to July 1999 she worked for Hennepin Home Health Care providing home care to patients, primarily assisting with medications and dressings and monitoring patients' vital signs. After a brief employment in factory work through a temporary service, the employee obtained a position with the employer, North Star Home Care, visiting medical clients in their homes. She was paid at the rate of $25.00 per hour for visits to Medicare patients, $18.00 per hour for "private pay" patients, and $20.00 per hour for other patients. Most of the patients she was assigned were Medicare patients. The employee did not receive pay for the time spent traveling between patient visits, but would receive mileage reimbursement. (Exh. Q; T. 35-36, 41-46.)

The mileage related payments were, for the most part, based on the actual mileage driven, which the employee was required to report to the employer periodically. It was paid at the federal tax deduction rate of 32 cents per mile. The only exception to using the actual mileage was that the mileage to the employee's first home visit and from her last home visit in each day was based on the mileage between the employer's office and the patient's home, although the employee was not actually required to come to the employer's office each day prior to beginning work. The employer's owner testified that this was required under Medicare expense reimbursement regulations, which were the basis for the employer's mileage payment policies, as well as for the policy that employees were not paid for travel time between patient homes. (T. 108-109, 118-119, 123-126.)

On January 6, 2000 the employee sustained a work-related injury in the nature of a chronic cervical and lumbar strain while transferring a patient from a wheelchair. (T. 51-53; Finding 4 [unappealed].) On the date of injury the employee was 31 years of age. The employee sought treatment on the date of the injury at the emergency room of North Memorial Hospital. She complained of severe neck and back pain and headache. A head CT scan performed to rule out any hemorrhage was negative. The employee was diagnosed with a lumbar and cervical strain, given a shot of Demerol and discharged with a prescription for Robaxin. (Exh. H.)

On January 7, 2000, the employee sought follow-up care for her injury at Northworks Occupational Health Services, an affiliate of North Memorial Health Care, where she was seen by Dr. Jennifer Huebner, M.D. The employee reported pain in the right and left lower back, more on the right than left, and pain in the right trapezius region of the upper back. Examination of the neck showed slightly decreased range of motion with some discomfort but no obvious spasm. In the upper back, some tenderness was present over the trapezius region, but the employee had good range of motion of her upper arms without neck or back discomfort. Examination of the low back showed tenderness to palpation over the paralumbar muscles, especially on the right, but no spasm. There was some decrease in back motion. Straight leg testing was negative bilaterally. Dr. Huebner diagnosed a thoracic and lumbar strain. She restricted the employee to no lifting or carrying greater than 10 pounds and no pushing or pulling

above 30 pounds, and advised the employee to remain off work until January 9, 2000. The employee was given Flexeril. (Exh. J.)

On January 10, 2000 the employee was seen for her work injury by Dr. Merle S. Mark, M.D., at the New Hope-Crystal Medical Clinic. Spasm was present in muscles of the employee's neck and low back and she was somewhat restricted in motion in both areas. Dr. Mark diagnosed a low back strain and cervical strain. He continued the employee on Flexeril and recommended four physical therapy visits at the Institute for Athletic Medicine. He extended the employee's off-work status pending completion of the physical therapy. On January 20, 2000, Dr. Mark referred the employee for a lumbar MRI. The MRI was negative. (Exh. G.)

On January 26, 2000 the employee told her physicians at the New Hope-Crystal Clinic that she continued to have low back pain, neck pain and headache. She reported that she had been treated with needle injections and suction by Hmong healers and that this had helped her neck and shoulder pain and headache. The employee expressed concerns over her financial situation. On February 7, 2000, Dr. Mark noted that the reports from physical therapy indicated that the employee was showing progress in the low back. His examination showed minimal spasm of the paravertebral muscles in the lumbar area, but reasonably full range of motion at the waist. There was reduced range of motion of the head on the neck in all directions. Neurological examination of the upper extremities was "non-focal." Because of the persistence of the employee's cervical and shoulder symptoms, Dr. Mark recommended an MRI of the cervical spine. (Exh. G.)

On March 1, 2000 the employee returned to Dr. Mark reporting continued pain in the back and neck. Dr. Mark referred the employee to an orthopedic surgeon, Dr. Paul Crowe, M.D., for evaluation. The employee also told Dr. Mark that she had become quite depressed. Dr. Mark gave her some samples of Celexa to take for depression. On March 3, 2000 the employee was seen at the New Hope-Crystal Clinic for a medication check. She reported that she had stopped taking the Celexa, which had caused unpleasant side effects. The employee was given samples of Zoloft to try instead of the Celexa. (Exh. G.) The employee's cervical MRI was performed on March 15, 2000 and was read to be normal, with no evidence of dehydration, degeneration or herniation at any level. (Exh. M.)

On March 21, 2000, the employee sought an evaluation from Dr. Thomas V. Rieser, M.D., at Midwest Spine & Orthopaedics, LLC. She reported symptoms of constant aching neck pain, headaches, bilateral shoulder pain with numbness in the hands, constant low back aching pain, and sharp, intermittent mid and low back pains depending on movement or activity. She also reported "emotional issues that are keeping her awake at night." The employee's cervical examination was normal with full range of motion and no spasm. No muscle spasm was present in the lower lumbar spine and range of motion was 100 percent of normal. Dr. Rieser diagnosed a myofascial sprain/strain of the cervical spine and lumbar back. He referred the employee to Medical Advanced Pain Specialists ("MAPS") for further evaluation and for chronic pain management. (Exh. I.)

The employee was also seen on March 21, 2000 by Dr. John Torseth, M.D., at the New Hope-Crystal Clinic. Dr. Torseth noted that Dr. Crowe had not considered the employee a

surgical candidate. It was also noted that the employee had been referred to the MAPS pain clinic by Dr. Rieser. The employee reported "multiple social problems with not working for the past three months" including "problems paying her bills and her electricity is suppose[d] to be turned off today." She reported difficulty in sleeping and "problematic thoughts," but no suicidal ideation. Dr. Torseth diagnosed situational depression, increased the employee's dosage of Zoloft, and recommended that the employee return in three weeks to report on her progress and "possible further assistance for her social situation." (Exh. G.)

The employee was seen at MAPS by Dr. David M. Schultz, M.D., on April 12, 2000. The employee reported symptoms of intermittent low back and neck pain and headaches several times per week. Her cervical range of motion was minimally limited in flexion and extension and upper and lower extremity range of motion and strength were within functional limits bilaterally. The employee refused to attempt lumbar flexion due to fear of pain, but lumbar extension was within normal limits. Dr. Schultz diagnosed low back pain and neck pain and recommended a neuromuscular reeducation program with an emphasis on self-management, with 12 visits anticipated over an 8-10 week period. (Exh. F.)

On April 12, 2000, Dr. Schultz again saw the employee who reported that her low back pain had lessened since the work injury but that her neck pain continued to be "bothersome and disabling." The employee reported noting intermittent tingling down the right leg. On examination, Dr. Schultz found straight leg raising positive on the right at 90 degrees but negative on the left. He diagnosed persistent cervicalgia and lumbar radicular symptoms. He recommended further physical therapy, a TENS unit, and anti-inflammatory medications. On May 4, 2000 the employee returned to Dr. Schultz reporting persistence of her symptoms, with no relief from the TENS unit. She was treated with trigger point injections in the right and left lumbar paraspinous musculature and in the left shoulder. (Exh. F.)

On April 18, 2000, the employee underwent a medication evaluation by Dr. Paul Ekberg, D.O., at Psychiatric Recovery. The employee reported that she "has been constantly worrying because she has threats of the utilities being shut off and her car being repossessed. She is extremely stressed, has nightmares of herself falling off cliffs, has depressed mood, is irritable, amotivational, lethargic, crying all the time, and has had passive suicidality without plan or intent . . . She has significant anxiety without panic symptoms and very low energy during the day." Dr. Ekberg's diagnosis was "Axis I: Adjustment Disorder with Depressed Mood 309.0; Axis II: Deferred; Axis III: Chronic pain secondary to back and neck muscle strain; Axis IV: Stressors are severe mainly related to loss of income; Axis V: GAF is 55." He prescribed a trial of Effexor as well as Klonopin as needed for insomnia and anxiety. (Exh. L.)

The employee returned to Dr. Schultz on May 19, 2000 reporting that her shoulder pain had completely resolved but pain in the back and neck continued to recur with light activity. Dr. Schultz recommended a lumbar steroid injection. On June 1, 2000 the employee returned to Dr. Schultz reporting that the lumbar steroid injection had exacerbated her pain symptoms, with pain radiating into the right lower extremity. Dr. Schultz noted that the employee "cries and exhibits exaggerated pain symptoms with change of position." Straight leg raising was now negative at 90 degrees on the right. Dr. Schultz recommended returning to physical therapy and

consideration of possible pool therapy. On June 21, Dr. Schultz reported that the employee had started physical therapy and found the warm pool therapy somewhat helpful. (Exh. F.)

On July 31, 2000 Dr. Schultz wrote a letter to the employee's attorney assessing the employee's condition. He diagnosed myoligamentous injuries to the lumbar and cervical spine and a developing chronic pain syndrome. In his view, her condition rated a 3.5 percent permanency for a lumbar spine syndrome, and a 3.5 percent permanency for a cervical pain syndrome. He opined that the employee's ongoing pain and pain behavior were the result of physical as well as psychosocial-emotional factors. He recommended a multidisciplinary chronic pain program and continuation of physical therapy. With respect to the employee's depressed mood, Dr. Schultz opined that "the severe and refractory nature of her persistent pain has contributed to her current anxiety and depression." He considered the employee totally disabled from the time of her injury until the date of his report, but that thereafter the employee was capable of returning to work with restrictions for four hours per day for a two-week period and full time thereafter. (Exh. E.)

The employee underwent an evaluation by Dr. Thomas J. Raih, M.D., on July 24, 2000 on behalf of the employer and insurer. Dr. Raih's diagnosis was of a lumbar and cervical strain, with normal neurologic examination and very few objective findings. Dr. Raih opined that "since April 1, 2000, Ms. Lukat's problems have been primarily social. . . [I]t is apparent from the medical notes that her findings were primarily subjective. All diagnostic tests were primarily normal." In his opinion, the employee had reached maximum medical improvement. He opined that she was temporarily totally disabled from the date of injury through the end of March 2000, after which she was capable of working at least limited light-duty work through April, May and June. Regarding further treatment, Dr. Raih recommended only "an exercise program and some social support." (Exh. 4.)

On August 18, 2000 a hearing was held before a compensation judge of the Office of Administrative Hearings to consider issues including, among other matters not relevant to this appeal, whether mileage reimbursements should be included in the calculation of the employee's weekly wage on the date of injury, the employee's entitlement to temporary total disability benefits, whether maximum medical improvement had been reached, and whether psychological treatment received by the employee was causally related to the work injury. Also at issue was a claim by the employee for penalties against the employer and insurer. Following the hearing, the compensation judge held that the employee was entitled to temporary total disability benefits from the date of injury to July 31, 2000, a 7 percent permanent partial disability rating and medical benefits. In fixing the employee's weekly wage, the compensation judge determined that mileage reimbursement payments should be included in the calculation. The judge found that the employee had reached maximum medical improvement, that the employee's psychological treatment was not causally related to the work injury and that the employee had failed to conduct a reasonably diligent job search from August 1, 2000 to the date of hearing. The judge also denied the employee's request for penalties. The employer and insurer appeals from the calculation of weekly wage, and the employee cross-appeals from the denial of a penalty and the findings relating to maximum medical improvement, causation for the employee's psychological condition and failure to conduct a reasonably diligent job search.

STANDARD OF REVIEW

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

DECISION

Calculation of Weekly Wage

The compensation judge included mileage reimbursements paid to the employee in the calculation of the weekly wage at the time of injury as "part of her wage contract." (Finding 1; Mem. at 4.) In making his decision, the compensation judge apparently focused on the statutory language which requires allowances to be included in computing weekly wage. This statute, Minn. Stat. § 176.011, subd. 3, provides that, "Where board or allowances . . . are made to an employee in addition to wages as part of the wage contract they are deemed to be part of earnings and computed at their value to the employee." The judge concluded that, because the employer told the employee that mileage reimbursements would be provided to compensate for the inability to pay the employee for the time spent traveling between clients, the reimbursements in this case were "part of the wage contract" and thereby properly included in the calculation of wage. (Id.)

There is a clear distinction in prior cases between an "allowance", or sum for expenses which is provided to an employee regardless of the actual expense incurred and without documentation, which is generally included in the employee's wages, and a reimbursement for actual expenses incurred. A meal or other expense allowance provided to an employee regardless of the actual expense incurred and without requiring documentation by the employee is generally included in the employee's wages. See, e.g., Illg v. Dagget Truck Lines, Inc., slip op. (W.C.C.A. May 18, 1990); Truesdale v. Detman, Inc., 40 W.C.D. 12 (W.C.C.A. 1987). On the other hand, in cases involving direct payment or reimbursement of actual expenses, we have held that such payments are not compensation to the employee and are excluded from the wage calculation. As these expenses are incurred solely by reason of the demands of the employment, and are paid only to the extent actually incurred, leaving no actual or potential discretionary compensation to the employee, their payment is not income which is lost to an employee after a work-related disability. See Johnson v. American Red Cross, slip op. (W.C.C.A. June 3, 1993).

Here, the reimbursements were calculated by actual mileage, although the mileage paid for transportation expenses to the first client visit and from the last client visit was calculated based on the distance from the employer's offices. The employer and insurer argue that this situation was one of simple reimbursement, and that the mileage paid should not have been included in the wage calculation. The employee, on the other hand, argues in essence that although actual mileage was used to calculate the mileage reimbursements, the mileage paid was not necessarily an accurate reflection of the employee's actual costs of transportation, and therefore was properly included in the wage calculation. Specifically, the employee points out that she was paid for mileage incurred even on occasions when she borrowed a friend's car and did not pay for the gasoline, and that she could have claimed a mileage reimbursement even had she walked or taken the bus, although she had never actually done so. The employee further points to the fact that the calculation of mileage to the first and from the last visit of the day was not based on her own actual mileage, but on the mileage between the first and last clients' homes and the employer's offices. Finally, the employee argues that the amount per mile, based on the federal mileage rate, does not necessarily correspond to actual mileage costs incurred, thus permitting possible gain or income.

With respect to the employee's first point, we do not think that the fact that the employee was on occasion able to borrow a friend's car transforms the reimbursement into a discretionary payment equivalent to a wage. Instead, such instances are most reasonably seen as situations in which the employee has received a gift from a friend, a matter not particularly relevant to the form of the payment relationship here between the employer and the employee. As to the second point, we note that the calculation of initial and final mileage to reflect the distance to the employer's offices was a federal program requirement, and apparently reflects the view that the mileage to be paid should not vary depending on the distance that the employer's home health workers might live from the employer. In essence, this calculation merely factors out the employee's commute to and from work for the employer from the determination of the mileage required to provide the health care. This lone exception is not enough to make this reimbursement a discretionary "allowance." Finally, we also do not think that the use of the federal tax rate for mileage makes this a discretionary allowance. The federal mileage rate is admittedly an arbitrary figure, and may over-estimate mileage-related costs for some individuals and underestimate them for others. It is not contested that this rate is intended to be a reasonable estimate of the average actual costs of maintaining and operating an automobile, factored out into a per mile basis. We do not think that the use of this mileage rate is a basis for finding that the payments made were something other than reimbursements for actual expenses. Were we to do so, we would in effect hold that every employer providing mileage reimbursement would have to monitor all of an employee's automobile costs, work and non-work, including insurance, amortization, depreciation, repairs, gasoline and oil consumption, in order to avoid having the reimbursement for mileage considered additional wages to the employee.

In light of the uncontroverted evidence in this case, we conclude that the compensation judge erred in including the mileage reimbursements made to the employee as part of her weekly wage, and reverse.

Causation for Depression Condition

The compensation judge found that the employee's treatment for depression was not causally related to her work injury. The employee appeals, arguing that the compensation judge relied solely upon a "gratuitous statement" by Dr. Raih, and that Dr. Raih's opinion was without adequate foundation because he is an orthopaedic physician rather than a psychologist or psychiatrist. The employee further asserts that her testimony and the opinions of both Dr. Schultz and Dr. Ekberg, that the employee's depression was related to the pain caused by the work injury, compelled a finding for the employee. (Employee's Brief at 10.)

The issue on appeal is whether there is adequate evidence in the record to support the compensation judge's resolution of this factual issue. The medical evidence in this case would support either parties' position. Dr. Schultz did offer the opinion that "the severe and refractory nature of [the employee's] persistent pain has contributed to her current anxiety and depression." (Exh. E: 7/31/2000.) There is, however, little in Dr. Schultz's treatment and examination records to suggest that the employee specifically reported that her depression was directly related to her physical symptoms or limitations themselves, whether objective or subjective, rather than to the indirect consequences of her injury in terms of loss of income. While Dr. Ekberg opined that the depression is related to the employee's injury, his specific diagnosis with respect to the employee's depressed mood includes the statement that the employee's "[s]tressors are severe mainly related to loss of income." (Ex. L.)

Dr. Raih's report stated that ". . . since April 1, 2000, Ms. Lukat's problems have been primarily social. It should be noted that she has had the support of her psychologist and psychiatrist." While we disagree with the employee's characterization of Dr. Raih's comment as "a gratuitous statement," it is true that his remarks on this issue were brief and given in association with his opinions on the other medical issues relating to the employee's physical symptoms. Nonetheless, the comments clearly reveal his medical opinion that the employee's depression was principally the result of social factors, rather than over the physical effects of the work injury. The medical records consistently mention the employee's depression as connected to such factors as "social problems" and financial concerns.

As to the relative qualifications of the physicians to render an opinion, while Dr. Raih is not a psychologist or psychiatrist, neither are Dr. Schultz or, apparently, Dr. Ekberg, who is listed as D.O. and thus seems to be an osteopath. In any event, the fact that a physician is not a specialist does not render his opinion without foundation. A compensation judge may consider the specialties of the physicians offering opinions in assessing the weight the judge ascribes to the various opinions, but the judge need not accept the opinion of a specialist over a generalist where the weight of the evidence taken as a whole reasonably appears to the judge to support a different result. Overall, we conclude that the compensation judge's finding on causation for the employee's depression had adequate support in the record, and affirm. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

Maximum Medical Improvement

Maximum medical improvement is defined as, "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. § 176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Maximum medical improvement is an issue of ultimate fact to be determined by the compensation judge after considering medical records, medical opinions, and other relevant evidence. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989).

The employee points out that Dr. Schultz has recommended that the employee undergo a chronic pain program and participate in further physical therapy, and that a physician at the MAPS Clinic also has recommended further physical therapy. The employee argues that this further treatment may result in additional functional improvement and pain relief.

The compensation judge, however, accepted Dr. Raih's opinion that the employee has reached maximum medical improvement and is not in need of further medical treatment. Further support for the compensation judge's MMI finding is provided by the uncontroverted negative results of the employee's radiologic tests as well as by Dr. Raih's examination findings indicating that the employee has reached a point of no objective improvement of function or other objective symptomology related to the work injury.

Dr. Raih's opinions had an adequate foundation. Accordingly, we must affirm the compensation judge's choice of his opinion over the opinions of the physicians cited by the employee. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (1985).

Job Search

The compensation judge found that the employee's job search efforts between August 1, 2000 and the date of hearing on August 18, 2000 had been less than reasonably diligent. A job search must be evaluated in light of all the facts and circumstances of a case. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 956 (Minn. 1988). Whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989).

The employee was released to return to light duty work by Dr. Schultz in his letter report dated July 31, 2000. The employee testified that she looked for work by reading newspaper advertisements, searching the internet, checking job service listings and making telephone calls. The employee argues that her level of job search activity should take into consideration her consultation, on August 4, 2000, with a QRC with the state vocational assistance program. She contends that she fully cooperated with the QRC's recommendations and therefore satisfied the standard for entitlement to temporary total disability benefits. She acknowledged, however, that she did not submit any job applications or go on any interviews. She also admitted that until just prior to the hearing, she had not applied for child care assistance, which she agreed would need to be in place before she was actually available to return to work. (T. 69-73, 93-97, 100-103.)

While the compensation judge could have concluded that the employee's search efforts were reasonably diligent, he apparently was not persuaded by the employee's testimony. No evidence, other than the employee's testimony, was offered concerning what, if anything, the state QRC recommended or whether the employee cooperated. The admissions by the employee that she submitted no applications and did not provided for day care are sufficient evidence to support the compensation judge's finding that the employee's efforts were inadequate. His determination is affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984).

Penalty for Frivolous Defense

On November 23, 1999 the insurer sent the employer a notice of cancellation of coverage for nonpayment of premium, with cancellation to be effective on December 23, 1999. (Exh. 1.) On about January 6 or 7, 2000 the insurer received notice of the employee's January 6, 2000 injury. On February 7, 2000 the insurer sent a letter denying coverage for the injury on the basis of the assumed effective cancellation date of December 23, 1999. (T. 146; Exhs. 1, W.)

According to the testimony of the insurer's claims resolution specialist, Joseph Vierling, no claim number was generated and no file was opened, and the insurer heard nothing further about the employee's claim until about April 24, 2000, when he received a telephone call from the Office of Administrative Hearings asking whether anyone representing the insurer would be participating in a pretrial hearing on the employee's claim petition on the following day, April 25, 2000. Mr. Vierling testified that he called an attorney and that he and the attorney attended the pretrial conference. According to Mr. Vierling, the insurer had no information at all about the employee's claim in its system at that time. At the pretrial conference, the insurer first learned that the Special Compensation Fund had taken the position that the insurer's coverage had continued past the date of injury by operation of law. The insurer maintained its denial of the claim pending investigation, including taking the employee's deposition and conducting an independent medical examination. Attempts to contact the employer failed as the employer had gone out of business. The independent medical examination ("IME") was conducted on July 24, 2000.

> The insurer admitted at hearing that at some time between the pretrial conference and the hearing it became clear that the insurer's coverage had continued through the date of injury by operation of law. The insurer also admits that by the date of the IME on July 24, 2000 it was clear that at least some medical benefits and a portion of the claimed temporary partial disability compensation was payable. However, the insurer indicates that its failure to pay benefits should be excused because it had entered into settlement negotiations with the employee's attorney during the weeks just preceding the hearing, and payment was deferred in anticipation of a settlement and the making of a single payment. The parties ultimately failed to reach a settlement, and as of the hearing on August 18, 2000, no payments had been made. (T. 135-174.)

The employee sought a penalty against the insurer pursuant to Minn. Stat. § 176.225, subd. 1, which provides:

> Subdivision 1. Grounds. Upon reasonable notice and hearing or opportunity to be heard, the commissioner, a compensation judge, or upon appeal, the court of appeals or the supreme court shall award compensation, in addition to the total amount of compensation award, of up to 30 percent of that total amount where an employer or insurer has:
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> (a) instituted a proceeding or interposed a defense which does not present a real controversy but which is frivolous or for the purpose of delay; or
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> (b) unreasonably or vexatiously delayed payment; or
>
> (c) neglected or refused to pay compensation; or
>
> (d) intentionally underpaid compensation; or
>
> (e) frivolously denied a claim; or
>
> (f) unreasonably or vexatiously discontinued compensation in violation of sections 176.238 and 176.239.
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> For the purpose of this section, "frivolously" means without a good faith investigation of the facts or on a basis that is clearly contrary to fact or to law.

The compensation judge denied the employee's request for a penalty "given the confusion over coverage and the rarity of the issue facing the claim representative." (Mem. at 8.) The employee appeals, arguing that even if the insurer's initial confusion was justified, the insurer knew by June 25, 2000 at the latest that its coverage defense was inapplicable, and that the insurer's failure to pay at least those benefits admittedly due to the employee thereafter through August 18, 2000 required the compensation judge to award a penalty.

We conclude that substantial evidence supports the judge's implicit finding that the failure to make any payments during this brief period was not vexatious and was not unreasonable under the unique factual circumstances presented. Whether a penalty is appropriate under Minn. Stat. § 176.225 is a question of fact for the compensation judge. Maxfield v. Stremel Mfg. Co., No. [REDACTED SSN], slip op. at 5, 7 (W.C.C.A. Jan. 6, 1999). We cannot here conclude that the compensation judge abused his discretion in declining to award a penalty.