

Redacted to remove Social Security Numbers.

LEROY SPAETH, Employee/Appellant, v. COLD SPRING GRANITE CO., SELF-INSURED,
admin'd by INDEPENDENT ADMIN. CO., Employer, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 20, 1995

No. *[Redacted to remove Social Security Number]*

HEADNOTES

PRACTICE & PROCEDURE - RIPENESS. Where the underlying issue of primary liability for medical treatment provided by the employee's treating physician has not been determined, the issue of the amount payable to the employee's physician for the disputed treatment is not ripe, and does not present a justiciable controversy.

Vacated.

Determined En Banc.

Compensation Judge: Jennifer Patterson

OPINION

R.V. (SALLY) OLSEN, Judge

The employee appeals from the compensation judge's determination that the self-insured employer was not required to pay the difference between the amount paid to the employee's treating physician, Dr. Robert A. Wengler, by Blue Cross and Blue Shield of Minnesota under a group health insurance policy, and the amount otherwise payable pursuant to the Minnesota workers' compensation medical fee schedule. We vacate for lack of a justiciable controversy.

BACKGROUND

The employee, LeRoy M. Spaeth, alleged that he sustained multiple work-related injuries in the course and scope of his employment with the employer, Cold Spring Granite Company, self-insured, administered by Independent Administration Company (IAC). On January 31, 1989, the employee filed a claim petition seeking various benefits. The parties entered into a settlement in January 1990, and an Award on Stipulation was issued on January 29, 1990. The stipulation and award left open future claims for medical expenses related to the lower extremities. (Finding 1; Judgment Roll: 1/31/89 Claim Petition, 1/90 Stip., 1/29/90 Award.)

On or about February 11, 1991, the employee underwent bilateral knee replacement surgery, performed by Dr. Robert A. Wengler. The self-insured employer denied primary liability and refused payment of Dr. Wengler's bills covering a period from November 20, 1990 through April 18, 1991. On June 27, 1991, the employee filed a new claim petition alleging injuries in 1980, 1983, 1984, 1987 and 1988, and a Gillette injury culminating on February 11, 1991. He sought additional permanent partial disability and payment of his outstanding medical bills. The self-insured employer answered denying primary liability. (Finding 2; Judgment Roll: 6/29/91 Claim Petition, 7/1/91 Answer, 12/92 Stip., 2/9/93 Award.)

The employee apparently had health insurance coverage with Blue Cross and Blue Shield of Minnesota (BCBSM), through a group medical insurance policy provided by the self-insured employer. In 1992,¹ Dr. Wengler submitted bills to BCBSM for charges totalling \$7,650.00, and received payment from BCBSM of \$6,022.85 pursuant to the terms of a BCBSM Aware Gold provider agreement previously entered into between Dr. Wengler and BCBSM. (Exh. A.)

In December 1992, the parties settled the employee's claims for non-medical benefits. The stipulation for settlement acknowledged the employee's claim that Dr. Wengler was entitled to additional payment for his services under the workers' compensation medical fee schedule, and that the employer denied the claim. The stipulation specifically left open medical expenses related to the employee's claimed injuries. An Award on Stipulation was served and filed on February 9, 1993. (Judgment Roll.)

On November 15, 1993, the employee filed another claim petition seeking payment of Dr. Wengler's billed charges, up to the maximum amount allowed under the workers' compensation medical fee schedule. The self-insured employer renewed its denial of primary liability, and further asserted that Dr. Wengler had been paid in full by BCBSM and was not entitled to any additional payment for his services. (Judgment Roll: 11/15/93 Claim Petition, 11/19/93 Answer.)

At the pre-trial conference, the employer and insurer continued to deny primary liability, and the compensation judge apparently directed that the issue of primary liability be bifurcated for hearing.² Primary liability remained in dispute at the time of the hearing below

¹ The BCBSM provider manual generally requires that bills be submitted for payment within 15 months from the date of service. (Exh. A, Vindedahl 9/22/94 letter and attachments.) Dr. Wengler submitted his initial bill for the disputed services on January 24, 1992, within 14 months of his initial services to the employee.

² A pre-trial conference was scheduled for February 14, 1994. At the conference, the parties argued the self-insured employer's Motion to Dismiss on the ground that the employee lacked standing to assert Dr. Wengler's claim for payment of additional medical expenses. The

and the appeal herein. (DOLI File: July 1994 Pre-trial Statements; Er's Trial Brief filed 10/7/94, at 3-4; Er's Appellate Brief at 3.)

By agreement of the parties, a hearing on the issue of the amount due to Dr. Wengler was conducted by telephone on October 7, 1994, before a compensation judge of the Office of Administrative Hearings.³ Following the hearing, the compensation judge determined, among other things, that this court's decision in Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993) compelled the conclusion that Dr. Wengler was not entitled to payment of the difference between the maximum allowed under the workers' compensation medical fee schedule and the sum he had already been paid by BCBSM, and that his charges must be considered excessive pursuant to Minn. R. 5221.0500 D. The employee appeals.

DECISION

The compensation judge determined that the issue of primary liability for the employee's bilateral knee condition was left open by the 1990 stipulation and award. (Finding 8.) The employee appealed from this finding. At oral argument it became apparent that the parties, in fact, do not agree on whether their stipulated agreements leave open the issue of primary liability for the knees. The parties continue to dispute the underlying question of whether there is a causal relationship between the employee's work injuries, his present disability, and the medical treatment provided by Dr. Wengler. At the pre-trial conference, the compensation judge apparently ordered a bifurcated hearing on the issue of primary liability. Thus, neither the issue of primary liability nor construction of the 1990 stipulation and award was before the compensation judge below. These issues were not, therefore, litigated at the hearing below, and remain unresolved. (Er's Brief at 3.)

Until the issue of primary liability for the treatment provided by Dr. Wengler has been determined, the question of the amount due for such treatment is not ripe for review. It is not within the authority of either this court or a compensation judge to issue an advisory opinion. The issue of the amount payable to Dr. Wengler is not ripe, and may not be decided until after the issue is properly presented in conjunction with, or following, a determination of the primary liability issues by a compensation judge. We, accordingly, vacate the decision of the compensation judge for lack of a justiciable controversy at this point.

compensation judge denied the self-insured employer's motion in an order issued on April 20, 1994. This order was not appealed. (Judgment Roll.) A second pre-trial conference was apparently held at a later date.

³ Although the hearing was recorded, most of the tape is inaudible, thus no transcript is available.