Redacted to remove Social Security Numbers.

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

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 11, 1996

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

HEADNOTES

STATUTES CONSTRUED - MINN. STAT. § 176.191, SUBD. 3. Minn. Stat. § 176.191, subd. 3, provides an exclusive framework for payment and reimbursement of medical expenses in cases of contested liability, and limits payment to a medical provider to that specifically set forth in the contract with the health carrier.

MEDICAL TREATMENT & EXPENSE - FEE SCHEDULE. Where a medical provider elects to receive payment from an employee's health insurer pursuant to Minn. Stat. Chs. 62A, 62C, or 62D, the provider is limited to the payment made under the applicable contract between the provider and the health insurer, even if that amount is less than the provider might have received from the workers' compensation insurer.

Affirmed.

Determined en banc.
Compensation Judge: Jennifer Patterson

MAJORITY OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's determination that the self-insured employer was not required to pay to the employee's treating physician, Dr. Robert A. Wengler, the difference between the amounts otherwise due under the Minnesota workers' compensation medical fee schedule for treatment of the employee's work-related injury, and the amounts received by Dr. Wengler from Blue Cross and Blue Shield of Minnesota pursuant to the employee's health insurance policy. We affirm.

BACKGROUND

The employee, LeRoy M. Spaeth, filed a claim petition in January, 1989, alleging that he sustained work-related injuries in the course of his employment with the self-insured employer, Cold Spring Granite Company, in 1977, 1983, 1984, 1987 and 1988, as well as a

Gillette-type[1] injury. The employee claimed injury to various parts of his body, including both knees. In January 1990, the parties entered into a settlement, and an Award on Stipulation was issued on January 29, 1990. The stipulation for settlement resolved, among other things, the employee's claim for medical expenses related to the alleged knee injuries to the date of the settlement. In the settlement the self-insured employer reserved all defenses, including primary liability, to any future claims for benefits relating to the alleged knee injuries.

On or about February 11, 1991, the employee underwent bilateral knee replacement surgery, performed by Dr. Robert A. Wengler. The self-insured employer, through its workers' compensation insurance administrator, Independent Administration Company (IAC), 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. He alleged a Gillette injury to both knees culminating on February 11, 1991, and sought permanent partial disability benefits and payment of his outstanding medical bills. In its answer, the self-insured employer/IAC again denied primary liability.

The employee had health insurance coverage with Blue Cross and Blue Shield of Minnesota (BCBSM) through a group medical insurance policy provided by the employer. Dr. Wengler had previously entered into an Aware Gold Agreement with Physicians (Physicians Agreement) pursuant to which the doctor agreed to provide health care services to those subscribers of BCBSM whom Dr. Wengler accepted as patients. (Ex. 1.)[2] Dr. Wengler submitted two bills to BCBSM for charges totaling $7,650.00 and received payments from BCBSM of $6,022.85. (Ex. A.)[3]

In December 1992, the parties entered into another settlement resolving the employee's claims for workers' compensation benefits arising out of any of his injuries, including the alleged Gillette injury of February 11, 1991. In that stipulation, the parties acknowledged Dr. Wengler's claim that he was entitled to receive an additional payment for his services from the workers' compensation insurer. This claim was denied by the employer, and specifically left open. (Para. VIII, 2.) An Award on Stipulation was served and filed on February 9, 1993. On November 15, 1993, the employee filed another claim petition seeking payment of the full amount

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[1] Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960).

[2] All references to exhibits herein are to the exhibits from the hearing on October 7, 1994.

[3] On or about January 24, 1992, Dr. Wengler submitted a bill to BCBSM for charges totaling $7,570.00, covering services provided between November 20, 1990 and April 18, 1991. On about February 14, 1992, he received payment of $5,987.70 from BCBSM, pursuant to the terms of the Aware Gold Agreement with Physicians. Dr. Wengler also saw the employee for an office visit and evaluation on August 17, 1992. The doctor's office submitted a bill to BCBSM for $80.00 that same day, and a payment of $35.15 was received from BCBSM on September 4, 1992, for that bill. (11/7/94 Findings and Order, Findings 2, 3; Ex. A; Ex. 1.)

of Dr. Wengler's bill, up to the 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 accepted payment in full under his contract with BCBSM and was not entitled to any additional payment for his services.

By agreement of the parties, a hearing on the issue of entitlement to additional medical expense was conducted by telephone on October 7, 1994, before a compensation judge of the Office of Administrative Hearings.[4] Following the hearing, the compensation judge issued a Findings and Order in which she found, that the workers' compensation medical fee schedule in effect on the dates of service allowed a total payment in excess of the amount accepted by Dr. Wengler under the terms of physicians agreement with BCBSM. She further determined 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 medical fee schedule and the sum he had already been paid by BCBSM/Aware Gold, and that his charges must be considered excessive pursuant to Minn. R. 5221.0500 D (1990).[5]

The employee appealed, and oral argument was had before this court on April 27, 1995. Concluding that the question of the amount due to Dr. Wengler was not ripe for review in the absence of a determination of primary liability for the treatment provided by Dr. Wengler, this court, in a decision issued on July 20, 1995, vacated the November 7, 1994, Findings and Order, for lack of a justiciable controversy. See Spaeth v. Cold Spring Granite Co., No. *[Redacted to remove Social Security Number]* (W.C.C.A. July 20, 1995).

A hearing was subsequently held before a compensation judge at the Office of Administrative Hearings on November 1, 1995. A Findings and Order on Remand was served and filed on January 9, 1996.[6] The compensation judge found that the employee had sustained a

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

[5] The compensation judge found that (1) Dr. Wengler's charges for treatment of the employee's work-related knee injuries were as itemized in Exhibit A; (2) Dr. Wengler accepted payment from BCBSM under an Aware Gold health insurance policy, a portion of which was submitted into evidence as Exhibit 1; and (3) the parties stipulated that Dr. Wengler received payment from Aware Gold for the treatment provided to the employee for his knees, as itemized in Exhibit A. These findings were not appealed by either party in either the 1994 or the 1996 appeals. (11/7/94 Findings and Order, Findings 2, 3.)

[6] The parties and the compensation judge treated this matter as a remand to OAH. This court, in fact, vacated the Findings and Order of November 7, 1994. In her "Findings and Order on Remand" the compensation judge "[a]dopted by reference" the vacated findings and order. (1/6/96 Findings and Order on Remand, Finding 1, mem. at 6.) We have treated this language as

compensable, work-related injury to both knees, culminating in October 1988. (1/9/96 Findings and Order, finding 7.) The judge reinstated her prior findings and order of November 7, 1994, again denying the claim for payment to Dr. Wengler of the difference between the maximum amounts allowed under the workers' compensation medical fee schedule and the sums paid by BCBSM/Aware Gold. The employee has again appealed.[7]

STANDARD OF REVIEW

A decision which rests upon the application of a statute or rule to essentially undisputed facts involves a question of law which this court may consider *de novo*. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993).

DECISION

1. Payments to Dr. Wengler

The issue in this case is whether the self-insured employer is liable for payment of Dr. Wengler's charges for medical treatment provided to the employee, up to the maximum amount permitted by the Minnesota workers' compensation medical fee schedule, where Dr. Wengler has already accepted from BCBSM, under a group health insurance plan, an amount less than that permitted under the workers' compensation fee schedule. The employee contends that resolution of this issue requires the interpretation and application of Minn. R. 5221.0500 D (1990), which provides that a fee for medical services is excessive if "the charge exceeds the provider's current charge for the same type of service in cases unrelated to workers' compensation injuries." The employee argues that "charge" means the amount requested by Dr. Wengler in his bill. He contends, therefore, that where a medical provider's charges are the same for all payers - even though the provider may accept or be entitled to less under a payment agreement with a third-party payer - the "charge" is not "excessive" within the meaning of Minn. R. 5221.0500 D. We do not agree that Minn. R. 5221.0500, et seq. are applicable in this situation.

Minnesota Statutes section 176.191, subdivision 3, provides:

> If a dispute exists as to whether an employee's injury is compensable under this chapter and the employee is otherwise covered by an insurer pursuant to chapters 62A, 62C and 62D, that insurer shall pay any medical costs incurred by the employee for the injury up to the limits of the applicable coverage and shall make any disability

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a *reinstatement* of her prior findings and order as set forth in the November 7, 1994, decision.

[7] The parties filed no new briefs, and the matter was resubmitted for consideration on the basis of the briefs previously filed at the time of the 1995 appeal, and on the oral argument presented by the parties on April 27, 1995.

> payments otherwise payable by that insurer in the absence of or in addition to workers' compensation liability. If the injury is subsequently determined to be compensable pursuant to this chapter, the workers' compensation insurer shall be ordered to reimburse the insurer that made the payments for all payments made under this subdivision by the insurer, including interest at a rate of 12 percent a year. If a payment pursuant to this subdivision exceeds the reasonable value as permitted by sections 176.135 and 176.136, the provider shall reimburse the workers' compensation insurer for all the excess as provided by rules promulgated by the commissioner.

In this case, the employee had health insurance coverage pursuant to chapter 62A see Minn. Stat. § 60A.06, subd. 1(5)(a)): (insurance against loss or damage by sickness, bodily injury or death). Once the employer denied that the employee's injury was compensable, BCBSM was statutorily obligated to pay the employee's medical costs. The purpose of Minn. Stat. § 176.191, subd. 3, is to ensure that an injured employee receives medical care when the workers' compensation claim is disputed. Johnson v. Blue Cross & Blue Shield of Minn., 329 N.W.2d 49 (Minn. 1983). In exchange for undertaking this obligation, the health insurer is statutorily entitled to full reimbursement for all payments made if the injury is later determined to be compensable. Reimbursement to the health insurer is not limited by the reasonableness clause of Minn. Stat. § 176.135 or the medical fee schedule of Minn. Stat. § 176.136. Instead, the statute makes the medical provider liable to repay the workers' compensation insurer for any payment received from the health insurer in excess of the maximum permitted under the medical fee schedule. The policy of the statute, thus, places the risk and burden to seek reimbursement for excessive payments upon the workers' compensation insurer that denied liability. Chrz v. Sacred Heart Hospice, No. *[Redacted to remove Social Security Number]* (W.C.C.A. Feb. 13, 1990). We further note that although the medical provider must reimburse excess payments, should the provider receive less than the fee schedule, the statute does not give the provider the right to obtain from the workers' compensation insurer the difference between the maximum allowable under the fee schedule and the payment from the health insurer.

Minn. Stat. § 176.191, subd. 3, provides a simple and expedient framework governing the payment and reimbursement of medical expenses in cases of contested liability. In such cases, the employee receives medical treatment, the medical providers are paid by the health insurer and the health insurer is later reimbursed in full, plus interest, by the workers' compensation insurer. We conclude that in such cases this statutory framework is exclusive. When the employee's workers' compensation claim is contested and a health insurer pays the medical costs incurred by the employee, the payment to a medical provider is governed by the provider's contract with the health insurer. While the legislature provided that a medical provider who was paid more than the fee schedule allows is required to reimburse the workers' compensation insurer for the excess received, it does not follow that the legislature intended that the provider should be paid extra amounts by a workers' compensation insurer where the provider contractually agreed to accept less than the maximum allowable under the medical fee schedule.

If such a result was intended, the legislature could have so provided in the statute. The omission of such a right evidences an intent that the payment to a medical provider be governed by the contract between the provider and the health insurer. Thus, in this case, Minn. R. 5221.0500, et seq. are not applicable.

> The BCBSM Physicians Agreement, Part II.C., provides:
> BCBSM shall make prompt payment directly to Provider for covered services and respond promptly to Provider's claims and inquiries. Except as provided for in section II.N,[8] BCBSM shall pay, and Provider shall accept as payment in full, the lesser of Provider's billed charge, Usual Charge or the Customary amount, minus subscriber or other carrier liabilities for services covered under Usual and Customary contracts.

(Resp. Ex. 1.) This contract clearly states that payment to a provider under the terms of the Physicians Agreement is accepted as "payment in full" of the provider's charge. There is no dispute that Dr. Wengler received full payment from BCBSM pursuant to the Physicians Agreement. The doctor, however, now asserts that he is not bound by this contract since the employee's injury was later determined to be compensable under workers' compensation law. We find no basis to so hold.

BCBSM's obligation to pay the employee's medical expenses was triggered by the workers' compensation carrier's denial of liability. Minn. Stat. § 176.191, subd. 3. Once Dr. Wengler submitted his bill to BCBSM, it was legally and contractually obligated to make payment in accordance with the terms of the Physicians Agreement, and the doctor contractually agreed to accept this payment in full satisfaction of his charges. The fact that the workers' compensation insurer later admitted liability for these medical expenses does not abrogate this contract. Neither the Physicians Agreement nor the law provides that a doctor or any other medical provider should receive a "bonus" simply because the services provided and paid for by health insurers are later determined to be the result of a workers' compensation injury. The medical fee schedule establishes a maximum fee a medical provider can receive from the workers' compensation insurer. The provider is free by contract or otherwise, to agree to accept less. In this case, Dr. Wengler did so. We conclude that payments to Dr. Wengler are governed by his contact with

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[8] Part II.N.1. provides in part:

> BCBSM shall pay, and Provider shall accept as payment in full, the lesser of the billed charge or the amount shown for each service on the attached AWARE Gold Fee Schedule minus subscriber or other carrier liability. For covered services not on the AWARE Gold Fee Schedule, BCBSM shall pay, and Provider shall accept as payment in full, 90% of the allowance described in section 11.C and E [the billed charge, Usual Charge, or Customary amount], minus subscriber or other carrier liabilities.

BCBSM. Since the payment by BCBSM was payment in full of Dr. Wengler's charges for treatment of the employee, the doctor has no further claim against the workers' compensation insurer.

The requirement in Minn. Stat. § 176.191, subd. 3 that a health carrier pay the employee's medical costs clearly benefits the medical provider as well as the employee. Under the Physicians Agreement, the provider is entitled to prompt payment from the health insurer and need not await a resolution of the workers' compensation case for payment. In addition, by accepting payment from the health carrier, the medical provider is not forced to intervene in the employee's workers' compensation case in order to protect its subrogation rights. (See Minn. Stat. § 176.361, subd. 7.)[9] Thus, the provider is not required to prove that the medical treatment provided did not exceed the reasonable value as limited by Minn. Stat. §§ 176.135 and 176.136. Clearly, Dr. Wengler received a valuable benefit from his contract with BCBSM. To the extent that the payment from BCBSM was, in this case, less than he would have received from the workers' compensation insurer, the doctor received other consideration in compensation for the loss. We find no legal or equitable reason to allow a medical provider to receive payment in full under a contract with a health insurer and later obtain a bonus from the workers' compensation insurer.[10]

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[9] We acknowledge that Dr. Wengler did not intervene in this case under Minn. Stat. § 176.361. Instead, the employee, by claim petition, has asserted his claim on his behalf. However, all of the employee's claims against the self-insured employer have been settled and only Dr. Wengler's claim remains. The employee has no direct interest in the outcome of this litigation since Dr. Wengler is prohibited by the Physicians Agreement from attempting to collect from the employee. (Resp. Ex. 1, Part II, B.) A medical provider has no standing to initiate a claim petition on its own. Freeman v. Armour Foods Co., 380 N.W.2d 816, 38 W.C.D. 445 (Minn. 1986). As a general rule, a medical provider should intervene to protect its rights. Minn. Stat. § 176.361, subd. 7.

[10] Such a result would be contrary to the effort to contain medical costs within the workers' compensation system. As the supreme court noted:

> In its March 1990 report to the legislature on Health Care Costs and Cost Containment in Minnesota Workers' Compensation at p. IV, the Department noted among its research findings:
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> * Minnesota's workers' compensation medical costs are growing faster than general medical care;
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> * Workers' compensation accrues higher charges than Blue Cross for similar injuries;
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> * Workers' compensation charges for back disorders, the most common workplace injury, are more than twice as high as charges for the same injury

Arguably, a provider is free to forego payment from the health carrier and await resolution of the employee's workers' compensation claim.[11] In such case, the provider's claim would be governed by Minn. Stat. § 176.361, not Minn. Stat. § 176.191, subd. 3. However, once the provider elects to receive payment from the employee's health insurer pursuant to Chapters 62A, 62C or 62D, we hold that payment to the provider is governed by the applicable contract between the provider and the health insurer. Where, as in this case, payment by the health insurer is payment in full of the provider's charges, the provider has no claim against the workers' compensation insurer.

The employee argues that our holding will result in insurers attempting to save money by denying liability for workers' compensation injuries in order to force the medical providers to submit their bills to health insurers which are statutorily obligated to pay the claims. We think this an unlikely result of our decision. The medical fee schedule "shall be limited to 85 percent of the provider's usual and customary charge, or 85 percent of the prevailing charges for similar treatment, articles and supplies furnished to an injured person when paid for by the insured person, whichever is lower." Minn. Stat. § 176.136, subd. 1b. Furthermore, in 1992, the legislature mandated that the medical fee schedule in effect on October 1, 1991, be amended to "reasonably reflect a 15 percent overall reduction from the medical fee schedule most recently in effect." Minn. Stat. § 176.136, subd. 1a. In view of these provisions, it seems unlikely that the workers' compensation insurer can profit by denying legitimate medical claims.[12] Finally, the statutes and rules provide for penalties against an employer or insurer which unreasonably refuses to pay medical benefits or interposes a frivolous defense. See Minn. Stat. §§ 176.221 and 176.225; Minn. R. 5220.2740, 5220.2760, 5220.2770, subp. 4, and 5220.2790. These statutes and rules are designed to sanction and prevent exactly the type of conduct of which the employee warns.

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in Blue Cross; * * *

Boedingheimer v. Lake Country Transportation, 485 N.W.2d 917, 922 n.5, 46 W.C.D. 646, 656 n.5 (Minn. 1992).

[11] In fact, Dr. Wengler did not submit his bill to BCBSM until 14 months after the date of his initial treatment of the employee. The BCBSM provider manual generally requires that bills be submitted for payment within 15 months of the date of service. (Ex. A.) We assume that his delay was predicated upon the very result reached by the compensation judge: that an election to be paid under his contract with BCBSM would be binding. We also assume that Dr. Wengler finally did submit his bill to BCBSM because he feared he would receive nothing if the employee's claim was determined not to be work-related.

[12] The medical bills in question in this case were incurred between November 1990, April 1991 and August 1992.

a. Roraff Fees

The compensation judge determined that if the employee prevailed, this was an appropriate case for attorney fees under Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980). Since the employee did not prevail, the claim for fees is denied.

b. Amans v. Carley Foundry, Inc.

The self-insured employer relies on Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993) as controlling here. The Amans case dealt with the issue of whether payment to a hospital, whose fees were not subject to the medical fee schedule, was limited to the amount the employee's health carrier would have paid the hospital. In Amans, liability for the employee's personal injury was admitted by the workers' compensation carrier. The hospital then intervened in the workers' compensation case so its claim was governed by Minn. Stat. § 176.361. In this case, liability for the employee's personal injury was denied so Minn. Stat. § 176.191, subd. 3 is controlling. Accordingly, the Amans case is distinguishable and not controlling here.

SEPARATE CONCURRING OPINION

STEVEN D. WHEELER, Judge

I agree with the majority decision, both in terms of its reasoning and its result, but I wish to reiterate my belief, as set forth in the majority opinion in Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993), that medical care providers should not receive a greater payment for providing services to an injured worker, whether you categorize the payment as a charge or a reimbursement, than they would receive if they provided the same service to a member of the general public. In the case at hand, as recognized by the dissent, if the employee's injury had not been work-related, Dr. Wengler would have been "paid in full" by the amounts received from the patient's regular healthcare provider, Blue Cross. One of the past criticisms of the workers' compensation system in Minnesota was that medical care costs for services to injured workers were higher than those for similar services provided to persons not injured in work-related incidents. As set forth in the majority decision in Amans, one way to prevent abuse of the workers' compensation system by healthcare providers, as Dr. Wengler is attempting to do in this case, is to enforce the principle that when the provider accepts "payment in full" from a healthcare insurer he cannot seek a "bonus" from the patient's employer and insurer under the workers' compensation system. Contrary to the desires of Dr. Wengler and the underlying assumption of the dissent, the medical fee schedule is not a "guaranteed" fee schedule, but is simply a "maximum" fee schedule. This schedule contemplates that providers may charge or receive less than the amount set forth in the schedule. When Dr. Wengler agreed to accept an amount less than set forth in the fee schedule from Blue Cross/Blue Shield, he established a maximum amount that he could charge the patient if the patient's injury were ultimately determined to be work-related. We find it interesting to note that Dr. Wengler waited until the last moment available to him to file his claim with Blue Cross, apparently hoping that the issue of whether the injury was work-related would be resolved before he had to elect to accept the lesser amount he knew that he

would receive from Blue Cross. Since he made the election to accept payment from Blue Cross, however, he should not be permitted to seek additional sums from the employer and its insurer. The effect of the dissent's theory and its interpretation of the workers' compensation statute and regulations regarding medical costs is contrary to the basic principle of the workers' compensation statute that medical costs should not be higher for services provided to injured workers than they would be if they were provided to the general public. In this case, we know exactly what Dr. Wengler would have charged the general public. He should not be permitted to charge more to an injured worker.

DISSENTING OPINION

R.V. (SALLY) OLSEN, Judge

I respectfully dissent. I find no basis in law or fact to apply Minn. Stat. § 176.191, subd. 3, to determine the issues presented in this case. In my opinion, the applicable statutes and rules are Minn. Stat. §§ 176.135 and 176.136 and the Minnesota workers' compensation medical fee schedule, specifically, Minn. R. 5221.0500, item D. (1990), as argued by the parties. Under the provisions of these statutes and rules, I would reverse the compensation judge, and would hold that Dr. Wengler is entitled to payment of his charges for medical services provided to the employee, to the extent allowed under the workers' compensation medical fee schedule in effect at the time the services were provided.

I agree with the majority that Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993) is not controlling, but for different reasons. Finally, I would deny the self-insured employer's request for a remand or reversal of the compensation judge's findings regarding Roraff attorney fees. These findings were not appealed by either party, thus, in my view, this court does not have jurisdiction to determine the issue.

1. Applicability of Minn. Stat. § 176.191, subd. 3

The issue in this case is whether the self-insured employer, through its workers' compensation insurance administrator, Independent Administration Company (IAC) is liable to Dr. Robert Wengler, the employee's treating physician, for payment to the extent allowed under the workers' compensation medical fee schedule, or whether Dr. Wengler is limited to the amount he has been paid by Blue Cross and Blue Shield of Minnesota (BCBSM), pursuant to the employee's group health insurance policy.

In addressing this issue at the hearings below, in their briefs, and at oral argument, both the employee and the self-insured employer raised and argued the interpretation and application of Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993) and the Minnesota workers' compensation statutes and rules relating to excessive medical fees, specifically Minn. Stat. §§ 176.135 and 176.136, and Minn. R. 5221.0500, item D. (1990). No party raised or argued the effect or applicability of Minn. Stat. § 176.191, subd. 3.

I disagree with the majority's view that Minn. Stat. § 176.191, subd. 3, is applicable or has any relevance to the dispute between the parties in this case. Section 176.191, by its express terms, applies solely to disputes *between insurers*. The claimant in this case is the *employee* who is seeking payment to his medical provider, Dr. Wengler. BCBSM, the relevant health insurer under § 176.191, subd. 3, has not intervened, is not a named party, and has made no claim for reimbursement in the matter before this court.[13]

In my view, the statutory framework governing the payment and reimbursement of medical expenses in cases involving disputed work injuries is fairly straightforward. The liabilities and obligations of an employer and insurer, generally, for payment of an injured employee's medical expenses are set forth in Minn. Stat. §§ 176.135 and 176.136. If, however, the workers' compensation insurer denies primary liability for the employee's injury, Minn. Stat. § 176.191, subd. 3, obligates the employee's health insurer to pay the employee's medical costs and expenses in accordance with the terms of the employee's health insurance policy.[14] If the employee's injury is later determined to be compensable under the workers' compensation act - as it has been here - the health insurer has no liability,[15] and is entitled to full reimbursement from

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[13] The majority suggests that the employee's doctor would receive "consideration" by not being "forced to intervene." This action was initiated by the employee to obtain payment of medical expenses, pursuant to the workers' compensation statute, for services provided to him by his treating physician, Dr. Wengler. Dr. Wengler is not an intervenor, nor does he have any "subrogation interest" to protect. The majority does not dispute that BCBSM, the only entity with a potential subrogation interest, would be entitled to full reimbursement of the amounts it paid. (See Maj. Dec. at pp. 7, 9.)

[14] Both parties assert certain facts as if they had been established. However, no real attempt was made to develop the underlying facts pertaining to the issue in this case. No evidence was submitted with respect to the employee's actual health insurance coverage. Both parties assert that he was covered under a BCBSM/Aware Gold group policy provided through the self-insured employer, but no testimony was taken, nor was a copy of the relevant provision of the health insurance policy submitted into evidence. That the employee had health insurance coverage under chapter 62A was never stipulated to or proved. It appears that Dr. Wengler was paid pursuant to a separate Aware Gold fee schedule - rather than under a "discounted" or percentage of charge arrangement - but the BCBSM/Aware Gold fee schedule was not submitted into evidence. Exh. A [1994] and Exh. C [1995] simply show lump sum payments made by BCBSM to Dr. Wengler. We do not know what amounts were paid for the individual services provided or even if the fee for service categories are comparable. The statement from Dr. Wengler's office itemizes both BCBSM "discounts" and deductions for "reserve withholding." There is no evidence explaining what these terms mean, although it appears that they may be subscriber or carrier liability deductions that are not directly related to the treatment charges.

[15] Minn. Stat. § 176.191, subd. 3, provides that the health insurer shall make payments "otherwise payable . . . in the absence of . . . workers' compensation liability." The BCBSM provider manual clearly indicates that where an injury is work-related, workers' compensation

the workers' compensation insurer for the amounts paid by the health insurer to the employee's medical provider.[16] The workers' compensation carrier is then liable to the employee for payment of medical expenses pursuant to Minn. Stat. §§ 176.135 and 176.136 and the medical fee schedule, as it would have been had liability not been denied.

In its only reference to a medical provider, Minn. Stat. § 176.191, subd. 3, states that if the *health insurer* paid the provider more than the amount permitted under Minn. Stat. §§ 176.135 and 176.136, the provider must pay back to the *workers' compensation insurer* any amount in excess of amounts allowed under the medical fee schedule. Thus, Minn. Stat. § 176.191, subd. 3, expressly recognizes that the amounts due to a provider, or the amounts for which a workers' compensation insurer is liable, are governed by Minn. Stat. §§ 176.135 and 176.136 and the medical fee schedule.

I believe the majority's application of Minn. Stat. § 176.191, subd. 3, to the question presented in this case is simply incorrect. I disagree that section 176.191 affects in any way the payment due to a *medical provider*. While section 176.191 subd. 3, may well provide a simple and expedient framework for the payment and reimbursement of medical expenses *by and*

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coverage is primary. (Exh. A [1994]; Exh. B [1995].) Thus, where it is later determined that the injury is compensable under the workers' compensation act, the health insurer is entitled to full reimbursement of all amounts paid, since the health insurer had no liability, and no health insurance payments were due, if the employee should have, in fact, been covered under the workers' compensation act.

[16] This court's decision in Chrz v. Sacred Heart Hospice, slip op. (W.C.C.A. Feb. 13, 1990), cited by the majority, is consistent with this analysis. In Chrz, the employer and insurer disputed primary liability and stopped paying for medical treatment provided to the employee. The employee was covered by group health insurance through George A. Hormel Co. (The employee was employed by Sacred Heart Hospice; Hormel was apparently a third-party, non-workers' compensation health insurer in this case.) The employee eventually filed a claim petition, and Hormel, as the employee's non-workers' compensation health insurer, intervened in the proceeding seeking reimbursement for the medical expenses it paid.

The compensation judge awarded reimbursement to the intervenor for the medical expenses it had paid, subject to the amounts allowable under the workers' compensation medical fee schedule. The intervenor appealed, arguing that it was entitled to full reimbursement under Minn. Stat. § 176.191, subd. 3. This court agreed, pointing out that under the medical fee schedule, Minn. R. 5221.0600, it is the *workers' compensation insurer* that is the party liable for workers' compensation benefits, rather than the health insurer, which is entitled to full reimbursement for amounts it paid but for which it was ultimately not liable. All references in the Chrz case, with respect to the liabilities and responsibilities of and between workers' compensation insurers and medical providers for the payment of work-related medical expenses are clearly couched in terms of the medical fee schedule.

between the two insurers, the statute simply does not alter the obligations of the employer and insurer to the employee, or to the employee's medical provider, with respect to the payment for work-related medical expenses where primary liability is found.

Here, Dr. Wengler's office was aware that the employer and insurer disputed primary liability. His office properly submitted the employee's bills to BCBSM for payment, "on an interim basis pending settlement of the work related dispute," within the 15 month time limit imposed by BCBSM for submitting claims. (Exh. A [1994], Exh. B. [1995].) It is clear that Dr. Wengler did not "accept" or "elect" payment from BCBSM in full satisfaction of his claim for payment from the workers' compensation carrier. If that were so, this case would not be before us. Had the employee's injuries not been found to be compensable under the workers' compensation act, Dr. Wengler would have been entitled only to the amounts allowed and paid under the BCBSM contract. Here, however, the claimed injury has been determined to be work-related, thus, the parties rights and liabilities are governed by the workers' compensation act, rather than the BCBSM policy. The employee's medical provider, Dr. Wengler, is, therefore, entitled to payment pursuant to the provisions of the workers' compensation medical fee schedule.

Nothing in § 176.191, subd. 3, states or suggests, as the majority contends, that "payment [by the workers' compensation insurer] to the employee's medical provider is governed by the provider's contract with the health insurer" for medical treatment expenses compensable under the workers' compensation act. The terms of the Physicians Agreement, including the obligation to accept "payment in full," have effect only if BCBSM is ultimately liable for payment under the employee's health insurance plan. Here, the services provided by Dr. Wengler are not "covered services" under the employee's health insurance plan, since the policy provides that workers' compensation coverage is primary in cases involving work-related injuries. Moreover, the payments from BCBSM are, in any event, payment in full *only* of Dr. Wengler's claim for payment from BCBSM, not his claim against the employee's workers' compensation carrier. The workers' compensation insurer, obviously, is not a party to the agreement between Dr. Wengler and BCBSM, but is a separate entity with its own obligations and responsibilities to the employee under the act.[17]

Payment to the employee's medical provider under the medical fee schedule does not involve payment of "extra amounts" by the workers' compensation insurer, or a "bonus" to the medical provider. Rather, the provider is simply paid the amounts due under the workers' compensation act for treatment of a work-related injury.[18] If there is any potential "bonus" or

[17] Nor was the employee a party to the provider agreement between the doctor and BCBSM, and there is no indication that the employee ever agreed that Dr. Wengler's charges should be limited to the amount allowed under the BCBSM contract. There is no evidence that Dr. Wengler accepted the employee as a patient solely on the basis of his Award Gold coverage. Dr. Wengler's bill specifically notes that the case involves a workers' compensation injury. (Exh. A [1994]; Exh. B [1955].)

[18] In footnote 9, the majority cites a footnote in Boedingheimer v. Lake Country Transp.,

windfall in this circumstance, it is to the workers' compensation carrier if it avoids payment of the amount the employer and insurer admit they would have paid had this not been a contested claim.[19]

2. Whether the Charges are Excessive

In my opinion, determination of the issue in this case, as argued by the parties, requires the interpretation of the workers' compensation statutes and rules relating to "excessive" medical fees. Minn. Stat. § 176.135, subd. 3,[20] limits the liability of an employer for medical services provided to an injured worker to "the *charges* therefor as prevail in the same community for similar treatment . . . where the same are paid for by the injured persons." Minn. Stat. § 176.136, subd. 1, directs the commissioner of the Department of Labor and Industry (DOLI) to establish, by rule, procedures for determining when a *charge* for health services is excessive. (Emphasis added.)

Specifically at issue in this case is Minn. R. 5221.0500, item D. (1990), which provides that a fee for medical services is excessive if "the *charge* exceeds the providers current *charge* for the same type of service in cases unrelated to workers' compensation injuries." (Emphasis added.) The employee argues that "charge" means the amount requested by Dr. Wengler in his bill. He contends that so long as the doctor's charges are the same for all payers, the amount charged is not "excessive" within the meaning of Minn. R. 5221.0500, item D., even though the doctor may receive less under a payment agreement with a third-party payer or health insurer.

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485 N.W.2d 917, 922 n.5, 46 W.C.D. 646, 656 n.5 (Minn. 1992), citing in turn a March 1990 report to the legislature on workers' compensation medical costs. In 1992, in response to the report, the legislature required cost containment measures within the workers' compensation medical fee schedule. See, e.g., Minn. Stat. § 176.136, subd. 1a (1992). (Maj. at p. 10.) See also, e.g., Minnesota Department of Labor & Industry, Compact, Aug. 1996 at p. 10, "Benefit Payments Reported" (indicating a significant decrease in medical payments from 1992 through 1995.)

[19] At the April 27, 1995 oral argument, counsel for the self-insured employer stated that, as a practical matter, if there had been no dispute with respect to primary liability, and if Dr. Wengler had not already been paid by BCBSM, the workers' compensation administrator would have simply paid the maximum amounts allowable under the medical fee schedule.

[20] Minn. Stat. § 176.135, subd. 3, was repealed effective October 1, 1992, as part of a substantial legislative revision of sections 176.135 and 176.136. The medical expenses at issue in this matter were incurred between November 20, 1990 and August 17, 1992. Minn. Stat. § 176.136, subd. 1a, effective October 1, 1992, provides that the "liability of an employer for services included in the medical fee schedule is limited to the maximum fee allowed by the schedule *in effect on the date of the medical services* . . . ." (Emphasis added.)

The self-insured employer argues that "charge" means the payment amount established by BCBSM in the Aware Gold provider agreement entered into between Dr. Wengler and BCBSM. The employer contends that once Dr. Wengler entered into the agreement with BCBSM, his "charge" (for that employee) became the amount specified by the terms of the BCBSM provider agreement, not what would have been charged to a different patient.

The workers' compensation medical fee schedule rules, as well as the statute, consistently refer to the medical provider's "charge" or "charges." The term "charge" is specifically defined in the medical fee schedule as "the payment requested by [the] provider on a bill for a particular service." Minn. R. 5221.0100, subp. 3 (1990) (emphasis added).[21] The plain language of the rule clearly states that it is the amount *requested* by the medical provider, that is, the charges billed, that cannot exceed the provider's usual charges, not the amount ultimately received from or reimbursed by a third-party insurer or health care plan. The sole limitation on liability is that the provider may not request or charge more for services provided to an injured employee than the provider would charge anyone else for the same service.[22]

In 1993, the commissioner of DOLI promulgated new medical fee schedule rules pursuant to legislative changes effective October 1, 1992. While not applicable in this case, the new rules, effective December 20, 1993, provide some evidence of what the commissioner means by the term "charge." In the new rules, Minn. R. 5221.0500, which defines "excessive charges," was amended to clarify that a "billing charge" is excessive if the charge exceeds the provider's "usual and customary charge" for the same or similar services in cases unrelated to workers' compensation injuries. The rule expressly provides that "usual and customary charge" means "the amount *actually billed* by the health care provider to all payers for the same services, whether under workers' compensation or not, and *regardless of the amount actually reimbursed under a contract* or government payment system." (Emphasis added.)[23] The commissioner's intent could not be any clearer.

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[21] A "bill" is defined as the provider's statement of charges rendered for treatment of a work injury. Minn. R. 5221.0100, subps. 1 and 3 (1990).

[22] Thus, under the amended statute, Minn. Stat. § 176.136, subd. 1a (1993), the employer's liability for services is limited to either the maximum fee allowed by the medical fee schedule, or the provider's "actual fee," whichever is lower. Accordingly, where the amount actually "charged" by the doctor is less than that allowed under the fee schedule, he is entitled to be paid only the amount he "charges" everyone else, even if it is less than the amount allowed under the fee schedule. See also Minn. R. 5221.0500, subp. 2.A. (1993).

[23] Minn. R. 5221.0500, subps. 1.B and 2.B.(1) (1993). See 17 Minn. Reg. 3187. Compare the dissent's statement in Amans that "a charge for a hospital's medical service is [not] excessive simply because it is not the lowest amount a hospital might accept from a different payer, in reimbursement . . . of a charge for services, such as that allowed by the . . . government, or pursuant to a contractual . . . agreement with a third-party insurer." Amans, 51 W.C.D. at 192.

The medical fee schedule was established by the commissioner after extensive consultation with insurers and medical providers. The rule establishes a uniform fee schedule based on the type of provider and the type of service rendered. Excessive fees are defined in relation to medical provider' *charges*, not payments made by a third-party insurer or health plan. The legislature and commissioner resolved the complex issues presented by our health care payment system - involving multiple health insurance carriers, health plans, and government programs, each with their own methods of payment and oversight - by focusing on the provider's "charges," rather than the rate, level or method of payment various insurers or health plans might require under a multitude of health insurance policies and plans.[24]

The self-insured employers suggests that Dr. Wengler could have avoided this situation by not submitting his claim to BCBSM. Because the issue of primary liability was disputed in this case, had Dr. Wengler not submitted his bill within the 15 months allowed by BCBSM for submission of claims, he would have risked receiving no payment at all for the treatment he provided to the employee. Further, such a delay clearly compromises the health insurer's obligations under Minn. Stat. § 176.191, subd. 3, which provision seeks to ensure prompt payment of an injured employee's medical expenses.[25] Moreover, the interpretation advocated by the self-insured employer would result in differing and unequal payments to providers for the same medical services to different injured workers, depending solely on whether the injured employee has a third-party health insurance plan or policy, the terms of that plan or policy, and when, or whether, the employee's medical provider submitted his or her bill to the employee's health insurer or plan.

Negotiated provider payment contracts or arrangements are common in the health insurance industry. Had the commissioner intended that workers' compensation insurers should have the benefit of reimbursement or payment contracts negotiated or imposed by third-party

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[24] As noted by the dissent in Amans, the decision in this case potentially affects employees and providers in a multitude of differing payment situations, including injured employees covered under Medicare or Medicaid, contractual arrangements by HMOs and PPOs for care and treatment of their members, services provided under bid or speciality contracts, the state health plan, varying negotiated contractual arrangements for volume care or managed care with a number of different private insurance carriers or administrators, or employer self-insured health care plans. Moreover, the methods and types of reimbursements vary considerably. In many instances, the amount that would be payable under a plan is not readily comparable to the amount that would be allowed under the fee-for-service method used in the medical fee schedule. Amans, 51 W.C.D. at 190-91, 191 n. 24.

[25] Here, the medical expenses at issue were incurred in 1991 and 1992. Primary liability for the employee's knee injuries was never admitted by the employer and insurer, and was not determined until January 9, 1996. A final resolution of the amounts due to Dr. Wengler has yet to be reached.

health insurers or plans, or that the workers' compensation rate payable for treatment provided to injured workers should be the lowest payment rate allowed by a health insurance carrier or payer, the rules could certainly have been drafted that way. It is unlikely that the legislature or the commissioner intended differing liability for the same medical treatment based solely on what other health insurance coverage an individual employee might have.

Finally, I am not convinced that applying the medical fee schedule will "open the floodgates" to litigation as suggested by the self-insured employer. Rather, under my analysis, an employer and insurer are simply liable to an injured employee's provider for the provider's charges, up to the limits allowed under the workers' compensation medical fee schedule. A determination of the level of payment afforded by other health insurance coverage, if any, is not required. A separate action, such as that initiated by the employee on behalf of Dr. Wengler in this case, would simply be unnecessary.

I, therefore, construe the statute and rules relating to excessive charges to provide that, so long as the amount *charged* to an employer or workers' compensation carrier, in the medical provider's bill, is no more than the amount the provider would charge anyone else for the same type of service, the provider's charge is not "excessive" within the meaning of Minn. R. 5221.0500, item D. (1990), even though the provider may, in the interim, have been paid a lesser amount by a third-party health insurer or health care plan for the disputed injury, consistent with the health insurer's obligations under Minn. Stat. § 176.191, subd. 3.

At oral argument on April 27, 1995, counsel for the employee asserted that the charges billed by Dr. Wengler's office, for the same services, are the same for everyone.[26] Counsel for the self-insured employer disagreed, arguing that since no testimony had been taken, the employee had proved no such fact. However, under Minn. Stat. § 176.136, subd. 2, the *"employer or insurer* . . . have the burden of proving excessiveness." (Emphasis added.) The compensation judge found that Dr. Wengler's charges were as itemized in his statement, submitted into evidence as Exh. A [1994]. (See Exh. C [1995].) There was no evidence presented by the self-insured employer from which it could be concluded that Dr. Wengler's charges for the services he provided to the injured employee in this case, were more than the charges he would have billed to anyone else.

I believe that the self-insured employer failed to meet its burden of proving that Dr. Wengler's charges are excessive within the meaning of Minn. R. 5221.0500, item D. I would,

[26] Subsequent to the October 7, 1994 hearing before the compensation judge in this matter, and prior to the April 27, 1995 oral argument, counsel for the employee mailed to this court a letter with a copy of comments from Dr. Wengler's accounts manager. In the letter and comments the accounts manager stated that the charges submitted for services provided by Dr. Wengler's office are the same for all insurance carriers, attorneys, and/or patients. These documents were not, unfortunately, submitted at the November 1, 1995 hearing. (3/21/95 Lindberg letter and attachments.)

therefore, reverse the compensation judge's decision, and hold that Dr. Wengler is entitled to payment of his charges for medical services provided to the employee for his work-related injury, up to the maximum amount allowed under the Minnesota workers' compensation medical fee schedule in effect at the time the services were provided.

3. Amans v. Carley Foundry, Inc.

I agree with the majority that Amans v. Carley Foundry, Inc., 51 W.C.D. 163 (W.C.C.A. 1993), is not controlling in this case.[27] I disagree, however, with the majority's assertion that Minn. Stat. § 176.136, a procedural statute, governed the hospital's claims in Amans, or that Minn. Stat. § 176.191, subd. 3, is controlling here.

As noted by the majority, Amans involved the question of whether a workers' compensation carrier could be required to pay to the intervenor, a hospital, an amount in excess of the amount the hospital would have accepted from the employee's health insurer, for the same treatment, when rendered in connection with a non-workers' compensation injury.[28] Amans, however, dealt with a hospital, whose fees were not included in the medical fee schedule.[29]

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[27] Amans was decided by a three-judge panel of the W.C.C.A., with a dissenting opinion. This court's decision in Amans was appealed to the supreme court in January 1994. The supreme court discharged the appellant's writ and remanded the matter to the Office of Administrative Hearings (OAH) for rehearing, including, if necessary, the taking of further evidence. On June 9, 1994, a deposition was taken of William S. Gedge, vice president of health plan relations of Health One, parent company of the hospital, before a compensation judge at OAH. Sometime thereafter, in about October 1994, the parties reached an agreement and settled the case with a lump sum payment by the workers' compensation insurer to the hospital's parent corporation, Allina Health System. An Award on Stipulation was issued by a compensation judge at OAH on December 21, 1994, dismissing the case. See Amans v. Carley Foundry, Inc., File No. *[Redacted to remove Social Security Number]*.)

[28] The majority in Amans held that requiring or requesting a higher payment than the amount paid by the employee's health insurer would constitute an "excessive charge." The dissent argued that the plain language of the statute and rules required the conclusion that there was a difference between the hospital's "charges" and the amount the hospital might accept in reimbursement or satisfaction of its charges from a third-party insurer, and that, so long as the charge was uniform for all injured persons, the charge was not excessive within the meaning of Minn. R. 5221.0500, item D (1990).

[29] The majority in Amans concluded that the definition of the term "charge" in Minn. R. 5221.0100, subp. 3 (1990), was not applicable in situations such as that in Amans, where the provider was a hospital not subject to the fee limitations in the medical fee schedule. See, Boedingheimer v. Lake Country Transp., 485 N.W.2d 917, 46 W.C.D. 646 (Minn. 1992). The statute was amended prior to the decision in Amans, requiring the commissioner of DOLI to include hospitals in the new relative value medical fee schedule. Minn. Stat. § 176.136, subds.

Dr. Wengler's charges are clearly subject to and limited by the Minnesota workers' compensation medical fee schedule.

4. Roraff Fees

The compensation judge found that, if the employee had prevailed, this was an appropriate case for an award of Roraff fees.[30] She further indicated that the employee's attorney had reserved the right to file a petition for attorney's fees after a final decision was made in this case. (11/7/94 F&O, findings 10, 11.) Neither finding was appealed by either party. In its brief, the self-insured employer requests that if this court reverses the compensation judge's decision, the issue of Roraff fees be remanded to OAH or, in the alternative, that this court determine the issue of entitlement to Roraff fees. It is, however, the *employee* who appealed in this case. Counsel for the self-insured employer acknowledged at the April 27, 1995 oral argument that a cross-appeal was not filed in this matter. This court does not have jurisdiction to consider findings which are not appealed. Minn. Stat. § 176.421, subd. 6. An issue that is not timely appealed, cannot be "preserved" for later appeal. We, accordingly, deny the request of the self-insured employer.

DEBRA A. WILSON, Judge
Dissenting

I join in the dissent of Judge Olsen.

1a and 1b (1992). The new medical fee schedule, which includes hospitals, went into effect on December 20, 1993, just ten days after Amans was decided.

[30] Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980).