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## The Brown & Carlson Insight

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### WCCA Rules Penalties Under Minn. Stat. §176.225, Subd. 5 Are Not Automatic

Based upon a recent case from the Workers' Compensation Court of Appeals, it appears that penalties under Minn. Stat. §176.225, subd. 5 are not automatic.

[Kriesel v. University of Minnesota](#)

Minn. Stat. §176.225, subd. 5 provides that when an employer is guilty of an inexcusable delay in making payments, the delayed payments are subject to a flat penalty rate of 25%. Prior to the Minnesota Workers' Compensation Court of Appeals decision in *Kriesel v. University of Minnesota*, slip op. (W.C.C.A. January 31, 2012), many employees took the position that they were entitled to payment of this penalty whenever a payment was late and regardless of the circumstances. *Kriesel* changes that at least somewhat.

In *Kriesel*, the regular claims adjuster on the file was out on a two-week medical leave when the Award on Stipulation was served and filed. The adjuster's supervisor was monitoring his desk while he was on leave as it was not feasible or practical to hire and train a temporary worker to handle the desk in the adjuster's short absence given the complexity of the files the adjuster handled. After the supervisor became aware that the executed Award on Stipulation had been served and filed, she was busy working on a very large project for the insurer for a few days followed by another two days of mandatory management meetings. The supervisor entered the checks into their system to be issued to the employee, the employee's attorney and one medical provider on her next available day. The checks were actually issued from Oregon for this particular insurer. The check to the employee, due to its size, had to be sent to Memphis to obtain a second signature before it could actually be issued to the employee. Once this second signature was obtained, the check was sent overnight mail to the employee. The employee's check ended up being one day

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late. The employee then made a claim for penalties under Minn. Stat. §176.225, subd. 5.

A hearing was held with regard to the employee's penalty claim and the compensation judge found the employee was not entitled to the payment of penalties as the delay in the employee's payment was not "inexcusable" as the employer had demonstrated a "reasonable and colorable" excuse for the delay. The judge found that the supervisor reasonably determined that it was not feasible to train in a temporary adjuster to handle the desk due to the complexity of the files, that taking on the 150 files handled by the regular adjuster in addition to handling her own supervisory duties adversely impacted on the supervisor's ability to make expeditious payment, and that the supervisor did her best to expedite payment. In upholding the compensation judge's finding, the Minnesota Workers' Compensation Court of Appeals held that substantial evidence supported the judge's factual finding.

Brown & Carlson advises that best practices and the statute still require payment under an Award be mailed within 14 days from the date the Award was served and filed. The circumstances in *Kriesel* were somewhat extraordinary.

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VIVIAN B. KRIESEL, Employee/Appellant, v. UNIVERSITY OF MINN., SELF-INSURED/ SEDGWICK CLAIMS MGMT. SERVS., INC., Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
JANUARY 31, 2012

No. WC11-5318

HEADNOTES

**PENALTIES.** Substantial evidence supports the compensation judge's determination that the employer was not guilty of inexcusable delay in making payment from a settlement and the compensation judge's resultant denial of penalties under Minn. Stat. § 176.225, subd. 5, is affirmed.

Affirmed.

Determined by: Stofferahn, J., Wilson, J., and Milun, C.J.  
Compensation Judge: Cheryl LeClair-Sommer

Attorneys: Raymond R. Peterson, McCoy, Peterson & Jorstad, Minneapolis, MN, for the Appellant. Jay T. Hartman and Britt M. Kringle, Heacox, Hartman, Koshmrl, Cosgriff & Johnson, St. Paul, MN, for the Respondent.

OPINION

DAVID A. STOFFERAHN, Judge

The employee claimed the employer was "guilty of inexcusable delay" in making payment of an award and was liable for penalties under Minn. Stat. § 176.225, subd. 5. The compensation judge denied the claim and the employee has appealed. We affirm.

BACKGROUND

Vivian Kriesel, the employee, claimed she was permanently and totally disabled as the result of work injuries at the University of Minnesota in 1978 and 1992. The parties reached a settlement on those claims and entered into a stipulation for settlement in which the employee closed out her claims against the employer in return for a lump sum payment of \$162,000 after attorney fees. The Award on Stipulation was served and filed on January 26, 2010; payment of the amount owed under the stipulation was due within fourteen days of the date of the award, or by February 9, 2010.

At the time of the award, the self-insured employer used Sedgwick Claims Management Services, Inc., [Sedgwick] to pay workers' compensation claims. Jim Fisher, a claims examiner at Sedgwick, had primary responsibility for Ms. Kriesel's file. Mr. Fisher went off work on January 20, 2010, for surgery and medical leave. It was anticipated that Mr. Fisher would be gone from work for about two weeks and Rhonda Bosworth, claims supervisor, testified at the hearing that it was not practical or feasible to train a temporary employee to do Mr. Fisher's job for that short time because of the complex nature of the files handled by Mr. Fisher. She elected instead to handle his duties as well as her own.

Ms. Bosworth testified she became aware the award had been issued as of January 29, a Friday. On Monday and Tuesday of the next week, Ms. Bosworth was working on a large project and at the end of that week she was in mandatory management meetings. Ms. Bosworth testified that she sat down at the computer on February 8 to issue payment pursuant to the award.

The actual settlement checks were not issued out of the Sedgwick claims office, but out of an office in Oregon. If the request for a payment check was entered into the computer before 11:00 A.M., the check would be issued that same day and if the request was entered after that time, the check was issued the next day. Three checks needed to be issued for the settlement in this case: one to the employee, one to her attorney, and one to a medical provider. Ms. Bosworth testified she entered all payment requests at one time on February 8. Apparently, the request for payment to the medical provider was entered before 11:00 A.M. because the check was issued in Oregon the same day. The check for attorney fees was issued on February 9 and sent to the employee's attorney on that date. Because of the amount of the check issued to the employee, a second signature was required and the check was sent to Memphis for the second signature. It was sent by overnight delivery to Memphis, was signed there, and was sent by overnight delivery to the employee. The check was sent from Memphis on February 10 and received by the employee on February 11.

The employee filed a claim petition seeking a penalty under Minn. Stat. § 176.225, subd. 5, which requires an award of 25% of the delayed payment amount when “the employer is guilty of inexcusable delay in making payment.” The employee’s claim was heard by Compensation Judge Cheryl LeClair-Sommer on May 31, 2011. Ms. Bosworth was the only witness at the hearing.

In Findings and Order issued August 4, 2011, the compensation judge denied the employee’s claim. She determined that the delay by the employer in making payment was not an “inexcusable” delay but that the evidence demonstrated a “reasonable and colorable” excuse for the delay. The employee has appealed the denial of her claim.

#### DECISION

Minn. Stat. § 176.225, subd. 5, provides that a penalty of 25% of the delayed payment of benefits by an employer must be assessed when the “employer is guilty of inexcusable delay in making payments.” The employee argues that the employer here was guilty of inexcusable delay and she must be awarded a penalty of 25% of the lump sum payment made to her.

The question for the compensation judge at the hearing was whether the employer’s delay of one day in making payment to the employee was “inexcusable.” We have held previously that if an employer has a “colorable excuse” for its delayed payment, a penalty under Minn. Stat. § 176.225, subd. 5, may not be assessed against the employer. Meyers v. K Byte-Hibbing Mfg., 66 W.C.D. 148 (W.C.C.A. 2005). We have also held that a finding by a compensation judge of “unreasonable delay, neglect, and refusal to pay on a timely basis” is not necessarily the same as an inexcusable delay. Shelton v. Independent Sch. Dist. #625, 63 W.C.D. 650 (W.C.C.A. 2003). We affirmed an award of a penalty under Minn. Stat. § 176.225, subs. 1 and 5, where the employer had improperly withheld amounts due to the employee under a settlement and did not pay those amounts until ordered to do so. Kuehn v. St. Louis County, 65 W.C.D. 185 (W.C.C.A. 2004). We affirmed an award of penalty for an inexcusable delay where the employer improperly withheld an alleged overpayment from the amount due from a settlement. Thronson v. Premier Aggregates, slip op. (W.C.C.A. Sept. 15, 2000). We reversed a compensation judge’s denial of a penalty under Minn. Stat. § 176.225, subd. 5, where the employer provided no excuse for its delay in payment of proceeds owed from a settlement. Peulen v. Andersen Corp., No. WC09-120 (W.C.C.A. July 1, 2009).

In the present case, the compensation judge discussed the evidence she relied upon to support her determination that the employer was not guilty of inexcusable delay. The claims adjuster who had primary responsibility for the file was on a medical leave and the claims supervisor reasonably concluded it was not feasible to train a temporary adjuster for the limited period of the anticipated medical leave given the complexity of the claim adjuster’s files. The claims supervisor testified that taking on the 150 files handled by Mr. Fisher adversely impacted her ability to make expeditious payment. The claims supervisor made significant effort to expedite payment, including having the check sent by overnight delivery and the check was issued only one day late.

Determination of whether a penalty is appropriate under Minn. Stat. § 176.225 is generally a question of fact for the compensation judge. Shelton v. Independent Sch. Dist. #625, 63 W.C.D. 650 (W.C.C.A. 2003); French v. Special Sch. Dist. #1, No. WC09-4978 (W.C.C.A. Feb. 23, 2010). Substantial evidence exists in the record to support the compensation judge’s denial of a penalty and we affirm the compensation judge’s decision.