IDA JEAN PHILLIPS, Employee/Appellant, v. HENNEPIN CNTY., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 12, 2001

No. [REDACTED SSN]

HEADNOTES

REHABILITATION – RETRAINING. Substantial evidence supports the compensation judge's denial of the employee's proposed retraining plan as a medical lab technician where that position would exceed the employee's physical restrictions.

ECONOMIC RECOVERY COMPENSATION. Where the employee sustained a second injury during the 90 day post-MMI period following her first injury, and was working at the end of the 90 day post-MMI after the first injury, but was not at MMI from the second injury and subsequently was medically unable to return to work as a result of both injuries, a determination of entitlement to economic recovery compensation cannot be made until after the employee reaches MMI from all conditions.

ECONOMIC RECOVERY COMPENSATION. Where the employee sustained an injury to her left shoulder and was paid permanency benefits for this condition, and subsequently developed thoracic outlet syndrome, the employee is not entitled to additional benefits under Minn. Stat. § 176.101, subd. 3t(b) (repealed 1995).

PENALTIES. Where the employee had returned to work, and payment of impairment compensation was delayed over three months while the parties were in settlement negotiations, a 15% penalty is appropriate under the circumstances. The payment should have been made even though the remainder of the settlement payments were delayed because of continuing settlement negotiations.
Affirmed in part, vacated in part, and reversed in part.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Peggy A. Brenden.

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's denial of the employee's request for retraining, her claim for economic recovery compensation benefits and her claim for benefits pursuant to Minn. Stat. § 176.101, subd. 3t(b). The employee further appeals from the compensation judge's denial of her claim for penalties related to payment of permanent partial disability benefits. We affirm the denial of the employee's retraining claim and denial of benefits

pursuant to Minn. Stat.§ 176.101, subd. 3t(b); we vacate the compensation judge's denial of the employee's claim for economic recovery compensation; and we reverse the denial of penalties related to payment of permanent partial disability benefits.

BACKGROUND

On August 5, 1991, Ida Jean Phillips (employee) sustained an admitted injury to her left upper extremity in the course of her employment with Hennepin County (self-insured employer). At the time of her injury, Ms. Phillips was 39 years old and was earning a weekly wage of $540.44. The self-insured employer paid temporary disability benefits, medical expenses and impairment compensation benefits based on a 3 % permanent partial disability to the body as a whole as a result of the employee's injury to her left shoulder.

On December 8, 1994, the employee sustained an admitted injury to her low back in the course of her employment with the employer. At the time of that injury, the employee was earning a weekly wage of $589.60. Following that injury, the self-insured employer paid temporary total disability benefits, medical expenses and impairment compensation benefits based on a 7 % permanent partial disability to the body as a whole as a result of the employee's injury to her low back.

The employee has worked for the self-insured employer since August 1980, in both part-time and full-time capacities. Prior to working for the employer, the employee obtained a bachelor's degree in art education and a master's degree in art, both from St. Cloud State University. The employee had also taken multiple science classes in high school, at Mesaba Community College and at St. Cloud State University, including biology, human anatomy and physiology, embryology, histology, chemistry and comparative anatomy. The employee had an interest in medical illustration and applied for work at the Hennepin County Medical Examiner's Office to further that interest. In 1980, she first interned for three months as a full-time volunteer autopsy assistant in the Medical Examiner's Office. Upon completion of her internship, she worked as a paid temporary morgue attendant at HCME from August 1980 through February 1981. Thereafter, until April 1986, she worked as a part-time morgue attendant. The employee then worked full-time in the Medical Examiner's Office until April 1995, working as both a Medical Examiner Technician and Medical Examiner Investigative Assistant/Autopsy Specialist. The employee performed a variety of duties including autopsy preparation and cleaning, assisting with autopsies and crime scene investigation, property inventory, and additional administrative tasks related to autopsy procedures.

On August 5, 1991, the employee lifted a bucket and experienced immediate pain in her neck, upper back, left shoulder and arms. In the subsequent months, she experienced left arm and hand pain and numbness. Initially she was diagnosed with left shoulder impingement syndrome. On July 27, 1993, the employee underwent left shoulder surgery in the nature of anterior acromioplasty, bursectomy and saline arthrogram, performed by Dr. Richard Kyle. Post-surgery, the employee returned to work in November 1993 and eventually performed her usual duties, although she was restricted in her ability to lift and reach. Following the employee's shoulder surgery, she continued to experience a recurring numbness in her hands. The employee's left shoulder had regained full range of motion by late January 1994, but the employee continued

to complain of numbness and swelling in her left hand. Dr. Kyle suspected thoracic outlet syndrome and referred the employee to Dr. David Blake for evaluation of her condition. The employee was evaluated by Dr. Arlen Holter on February 23, 1994, and by Dr. Blake on June 6, 1995. Both physicians diagnosed the employee with thoracic outlet syndrome and recommended that she undergo a surgical first rib resection. The employee, however, chose not to pursue surgery at that point, and continued to work within physical work restrictions.

On October 27, 1994, the employee was served with notice of maximum medical improvement (MMI), along with Dr. Richard Kyle's medical report of October 3, 1994. On November 4, 1994, the employer paid the employee permanency benefits as impairment compensation benefits based on Dr. Kyle's determination that the employee sustained 3% permanent partial disability of the body as a whole, pursuant to Minn. R. 5223.0110, subp. 2.C., as a result of her left upper extremity.

On December 8, 1994, the employee injured her low back as she attempted to reposition a body for an autopsy, and noticed immediate pain in the sacral area of her low back extending into her right leg. The employee remained off work until December 23, 1994; thereafter she returned to work and received no further medical treatment for her low back symptoms until April 26, 1995. Due to ongoing left arm symptoms, however, the employee discontinued working after April 26, 1995. On October 9, 1995, the employee underwent surgery in the nature of a left first rib resection as treatment for her left upper extremity injury. Following that surgery, the employee continued to experience varying degrees of pain and numbness in her left hand.

The employee was medically unable to continue working as a Medical Examiner Investigative Assistant/Autopsy Specialist after April 1995, due to the effects of both her left upper extremity and low back injuries. (Finding Nos. 14 and 15.) After it became apparent that the employee was physically unable to return to her previous position in the Medical Examiner's Office, the employee's disability case manager continued to work with the employee to clarify the employee's work restrictions and to begin exploration of work options. (Finding No. 16; Ee. Ex. J.) As part of that exploration, the employee underwent a Functional Capacities Evaluation at Saunders Physical Therapy in January 1996 and a vocational evaluation at the Courage Center in June 1996. The Courage Center's report of June 18, 1996, stated that the appropriate first step for the employee was to explore options with the employer, and that employee reported her desire to continue with a professional career, which "will probably mean retraining, if not on the job, then formally." The report also stated that the employer is "limited to work falling in the sedentary to light work categories, with lifting limited to 20-30 pounds, plus occasional restriction on gross motor activity. There were no limitations on use of hands and fingers, although she does report swelling in her hands and a loss of sensation which has resulted in dropping things–this may be a consideration for some types of work." The evaluator recommended some development of computer skills, suggested vocational areas to pursue, suggested that employee take another career exploration class, and recommended adaptive aids for the employee's work site, dependent upon her job. (Er. Ex.7.)

By September 1996, a qualified rehabilitation consultant [QRC] was assigned to facilitate the employee's return-to-work efforts. The employee underwent interest and aptitude testing, completed keyboard and computer course work, participated in informational interviews,

and conducted a job search for positions within and outside Hennepin County. The employee also explored alternative retraining programs.

One of the various positions with the employer which was considered for the employee was an Office Specialist I position. This option was first suggested in early 1998; the employee's QRC and the employer provided a job description for this position to various medical providers, to obtain their opinions as to whether the position was physically suitable for the employee.[1]

Since at least December 1994, the employee has treated on an ongoing basis with the family practice department of HealthPartners, whom she has consulted for both her left shoulder and low back symptoms. The employee primarily has consulted Dr. Ann Lowe at HealthPartners, who has referred the employee for various outside medical consultations, to address her ongoing symptoms and complaints. Dr. Terence Capistrant conducted a neurological evaluation in November 1997. He recommended an EMG of the upper extremities, which had normal results, and an MRI of the cervical spine, which did not show any significant nerve root impingement. In his report of December 9, 1997, Dr. Capistrant stated that "I have no ready explanation for the ill-defined paresthesias in both upper extremities." In a letter dated December 16, 1997, to the employee's QRC, Dr. Capistrant stated that "[f]rom a neurological standpoint, I have no reservations about allowing her to assume the light-duty job you outlined in your letter to me of 11/11/97." Dr. Capistrant recommended that the employee intersperse sustained keyboarding with rest periods or a variety of tasks. He also recommended no lifting over 25-30 pounds and no repetitive arm use at or above shoulder level. (Er. Ex. 27.)

On January 28, 1998, the employee underwent an evaluation with Dr. Chris Tountas at the request of the employer. Dr. Tountas concluded that based upon objective findings and a "plethora of negative studies, there are no restrictions relative to the upper extremities." Dr. Tountas determined that the employee had sustained no permanent partial disability to her left shoulder or left upper extremity as a result of her 1991 work injury, based upon lack of objective findings to support such a rating. (Er. Ex. 28.)

In his report dated April 27, 1998, Dr. Kyle, the employee's orthopedic surgeon, stated that the employee was still subject to her original work restrictions which were "[N]o overhead work, no heavy lifting, no use of the arms in an outstretched position, and no repetitive use of the arms." He also stated that the employee could do light duty work within those restrictions, and recommended that she return to work on a work hardening basis, beginning with four hours a day, gradually working up to eight hours per day. (Er. Ex. 24.) In his report dated August 18, 1998, Dr. Kyle stated that:

> At this time, I feel that this patient is suitable for the position as an Office Specialist I. I have reviewed the job description, job duties,

[1] The record contains multiple medical and rehabilitation reports documenting medical providers' assessments of the physical requirements of various jobs, opinions as to whether those jobs were suitable for the employee, and recommendations for ergonomic and other revisions necessary for the employee.

> and restrictions, and I feel that Ms. Phillips can perform this job. At this time, I would add no further restrictions.

(Er. Ex. 24.)

On June 15, 1998, the self-insured employer offered the employee a position as an Office Specialist I at its Family Medical Center. The employee's QRC had performed an on-site job analysis of this position; after receiving the offer, the employee visited the job site to personally view her proposed work site. At the same time the self-insured employer offered this job, it also filed a Notice of Intention to Discontinue Benefits (NOID) which stated that ongoing temporary total disability benefits would be discontinued as of July 3, 1998, if the employee rejected that job offer, pursuant to Minn. Stat. § 176.101, subds. 3e or 3f. The employee rejected the offer. Following an administrative conference which addressed the employer's request for discontinuance, a compensation judge determined that although the offered job was economically suitable, it was neither vocationally nor physically suitable, and therefore disallowed the employer's request to discontinue payment of temporary total disability benefits. The employer appealed, filing a petition to discontinue on September 17, 1998. In an unappealed finding, the compensation judge determined that the employee reasonably refused the Office Specialist I job as the written offer failed to inform the employee fully and completely of the job duties she would be expected to perform. (Finding Nos. 25 and 26.)

On June 29, 1998, the employee filed a Rehabilitation Request, requesting retraining at Hamline University to complete her major in biology and to obtain a forensic science certificate. The employer filed a rehabilitation response, opposing the employee's retraining request primarily due to the job offered by the employer which would purportedly provide a salary higher than entry level positions in the field of proposed study. At the employer's request, the employee underwent a vocational evaluation with Mark Raderstorf. After that evaluation and after completion of a labor market survey, Mr. Raderstorf concluded that the employee's position as an Office Specialist I was suitable, and that the proposed retraining program was not reasonable for the employee, based in part upon the salary available through the Office Specialist I position.

On October 16, 1998, the employee was served with notice of MMI relative to her 1991 work injury, with Dr. Kyle's medical report dated September 30, 1998. On October 19, 1998, the employer filed a NOID, referring to service of notice of MMI on October 16, 1998, and discontinuance of temporary total disability benefits 90 days thereafter, as of January 18, 1999. On November 2, 1998, the employee's rehabilitation request and employer's petition to discontinue were consolidated for hearing.

The employer again offered the Office Specialist I position to the employee on December 1, 1998. As part of a tentative settlement agreement, the employee accepted that offer and began working at Hennepin County's Family Medical Center by December 14, 1998. That settlement included, among other items, an agreement by the employee to accept that job offer and by the employer to pay permanent partial disability benefits related to the employee's December 8, 1994 low back injury. The employer also agreed to make certain ergonomic changes for the employee's new position. Settlement negotiations apparently broke down by mid April 1999, so

a settlement agreement was never finalized by the parties. As a result, the agreed-upon permanency benefits were not paid to the employee until April 21, 1999.

Dr. Lowe referred the employee to Dr. Gail Gregor for an occupational medicine consultation, which was conducted on February 25, 1999. Dr. Gregor concluded that

> Chronic pain clear[ly] is her major concern now and affects her whole life. She is not particularly enthusiastic about returning to work and feels that she is over-educated for the job of an office specialist. However, during the three years of not being at work, she states she was so fatigued and in so much pain that she could not engage in any work activities.

(Er. Ex. 17.)

Dr. Gregor diagnosed the employee with chronic muscular type upper/thoracic strain type back pain, chronic muscular type low back pain, chronic pain syndrome, history of left shoulder impingement syndrome, and history of thoracic outlet syndrome. Dr. Gregor also noted multiple musculoskeletal complaints with minimal objective findings on examination. Dr. Gregor concurred with Dr. Kyle's restrictions, in place since 1995. She recommended that the employee follow ergonomic recommendations for office-type work, that she rotate tasks and positions throughout her work day, and that she follow "other chronic pain management measures, including return to aerobic exercise, brisk walking for her, and pursuit of usual lifestyle interests and activities." Dr. Gregor suggested that a chronic pain program could be considered, but that "pursuit of other activities would probably be more beneficial than interfering with her work activities by participation in a daytime chronic pain program." (Er. Ex. 29.)

Dr. Lowe also referred the employee to Dr. Loran Pilling for a pain clinic evaluation. In his report of May 13, 1999, Dr. Pilling related the employee's dissatisfaction with her present work situation, and that the employee would like to be retrained "so that she can find a job that would meet her needs." Dr. Pilling further reported that

> She complains of pain in various areas of her body, which is complicated by chronic fatigue, chronic depression, and dissatisfaction in life. She is the kind of person that we would diagnose as having chronic pain syndrome that we very frequently treat in a pain clinic successfully. However, I don't feel that participation in pain clinic would be of value unless the vocational issue is also resolved. The treatment of choice would be to have her involved in a pain clinic program to address the physical issue and the complications that have developed and, at the same time, have others work diligently in the vocational area to bring that to resolution. If those two approaches were taken simultaneously, I think that this lady could reach a satisfactory place in life where quality of life was returned.

(Er. Ex. 30.)

After the employee completed a four-week pain clinic program, Dr. Pilling issued a report on August 11, 1999, stating that the employee had reacted positively to the therapies, that the employee agreed to participate in the aftercare program, and that, in his opinion, the employee can perform the job of Office Specialist at the Family Medical Clinic. Dr. Pilling concurred with the workstation modifications recommended by the employee's QRC, but also stated that the employee could start at the job before those changes are fully implemented. (Er. Ex. 30.)

In August and September, Dr. Lowe met with the employee and her QRC to review the modifications needed to accommodate the employee's restrictions. In a report dated September 7, 1999, Dr. Lowe outlined necessary restrictions, and stated that, "I would emphasize that until the restrictions are met for her job environment, she really ought not to return," and that "[o]nce these adjustments are in place, she may return to work."

On July 30, 1999, the employee filed a claim petition, claiming permanent partial disability benefits based upon 7 % whole body permanency relative to the employee's low back, a minimum of 26 weeks economic recovery compensation (ERC) and penalties for delay in payment of permanency benefits.

On August 23, 1999, the employer filed a NOID, advising that the employee's temporary total disability benefits would be discontinued as of August 19, 1999, based upon the expiration of the ninety day period post-service of MMI, and based upon the employer's assertion that the employee had refused to work at a position that was within her physical restrictions. The employee objected, arguing that the employee had not yet reached MMI from both her 1991 and 1994 injuries, from a physical and mental standpoint. Following an administrative conference on September 22, 1999, a compensation judge determined that the medical records, including Dr. Loran Pilling's report of August 11, 1999, which was served with the NOID, supported a determination that the employee had reached MMI. The judge therefore determined that reasonable grounds existed to discontinue temporary total disability benefits 90 days post-service of the NOID, by November 9, 1999. The employee appealed, filing an objection to discontinuance.

On September 29, 1999, the employer served another NOID which stated that benefits would be discontinued as of October 4, 1999, when the employee was scheduled to return to work after attendance at a pain clinic program.

On October 5, 1999, the employee filed an additional rehabilitation request for a change of QRC. The employer objected, asserting that the employee did not need any further rehabilitation services as she was re-employed with the employer in suitable gainful employment, and that such a request was premature because other litigation was pending regarding the employee's retraining request and the issue of suitability of the employee's current position.

As of November 1999, the employee's Office Specialist I position was reclassified to a "Patient Services Coordinator." The employee earned $13.21 per hour as of November 1999, and was scheduled to receive an increase to $13.61 per hour by early 2000. By November 1999, the employee's job duties as a Patient Service Coordinator were solidified, and included backup

phone room work, registering and scheduling patients for certain specialty clinics, and special projects as assigned. The employee was working at that position at the time of the hearing.

In December 1999, the employee revised her claim for retraining, requesting to be retrained as a medical laboratory technician.

Various claims and pleadings were consolidated for hearing which was held on January 6 and 7, 2000, including the employee's rehabilitation requests filed June 29, 1998 and October 20, 1999, the employer's petition to discontinue filed on September 17, 1998, the employee's claim petition filed on July 30, 1999, the employee's rehabilitation request filed on October 5, 1999, and the employee's objection to discontinuance filed on November 8, 1999. The following claims and issues were addressed:

1. Whether the requested retraining as a medical laboratory technician is reasonable and necessary.

2. Whether the employee's present position as an Office Specialist I, Patient Services Coordinator, represents suitable, gainful employment.

3. Whether the employee unreasonably rejected a job offer presented on June 15, 1998, pursuant to Minn. Stat. § 176.101, subd. 3(e) or 3(f), and therefore whether the employer is entitled to a credit for payment of temporary total disability benefits between July 6 and December 11, 1998.

4. Whether the employee reached maximum medical improvement as to her shoulder condition, as of October 27,1994, September 29, 1998, and October 16, 1998, and whether the employee reached maximum medical improvement as to her low back, as of November 3, 1998.

5. Whether the previously-paid impairment compensation benefits should now be paid as economic recovery compensation.

6. Whether the employee is entitled to payment of 26 weeks of ERC benefits related to her thoracic outlet syndrome, pursuant to Minn. Stat. § 176.101, subd 3t(b).

7. Whether the employee is entitled to penalties related to a delay in payment of permanency benefits relative to the employee's low back and related to the filing of a NOID in September 1999.

8. Whether the employee should be allowed to change QRC.

9. Whether the employee is qualified for further rehabilitation services.

10. Claimed attorney fees.

During the course of the two-day hearing, testimony was taken from the employee; QRC Monica Cronin; Katherine Rose Piela; occupational therapist with Saunders Therapy Centers who conducted an on-site job analysis of the Office Specialist I position in 1999 at the request of the employer; Marie Maes-Voreis, R.N., clinic manager of the Hennepin County Family Medical Center; Lee Korems, workers' compensation claims administrator for Hennepin County; Mark Raderstorf, the employer's vocational expert; and Stephanie Secrest, senior human resources representative assigned to the employer's health division.

Other evidence submitted at the hearing was extensive, and included the reports of Mr. Raderstorf, the report and deposition testimony of John Hjelmeland, the employee's vocational expert; the employee's medical records dating from 1990; the employer's personnel records for the employee, including job descriptions, job offers, wage records, and on-site job analyses; the employee's rehabilitation records and job search logs; the employee's high school and college transcripts; correspondence; and medical consultation reports.

In a decision issued on March 17, 2000, the compensation judge determined that the preponderance of evidence failed to establish that the proposed retraining program was physically suitable for the employee or that it is a cost-effective rehabilitation alternative. The compensation judge determined that the employee's current position with the employer represents an appropriate light duty job. However, the compensation judge determined that additional rehabilitation services are necessary to facilitate ergonomic adjustments for the employee's current position, and that the employee is in need of assistance of a QRC to facilitate and expedite these remaining modifications. The compensation judge therefore granted the employee's request to change QRC to Kari Schwandt.

The compensation judge determined the employee reasonably rejected the job offer presented on June 15, 1998, as that job was not suitable, gainful employment and the offer did not inform the employee fully and completely of the job duties she would be expected to perform. The compensation judge determined that the employee reasonably refused this job offer because the employee reasonably believed the job offered exceeded her physical abilities. As a result, the compensation judge denied the employer's claim for a credit for temporary total disability benefits paid from July 6, 1998 through December 11, 1998. Those findings were unappealed. (Findings No. 25 and 26.)

The compensation judge denied the employee's claim for economic recovery compensation benefits relative to her shoulder injury, and also denied the employee's claim for 26 weeks of benefits pursuant to Minn. Stat. § 176.101, subd. 3t(b), relative to her thoracic outlet syndrome. The compensation judge also denied the employee's claim for penalties related to claimed late payment of the 7 % permanent partial disability benefits and dismissed her claim for penalties associated with the filing of the NOID in September 1999.

The compensation judge also determined that, as of October 27, 1994, and again on October 16, 1998, the employee was properly served with notice of MMI relative to her August 15,

1991 left upper extremity injury. Although the employer claimed that the employee reached MMI relative to her low back injury as of November 3, 1998, the compensation judge determined that the employee had not reached MMI from her low back injury by that date. The compensation judge also determined that the medical reports served on the employee on September 29, 1999, which addressed both the 1991 and 1994 injuries, were improperly served as notice of MMI as they were not accompanied by a cover letter explaining the consequences of an MMI determination.[2] The compensation judge determined that the employee has not been properly served with an MMI report related to her 1994 injury.

The employee appeals the compensation judge's denial of her retraining request, of economic recovery compensation, of benefits under Minn. Stat. § 176.101, subd. 3t(b), and of penalties for late payment of permanent partial disability benefits.

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 (1998). 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.

"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

Retraining

The compensation judge denied the employee's claim for retraining as a medical technician. Retraining is one of the vocational rehabilitation benefits provided by Minn. Stat. § 176.102. As outlined in that section:

[2] We note that earlier the employee was properly served with notice of MMI relative to her 1991 work injury, on October 16, 1998.

> (b) Rehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability. Rehabilitation to a job with a higher economic status than would have occurred without disability is permitted if it can be demonstrated that this rehabilitation is necessary to increase the likelihood of reemployment. Economic status is to be measured not only by opportunity for immediate income but also by opportunity for future income.

Minn. Stat. § 176.102, subd. 1(b).

The self-insured employer provided rehabilitation assistance to the employee, initially by a disability case manager, and later through a QRC. In June 1998, the employee filed a rehabilitation request, requesting retraining at Hamline University to complete her major in biology and to obtain a forensic scientist certificate. The employee later amended her retraining claim, in December 1999, requesting retraining as a medical laboratory technician. That claim was denied by the compensation judge.

As outlined in Minn. R. 5220.0750, subp. 1, "[t]he purpose of retraining is to return the employee to suitable gainful employment through a formal course of study. Retraining is to be given equal consideration with other rehabilitation services, and proposed for approval if other considered services are not likely to lead to suitable gainful employment." Factors to be considered in making a determination as to whether retraining is appropriate include:

1. the reasonableness of retraining versus return to work through alternate rehabilitation methods;
2. the likelihood of success in the retraining program;
3. the likelihood that the retraining will result in employment; and
4. the likelihood that the job returned to will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.

Poole v. Farmstead Foods, 42 W.C.D. 970 (W.C.C.A.1989); see Minn. Stat. § 176.102, subd. 1.

The compensation judge reviewed reports and testimony by the parties' vocational experts, Mark Raderstorf and John Hjelmeland. The employee underwent a vocational evaluation with Mr. Raderstorf on July 20, 1998 at the request of the employer. In conjunction with the evaluation, the employee underwent various tests and assessments and Mr. Raderstorf conducted a labor market survey of the forensic science area, in order to respond to the information set forth in the employee's original retraining request. In his report dated October 26, 1998, Mr. Raderstorf concluded that the initial proposed retraining program was not reasonable, "given the very competitive job market in Forensic Sciences, the scarcity of employers in this field, Ms. Phillips' lack of academic training in the sciences, and her below average math skills." He concluded that

the employee's limited math skills would be a liability in functioning in the scientific-related aspects of the field.

Mr. Raderstorf also evaluated the job offer for an Office Specialist I position with the Hennepin County Medical Examiner's Office. He acknowledged that although the clerical position was not "high on Ms. Phillips' list of interesting positions, . . . this job offer appears to be the most efficient route of returning Ms. Phillips to suitable, gainful employment." (Er. Ex. 22.)

On November 29, 1999, on her own behalf, the employee underwent a vocational evaluation with John Hjelmeland. Mr. Hjelmeland determined that, based on multiple medical opinions rendered between 1996 - 1999, that the employee can perform work categorized in the sedentary to light level of work, ranging from ten to twenty pounds of lifting and carrying on an occasional basis. Mr. Hjelmeland also determined that based on his review of the employee's work history, education, vocational testing, medical restrictions, vocational interests and her work skills, her current employment as an Office Specialist I is not suitable employment. He based this upon her limited transferrable skills for that position, and a very limited opportunity for advancement and promotion. In Mr. Hjelmeland's opinion, ever since the employee left her Autopsy Specialist position in 1995, the employer had not offered her suitable employment. The employee reported to him that she last earned an hourly wage of $15.40 while working as an autopsy specialist in 1995. (Er. Ex. M.)[3] He also referred to the employee's job search conducted over a two-year period, which had not resulted in suitable or gainful employment.

Mr. Hjelmeland researched four alternative vocational areas as potential retraining areas, in order to assist the employee in securing suitable and gainful employment: histotechnician, diabetic educator, floral wholesaler-buyer, and medical laboratory technician. Based upon his research, he recommended the medical laboratory technician as a suitable vocational objective and recommended retraining for the employee. Mr. Hjelmeland recommended that the employee enroll in an accredited two-year associate degree program at the Medical Institute of Minnesota, and also estimated that the total retraining cost, excluding wage benefits, would be $29,496.50. Based upon his research, this retraining had the potential for allowing the employee to earn a starting salary in excess of $14.50 per hour. (Hjelmeland depo., Ee. Ex. X, p. 56.)

By December 1999, the employee revised her retraining claim to instead request retraining as a medical laboratory technician. She applied for and was accepted into a program at the Medical Institute of Minnesota. In December 1999, at the request of the employer, Mr. Raderstorf reviewed additional medical records, an on-site job analysis, employment records from Hennepin County and Mr. Hjelmeland's vocational assessment, in order to evaluate the suitability of the Office Specialist I job offer and the employee's revised retraining plan. In his report, dated December 23, 1999, he concluded that the employee's current Office Specialist I/Patient Service Coordinator position is suitable, gainful employment. He determined that this

[3] By comparison, the employee's hourly wage on the date of her initial injury, August 5, 1991, was $13.51. Ms. Secrest, senior human resources representative for the employer, testified that the maximum hourly wage in 2000 earned by a Medical Examiner Investigative Assistant/Autopsy Specialist is approximately $18.00 per hour. (T. 552.)

position makes use of the employee's transferrable skills, is within her physical work restrictions, and provides a wage close to her date of injury wage.

Mr. Raderstorf again cited the employee's limited math skills as being an impairment to performing laboratory technician duties. He also questioned whether the employee had the physical capabilities to perform a lab technician position because of the extensive reaching, bending and gripping required of a lab technician.[4] He referred to the Courage Center's evaluation which raised concerns about medical laboratory technology as a vocational alternative for the employee because of the unreliable control of her hands.[5] Mr. Raderstorf further stated that the employee's "physical capabilities may impair her ability to perform laboratory technician duties." (Er. Ex. 22.)

Mr. Raderstorf stated that retraining would enhance the employee's marketability, but physical accommodations would need to be addressed with any potential new employer because of the employee's physical work restrictions.

While the compensation judge found that the employee is intellectually capable of completing the course requirements for a medical laboratory technician associate degree, the compensation judge determined that the employee has not met her burden of proof as it relates to the physical suitability of the proposed medical technician training program, as she had not shown that work as a medical laboratory technician is reasonably attainable for an individual with her physical limitations. The compensation judge cited to Dr. Lowe's medical opinion and to the testimony presented by Mark Raderstorf and Ms. Maes-Voreis in support of her conclusion that the customary duties of a medical lab technician appear to exceed the employee's physical work restrictions. Substantial evidence supports that conclusion by the compensation judge.

Although there is evidence in the record that could support a conclusion that the employee is a reasonable candidate for her proposed retraining program, specifically the reports and testimony of Mr. Hjelmeland, substantial evidence supports the compensation judge's denial of the retraining request. It is the compensation judge's function to choose between conflicting expert opinions. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Based upon the employee's retraining proposal, the rehabilitation reports in the record, the testimony of the employee, employer representatives and rehabilitation professionals, the compensation judge's

---

[4]Ms. Maes-Voreis also testified about the physical requirements of a medical laboratory technician position. As a staff nurse, which included work in the intensive care and dialysis areas, Ms. Maes-Voreis worked closely with medical lab technicians in the clinical area, and also performed blood drawing and specimen collecting. At the Family Medical Clinic, she oversees the lab staff; at hearing, she described the duties performed and equipment utilized by the medical laboratory technicians.

[5]The Courage Center Vocational Evaluation Report, dated June 18, 1996, stated that "There were no limitations on use of hands and finger, although [the employee] does report swelling in her hands and a loss of sensation which has resulted in dropping things - this may be a consideration for some types of work." (Er. Ex. 7.)

denial of the proposed retraining program was very amply supported by evidence of record, and we therefore affirm.

Economic Recovery Compensation

The compensation judge denied the employee's claim for economic recovery compensation benefits related to her rating of 3% permanent partial disability of the body as a whole for her shoulder injury, and the employee appeals from that denial.

On November 4, 1994, the employer paid $2,250.00 to the employee as impairment compensation, based upon 3 % permanent partial disability to the body as a whole, relative to her left shoulder injury. That payment was issued by the employer following receipt of Dr. Richard Kyle's medical report dated October 3, 1994, in which he determined that the employee had sustained permanent injury as a result of her August 5, 1991 injury, and was entitled to permanency benefits pursuant to Minn. R. 5223.0110, subp. 2.C.

The compensation judge determined that the employee has reached maximum medical improvement [MMI] relative to her August 5, 1991 injury, and that MMI was reached when the employee was served with Dr. Kyle's MMI report on October 27, 1994. The compensation judge determined that the employee was properly paid impairment compensation benefits for a 3% disability to the body as a whole after reaching MMI for the first time in October, 1994. She further determined that since there has been no change in the employee's permanency rating as it relates to the condition of her left shoulder, the employee is not entitled to a conversion of previously-paid impairment compensation benefits to ERC benefits. In accord with that determination, the compensation judge denied the employee's claim for economic recovery compensation (ERC) benefits related to her shoulder injury of August 5, 1991 and dismissed that claim with prejudice. (Order No. 3.)

The employee argues that the compensation judge erred by finding that she had reached maximum medical improvement from her 1991 injury. The employee contends that she has not reached MMI because she continues to require extensive treatment and all treatment modalities have not been exhausted. However, the compensation judge relied upon the lack of changes in the employee's condition and Dr. Kyle's opinion that the employee had reached MMI from her 1991 injury as of his report dated October 3, 1994. The compensation judge's determination that the employee has reached MMI from her 1991 injury was supported by substantial evidence of record, and we affirm.

The employee also argues that since the employee has not reached MMI with respect to all of her injuries that affect her disability, her shoulder injury, her thoracic outlet syndrome diagnosis and her low back injury, it is therefore premature to determine whether the employee is entitled to ERC benefits relative to her 1991 shoulder injury. The employee asserts that the compensation judge erred as a matter of law in dismissing, with prejudice, the employee's claim of ERC for her shoulder impingement syndrome. The employee claims that once she reaches MMI from all injuries, the employee will be entitled to economic recovery compensation benefits, less the impairment compensation already paid, if the employee continues to work in an unsuitable job, unless the employee is offered a job described at Minn. Stat. § 176.101, subd. 3e(b).

The compensation judge determined that the payment of impairment compensation benefits in 1994, made after the employee had returned to work and had been served with notice of MMI, satisfied the employer's statutory obligations for payment of permanency benefits relative to the 1991 injury. This finding suggests that the employee's job following her December 1994 low back injury was "suitable," as outlined in Minn. Stat. § 176.101, subd. 3e, resulting in entitlement to impairment compensation. However, to determine whether the employee is entitled to impairment compensation or economic recovery compensation for this permanency, we must look at the circumstances in place following service of maximum medical improvement on October 3, 1994. Generally, the form of payment of permanent partial disability under the two-tier system of impairment compensation or economic recovery compensation depends on whether the employee is offered a suitable job within ninety days of service of MMI. Minn. Stat. § 176.101, subd. 3e (repealed 1995).[6] In this case, following her 1991 injury, the employee had returned to full time work in November 1993, performing the usual duties of her Medical Examiner Investigative Assistant/Autopsy Specialist position, although she was restricted in her ability to lift and reach. Service of MMI was effected on the employee on October 17, 1994. The ninety-day period outlined in Minn. Stat. § 176.101, subd. 3e, expired on January 26, 1995. If the employee was deemed to be employed in a suitable "3e" job on January 26, 1995, impairment compensation would represent the employee's sole entitlement for permanency benefits.

During that ninety-day period post MMI, however, the employee sustained a low back injury, on December 8, 1994. Although she had returned to work on December 23, 1994, and was working on January 26, 1995, it is not evident from the record whether the job to which

---

[6] Minn. Stat. § 176.101, subd. 3e, provides, in relevant part, that:

> (a) Ninety days after an employee has reached maximum medical improvement and the medical report described in clause (c) has been served on the employee, ... the employee's temporary total compensation shall cease . . . .
>
> (b) If at any time prior to the end of the 90-day period described in clause (a) the employee retires or the employer furnishes work to the employee that is consistent with an approved plan of rehabilitation and meets the requirements of section 176.102, subdivision 1, or, if no plan has been approved, that the employee can do in the employee's physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability, or the employer procures this employment with another employer or the employee accepts this job with another employer, temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation pursuant to subdivision 3b. This impairment compensation is in lieu of economic recovery compensation under subdivision 3a, and the employee shall not receive both economic recovery compensation and impairment compensation . . . .

the employee returned in December 1994 was a suitable "3e" job under the strict reading of the statute. Indeed, by that point, as the employee was recovering from a low back injury, she had not yet reached maximum medical improvement from that 1994 injury. As found by the compensation judge, the employee has not yet reached MMI from her low back injury. (Finding No. 34.) In addition, within three months of expiration of the ninety days post-MMI, by April 25, the employee had become medically unable to continue working in the autopsy specialist position as a substantial result of both her 1991 and 1994 injuries. (Findings Nos. 14 and 15.) This case is somewhat unusual, therefore, in that the employee was temporarily totally disabled for a portion of the 90-day post-MMI period, and both the employer and employee were effectively precluded from having the benefit of the full 90-day post-MMI period in which to develop stable, long-term, suitable work. Under these particular circumstances, a determination of entitlement to ERC should not be made until the expiration of 90 days after the employee again reaches MMI from the conditions that caused the employee's total disability, which in this case were the employee's shoulder, thoracic outlet syndrome and low back problems. See Lloyd v. University of Minnesota, File No. [REDACTED SSN] (W.C.C.A., May 19, 1995.)

It is premature to determine whether the employee is entitled to economic recovery compensation benefits as a result of her 1991 right shoulder injury. Therefore, we cannot agree with the compensation judge that the impairment compensation benefit paid in November 1994 was appropriate under the circumstances that existed at that time. We therefore vacate the compensation judge's dismissal with prejudice the employee's claim for economic recovery compensation for her shoulder impingement syndrome.[7] As the employee has reached MMI from her 1991 right shoulder injury, once the employee reaches MMI from her 1994 low back injury, a determination can be made as to which form of permanency benefits the employee is entitled. The critical question, in resolving that issue, will be whether the employee is in a "suitable job" as defined by Minn. Stat. § 176.101, subd. 3e.[8] The employee may file another claim petition for the ERC benefits, if appropriate, after MMI has been reached.

[7]Specifically, we vacate Finding No. 19 and Order No. 3.

[8]The basic standard is whether the job is physically and economically suitable. In the economic area, the work must provide the employee an economic status as close as possible to the status she would have enjoyed had she not been injured. We note that in the context of the retraining dispute, the vocational evaluations seemed to focus on a comparison of the wages in the employee's current work with her pre-injury wage. That is not the proper focus in either a rehabilitation or suitable job context. The focus should be on what she would now be earning in her pre-injury job had she not been injured and how close rehabilitation would get her to that economic status. In that context, being "close" is not the standard. The standard in the statute is "as close as possible." In addition, the parties need to look at the rules governing worker's compensation practice and procedure, specifically Minn. R. 5220.0100, subp. 34, concerning "suitable gainful employment" which requires a consideration of the "employee's former employment and the employee's qualifications, including, but not limited to, the employee's age, education, previous work history, interests, and skills."

Economic Recovery Compensation Benefits pursuant to Minn. Stat. § 176.102, subd. 3t(b)

The compensation judge also denied the employee's claim for benefits pursuant to Minn. Stat. § 176.101, subd. 3t(b), 26 weeks of economic recovery compensation(ERC), as a result of her thoracic outlet syndrome and dismissed that claim with prejudice. (Order No. 4.) The employee claimed these benefits based upon the lack of a ratable permanent partial disability assigned to her thoracic outlet syndrome. Dr. Tountas determined that the employee had sustained no ratable permanent partial disability relative to her thoracic outlet syndrome, since the employee lacked objective medical evidence required by the pertinent section of the permanency schedules, Minn. R. 5223.0090, subp.4. Dr. Kyle also assigned no permanency rating to the employee's thoracic outlet syndrome, assigning only a 3 % permanency rating relative to the employee's 1991 injury based solely on her left shoulder condition under Minn. R. 5223.0110, subp 2C.

Minn. Stat. § 176.101, subd. 3t(b) provides:

> Where an employee has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability and the employee is unable to return to former employment for medical reasons attributable to the injury, the employee shall receive 26 weeks of economic recovery compensation.

The compensation judge found the employee had not met the requirements of this subdivision because the employee was already paid permanent partial disability for the left shoulder condition for the 1991 injury and because the employee had returned to her former employment after the injury. The compensation judge found that:

> The employer has no liability for ERC benefits related to the employee's left shoulder injury or benefits pursuant to M.S. 176.101 3t(b) as a result of the work injury of August 5, 1991. The employer's previous payment of impairment compensation benefits for a 3% permanent partial disability to the body as a whole fully satisfies all statutory requirements as it relates to the August 5, 1991 work injury and payment of permanent partial disability benefits. Unless/until the employee's permanent partial rating changes, no further permanent partial disability benefits are due.

The employee argues that her left shoulder condition and thoracic outlet syndrome should be considered as two separate injuries, for purposes of applying this subdivision. However, this court has previously held that pursuant to the language in Minn. Stat. § 176.101, subd. 3t(b), an employee is ineligible for an award of ERC under subdivision 3t(b) where a ratable permanency is produced by at least one of the conditions caused by an injury. See, e.g., Kyrola v. Murphy Bros., Inc., File No. [REDACTED SSN] (W.C.C.A. Sept. 3, 1997), Montanye v. Snyder Gen'l Corp., 47 W.C.D. 474 (W.C.C.A. 1992); Beeksma v. I.C. Systems, Inc., File No.[REDACTED SSN] (W.C.C.A. Oct. 19, 1987). In Kyrola, the employee injured his head and right wrist as the

result of a single work-related injury, sustained a ratable permanent partial disability related to his head injury but had no ratable permanent partial disability due to his right wrist injury. This court held that the employee sustained injuries as the result of a single occurrence, and that 3t(b) benefits were not due for his wrist injury since the employee was paid permanency benefits based on his head injury. As stated in Kyrola:

> It is . . .well-established in workers' compensation matters that the term "personal injury" denotes an occurrence, arising out of and in the course of employment, which results in specific injury or disability to one or more body parts. See, e.g., Minn. Stat. Sec. 176.105, subd. 4c (providing a formula for combining permanency ratings attributable to "more than one body part due to a personal injury"). We believe that the legislature intended subdivision 3t(b) to be a kind of "safety net," providing an alternative form of compensation for loss of use where an injury produces disability which, although not compensable in the form of permanent partial disability, is significant enough to permanently affect the ability to return to former employment. As such, we believe that subdivision 3t(b) was not intended to *supplement* the benefits provided to an employee where permanent partial disability benefits are available from the same occurrence.

Kyrola, File No. [REDACTED SSN] (W.C.C.A. Sept. 3, 1997) (emphasis in the original).

Very similar circumstances exist in the present case; on August 5, 1991, the employee sustained an injury to her left shoulder and subsequently developed thoracic outlet syndrome, both conditions which were compensable injuries. The employee was earlier paid permanency benefits based on her left shoulder condition, and therefore is not entitled to payment of any additional 3t(b) benefits based on her thoracic outlet syndrome. The compensation judge did not err by denying benefits under Minn. Stat. § 176.101, subd. 3t(b), and so we affirm.

Penalties

The employee claims entitlement to penalties related to payment of the 7% permanent partial disability benefits for the low back, paid in April 1999. The compensation judge determined that the "employer's conduct relative to the payment of permanent partial disability benefits does not violate the provisions of Minn. Stat. § 176.225." (Finding No. 31.) The issue before us is whether the employer's delay in payment of impairment compensation benefits violated the provisions of Minn. Stat. § 176.225.

Minn. Stat. § 176.225 outlines circumstances in which payment of a penalty is appropriate. As outlined in that statute, as amended in 1995[9]:

[9]We note that the controlling event for the application of Minn. Stat. § 176.225, subd. 5, is the date of the delay in payment rather than the date of injury. Even though this penalty claim relates to an injury date of December 8, 1994, the statute in effect at the time of the delay in

> **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 % of that total amount where an employer or insurer has:
> (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,
> (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.

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 law. Minn. Stat. § 176.225.

The employee argues that such a penalty is justified in this case, as the reason for the neglect or delay in payment was patently ill founded and unwarranted. By way of background, in her report dated May 10, 1996, Dr. Ann Lowe assigned a rating of 7% permanent partial disability to the body as a whole, pursuant to Minn. R. § 5223.0390, subp. 3.C.(1), relative to the employee's low back injury of December 8, 1994. The employer and insurer served that report on the employee on November 3, 1998. It appears that there was no dispute as to the level of permanency the employee sustained as a result of her low back injury. The employee returned to work on or about December 14, 1998. The employer and insurer paid the employee impairment compensation, in the amount of $5,250.00, on April 21, 1999.

The employee argues that since she returned to work in an Office Specialist I position with the employer on December 14, 1998, her payment of impairment compensation was due within thirty days after her return to work, pursuant to Minn. Stat. § 176.021, subd. 3(a),[10] and

---

payment of the benefits at issue is controlling. Hop v. Northern States Power Co., No. [REDACTED SSN] (W.C.C.A., Sept. 12, 1996.)

[10] Minn. Stat. § 176.021, subd. 3a, in effect on the date of the employee's December 8, 1994, low back injury states in pertinent part:

> **Subd. 3a. Permanent partial benefits, payment.** Payments for permanent partial disability as provided in section 176.101, subdivision 3, shall be made in the following manner:
> (a) If the employee returns to work, payment shall be made by lump sum; . . .

Minn. R. 5220.2550, subp. 1A.[11] The impairment compensation benefit was issued to the employee on April 21, 1999, over three months after January 13, 1999, the last timely payment date claimed by the employee.

Whether a penalty is appropriate under Minn. Stat. § 176.225 typically 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). In this case, the employee returned to work for the employer in an Office Specialist I position on December 14, 1998, as part of a settlement agreement between the parties. One of the terms of the settlement agreement was payment of agreed-upon permanency benefits. Both parties anticipated that the settlement would go forward. On December 1, 1998, the parties notified the Office of Administrative Hearings that a settlement had been reached. A draft of a stipulation for settlement was apparently first drafted by the employer's counsel and circulated by December 10 or 11, 1998. The parties ultimately did not agree on the wording of the stipulation; correspondence in the judgment roll between the counsel and the Office of Administrative Hearings reflects the ongoing settlement discussions between January and April 1999. On March 4, 1999, a compensation judge wrote to the parties, citing to the requirement in Minn. R. 1415.2000, subp. 2, that stipulations for settlement be filed with the Office of Administrative Hearings within thirty days of reaching settlement. The compensation judge advised the employee that she had thirty days from the date of that letter within which to file a signed stipulation for settlement.

According to a letter from counsel for the employer to counsel for the employee, dated April 8, 1999, the employer advised that if no signed stipulation was received by April 12

---

[11] Minn. R. 5220.2550, subp. 1.A., states as follows:

5220.2550. Payment of Permanent Partial Disability, Including Impairment Compensation and Economic Recovery Compensation

Subpart 1. Time of payment. Permanent partial disability must be paid at the time specified in *Minnesota Statutes*, sections 176.021 and 176.101. When permanent partial disability compensation is being paid periodically following the payment of temporary total benefits or following or concurrent with the payment of temporary partial benefits, the payments must be continued without interruption at the same intervals that the temporary benefits were paid. When the employee reaches maximum medical improvement, the insurer must request an initial assessment of any permanent partial disability from the employee's physician.

A. When the extent of permanent partial disability is not disputed, upon receipt of a medical report containing a permanency rating or medical information from which the insurer may determine a rating, the employer or insurer must, within 30 days:

(1) make a lump sum payment or begin periodic payments to the employee; or

(2) inform the employee in writing of the disability rating and the time when the permanent partial disability payment will be payable under the statute.

the settlement offer would be withdrawn. By letter dated April 13, 1999, counsel for the employee advised the employer's counsel of the reasons the stipulation was not yet signed and that she would know by the end of that week whether the employee would agree to sign the stipulation for settlement as drafted. According to a letter dated April 14, 1999, from the employer's counsel to a compensation judge, the settlement offer was withdrawn as it was not accepted by the employee within the required thirty days, or within the seven days thereafter outlined in that letter of April 8. Employer's counsel requested that the judge schedule the matter for a pre-trial conference. Employer's counsel also stated that since the employee had now returned to work, the employer would pay the impairment compensation to the employee. According to a Notice of Benefit Payment dated April 29, 1999, impairment compensation benefits were issued on April 21, 1999.

The self-insured employer's claims administrator testified that payment of permanency benefits was included as part of a settlement agreement, and that she "was waiting for the stipulation of settlement to be returned before that payment was issued." (T. 440.) The compensation judge determined "that the permanent partial disability benefits were paid within a reasonable time after it became clear the stipulation would not be finalized" (Finding No. 31) and therefore denied the employee's claim for penalties. The judge further explained that "I find no persuasive evidence that the timing of the payment of permanent partial disability benefits was unreasonable or vexatious. Nor is there evidence to establish the employer unreasonably neglected or refused to pay permanent partial disability benefits." (Memo. p. 13.)

Based upon the circumstances surrounding the settlement negotiations in late 1998 and early 1999, as supported by the testimony of the claims representative, we agree with the compensation judge that the delay in payment was not vexatious. However, the lengthy delay in payment of the impairment compensation, pending settlement negotiations, could be considered to be neglect or refusal to pay compensation. Even though settlement negotiations were being conducted in good faith, and although payment was issued when settlement negotiations definitively broke down, the requirements of Minn. Stat. § 176.021, subd. 3(a), and Minn. R. 5220.2550, subp. 1A, were not followed. While it was obvious that the parties intended to incorporate the impairment compensation in the settlement payments, and that the employee's level of permanency was not contested for this admitted injury, the employee did return to work as a term of the settlement agreement, and therefore the employer should have paid the impairment compensation in a more timely manner, even though the remainder of the settlement payments were delayed because of continuing settlement negotiations.

The issue before this court is whether the conclusion that the employer's delay in payment of impairment compensation did not violate Minn. Stat. § 176.225 is supported by substantial evidence and is not clearly erroneous. In view of the evidence of record, we believe that the employer's delay constituted neglect or refusal to pay compensation, and that a penalty of 15% of the impairment compensation, as opposed to the 30% rate allowed by statute, is warranted. We have sympathy for the employer's position as it had a good faith belief that the payment would be made in accordance with the stipulation. To delay payment for that reason, however, when there was no dispute, risks a penalty if the settlement is not consummated. We therefore reverse the compensation judge's denial of the employee's claim for penalties and award a 15% penalty, based upon $5,250.00 in impairment compensation, for a total penalty amount of $788.