

LARRY L. BORYCA, Employee, v. MARVIN LUMBER & CEDAR and LUMBERMEN'S UNDERWRITING ALLIANCE, Employer-Insurer/Appellants, and CLARKSON HOSP., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS  
NOVEMBER 10, 1999

No. [REDACTED SSN]

HEADNOTES

**SETTLEMENTS - INTERPRETATION.** The compensation judge correctly concluded that disputed treatment expenses did not constitute expenses from "pain clinic programs," which were barred by a settlement agreement, but erred in concluding that, under the settlement agreement, the limits imposed by the permanent treatment parameters were inapplicable.

**MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY.** Substantial evidence supported the compensation judge's determination that disputed treatment expenses, including narcotic pain relievers, were generally reasonable and necessary to treat the employee's work-related low back condition. However, the judge erred in concluding that the permanent treatment parameters were not "binding" as to the claims, and, because his alternative findings applying the parameters were inadequate for review purposes, the matter would be remanded for reconsideration and further findings.

**MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; MEDICAL TREATMENT & EXPENSE - OUT-OF-STATE PROVIDER.** The permanent treatment parameters are applicable to treatment rendered by out-of-state providers.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Rykken, J., and Pederson, J.  
Compensation Judge: James R. Otto.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of treatment expenses. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

On October 13, 1987, the employee sustained a work-related low back injury while employed by Marvin Lumber & Cedar [the employer]. Lumbar fusion surgery performed in April of 1988 failed,<sup>1</sup> leaving the employee with severe chronic mechanical low back pain known as failed low back surgery syndrome. After subsequent litigation, including appeal to the Minnesota Supreme Court, it was determined that the employee was permanently and totally disabled, effective July 16, 1990, as a result of his work injury. Boryca v. Marvin Lumber & Cedar, 487 N.W.2d 876, 47 W.C.D. 136 (Minn. 1992). In the spring of 1993, the parties entered into a stipulation for settlement, settling the employee's claims against the employer and insurer on a full, final, and complete basis, except for certain medical expenses, in exchange for \$195,000, less attorney fees. An award on stipulation was issued on April 19, 1993.

By the time of the settlement, the employee had moved to Omaha, Nebraska, where his primary treating physician was Dr. Daniel Vaughn. In the spring of 1995, the employee moved again, this time to Las Vegas, after a physician suggested that a drier climate might decrease his symptoms. However, his condition did not improve as hoped, and, in July of 1996, he returned to live in Omaha, again becoming a patient of Dr. Vaughn's.

Dr. Vaughn's chart notes from the fall of 1996 indicate that the employee was seen for two problems: chronic low back pain with spondylolisthesis, and depression. Dr. Vaughn observed on December 2, 1996, that the employee had been "essentially addicted to narcotic medication" since his work injury, and the doctor agreed with the employer's workers' compensation carrier that "narcotics are not indicated at this time."<sup>2</sup> Noting that the employee had reported only minimal improvement from lumbar steroid injections, Dr. Vaughn referred him for physical therapy and encouraged him to use nonsteroidal anti-inflammatories to treat his pain.

In late January of 1997, Dr. Vaughn referred the employee to an orthopedist and also "for long-term pain management" to "Clarkson Pain Clinic," where the employee came under the care of Dr. Jacqueline Chanlatte. On February 20, 1997, Dr. Chanlatte wrote to the insurer to explain the employee's condition and her plans for treatment. Among other things, Dr. Chanlatte indicated that, because of concerns about narcotic abuse, she had asked the employee to agree to obtain all narcotic prescriptions from her alone, to be filled at only one pharmacy. Dr. Chanlatte also explained that she was changing the employee's pain prescription to Oxycontin, a long-acting narcotic, in combination with a "rescue drug," or short-acting narcotic, for breakthrough pain. As indicated in later reports, Dr. Chanlatte's goal was to reach a therapeutic plateau with the medications and then to taper back to the minimum necessary to maintain adequate pain control.

In April of 1997, the employee was admitted to Clarkson Memorial Hospital for low back pain and rectal bleeding. Hospital records indicate that the employee had been unable to obtain his medications because the insurer had refused to pay for them, with the result being

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<sup>1</sup> Diagnostic tests revealed an incomplete fusion at L5 to the sacrum.

<sup>2</sup> Previous prescriptions included Tylenol 3 with codeine and Darvocet.

that the employee was “in extreme pain and exhibiting some signs of narcotic withdrawal.” The hospital discharge summary reflects that the employee’s low back pain and withdrawal symptoms had resolved promptly on reinstatement of his medication. Physicians concluded that the employee’s rectal bleeding had been caused by hemorrhoids resulting from constipation, a common side effect of narcotic pain relievers.

On May 30, 1997, the employee filed a medical request seeking payment for medication. In their response, the employer and insurer indicated that they questioned the employee’s need for narcotics “as well as the control over the prescription,” alleging that the treatment was not reasonable and necessary.

The employer and insurer subsequently had Dr. Donald Starzinski, a neurologist and psychopharmacologist, review the employee’s medical records. In his July 7, 1997, report, Dr. Starzinski indicated that the ongoing narcotic use was inappropriate for the employee and should be discontinued in favor of alternative therapies, such as antidepressants and anticonvulsant medications, meditation or biofeedback, and perhaps use of a TENS unit.

A medical conference was held on September 16, 1997, to consider various claimed treatment expenses, including prescription expenses, expenses for monitoring by Dr. Chanlatte, and costs associated with the employee’s hospitalization in April of 1997. In an order issued on October 9, 1997, the settlement judge expressed concerns about the employee’s narcotic use, indicating that the employee “should be totally weaned off” that medication, but the judge nevertheless awarded the claimed expenses.

The employer and insurer filed a request for formal hearing on November 5, 1997, and the matter was heard by a compensation judge of the Office of Administrative Hearings on May 21, 1999. In the interim, both parties obtained additional medical reports, concerning the disputed treatment, from Drs. Chanlatte and Starzinski. At hearing, the employer and insurer contested the employee’s medical expense claims on several grounds, maintaining that the treatment at issue was closed out by the 1993 stipulation for settlement, that the treatment was not reasonable and necessary under case law standards, and that the treatment was not consistent with the permanent treatment parameters, Minn. R. 5221.6010, et. seq.<sup>3</sup> The compensation judge resolved all issues in the employee’s favor and ordered the employer and insurer to pay all the claimed treatment expenses. The employer and insurer appeal.

## STANDARD OF REVIEW

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<sup>3</sup> The transcript does not actually indicate that the employer and insurer raised the treatment parameters at hearing. However, review of the division file discloses that all parties were on notice that application of the parameters was at issue. As a rule, the parameters are a defense that may be deemed waived unless specifically raised to the compensation judge, and we caution parties to develop the record in this regard.

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 (1992). 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.

## DECISION

### The Effect of the 1993 Stipulation

The 1993 stipulation for settlement contains the following provision concerning future treatment expenses:

That with respect to future medical expenses the parties do hereby stipulate and agree that chiropractic treatment, any type of psychological treatment and any and all associated pain clinic programs and any psychiatric treatment of any kind shall be waived by the Employee as part of the Stipulation for Settlement with the Employer and Insurer receiving a full, final and complete settlement of any and all claims for medical treatment as outlined in this subsection with the Employee being entitled to future reasonable medical treatment pursuant to M.S. 176.135 and the appropriate fee schedule except for the types of treatment outlined in this subsection.

(Emphasis added.) At hearing, and in their post hearing memorandum to the compensation judge, the employer and insurer took the position that the treatment at issue, specifically, the treatment provided by Dr. Chanlatte, constituted a "pain clinic program" foreclosed by the settlement agreement. The compensation judge rejected this argument. On appeal, the employer and insurer contend that, while the employee's treatment by Dr. Chanlatte has been outpatient, that treatment "nevertheless has the look, smell and feel of a chronic pain program" and should be noncompensable under the stipulation. We are not persuaded.

Dr. Chanlatte is the medical director of the pain management team for inpatients at Clarkson's Hospital, and she has clearly been treating the employee for chronic pain. However,

in her February 20, 1997, letter to the insurer, Dr. Chanlatte specifically indicated that she was not treating the employee as part of a pain clinic program. Even Dr. Starzinski, the employer and insurer's expert, wrote the following on this issue:

With regard to your question about as to whether or not I believe this is "essentially a pain clinic program which is being monitored through the employee's treating physician," I would state that the extent of a pain clinic-type program was not clearly documented in records. Specifically, the documentation revolves around pharmacologic intervention with no apparent other modalities being employed. Hence, I see no evidence for a comprehensive pain program for Mr. Boryca.

We also see no evidence that Dr. Chanlatte's treatment is, using the terminology of the settlement agreement, "associated" with "any type of psychological treatment." Therefore, we conclude, as did the compensation judge, that the treatment expense claims at issue are not part of "associated pain clinic programs" and as such are not closed out by the settlement agreement.<sup>4</sup>

#### Reasonableness and Necessity - In General

Dr. Starzinski and, at one point, Dr. Vaughn, expressed significant concern about the employee's long term use of narcotic pain relievers, with Dr. Starzinski indicating that such use is not appropriate, reasonable, or necessary to treat the employee's work-related condition. Citing this evidence, as well as the settlement judge's October 1997 administrative order,<sup>5</sup> the employer and insurer argue as follows:

The records and testimony reflect both chronic pain syndrome and a long history of chemical dependency and addiction to pain medication. [The employee's] testimony and the medical records reveal increasing dosages of narcotic pain medication, concurrent use of multiple narcotic pain medications prescribed by different and presumably unknowing physicians, changing drug

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<sup>4</sup> One of the medications prescribed by Dr. Chanlatte is Effexor, which is, according to Dr. Chanlatte, for anxiety and depression. The employer and insurer have not, however, made any argument that the Effexor prescription constitutes psychological or psychiatric treatment, which is also closed out by the settlement. We therefore see no need to address the Effexor prescription separately on appeal.

<sup>5</sup> We would note here that the settlement judge's decision is completely irrelevant to either the compensation judge's decision or to this court's review of the compensation judge's decision. The hearing before the compensation judge was de novo, and the settlement judge's decision is not evidence of any kind.

types to more potent ones, and weaning off existing drugs. The records clearly document a concern among the employee's physicians about drug addiction and abuse and the failure to pursue alternative treatment regimens given this addictive behavior. Therefore, the disputed treatment and related mileage and prescriptions is not reasonable and necessary, is not causally related to the October 13, 1987 injury, and should be denied.

We note initially that nothing in the record suggests that causation was ever at issue here; that is, there was no evidence or argument below that the treatment in question was related to anything other than the employee's work-related back condition. As to the general reasonableness and necessity of that treatment, the compensation judge was apparently persuaded by the records of Dr. Chanlatte and the testimony of the employee and his wife. Dr. Chanlatte reported in April of 1999 that the employee's current medication regimen provides more pain relief, with less medication, than the employee experienced prior to beginning treatment with her. Both the employee and his wife testified that the employee's level of pain is lower, that his daily life has substantially improved since he came under Dr. Chanlatte's care, and that he experiences considerably fewer side effects now than he did before Dr. Chanlatte changed his medications. And, while Dr. Vaughn expressed disapproval of the employee's narcotic use in December of 1996, he later changed his opinion, indicating in September of 1997 that he had "seen improvement in [the employee's] pain syndrome" and "wholeheartedly support[ed] Dr. Chanlatte's treatment management of this problem." Even Dr. Starzinski noted that "it would be very difficult to alter the pattern of [the employee's] narcotic use," and Dr. Chanlatte explained that, while the employee was physically dependent on the opioids he used to "medically" control his pain, he was not "addicted."

In the years following his 1987 work injury, the employee underwent major low back surgery, which failed, and then tried numerous conservative treatment modalities to control the resulting severe symptoms, including physical therapy, magnet therapy, use of a TENS unit, acupuncture, and massage therapy.<sup>6</sup> He essentially testified that the medication regimen prescribed and monitored by Dr. Chanlatte has been more effective than anything else that has been tried.<sup>7</sup> While the employer and insurer's concerns about the employee's long term narcotic use may be understandable, the record as a whole clearly supports the judge's conclusion that the disputed treatment was, in general terms - - that is, disregarding for the moment the permanent

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<sup>6</sup> According to Dr. Chanlatte's April 1999 report.

<sup>7</sup> Just prior to hearing, the employee was taking 75 mg of Effexor once a day for depression and anxiety; 50 mg of Trazadone at bedtime for insomnia; 75 mg of MS Contin every 12 hours for pain; Tylenol every six hours as needed for pain; 600 mg of Neurontin three times daily for neuropathic pain; Haley's MO daily for constipation caused by the opioids; and 5 mg of Visken twice a day for hypertension. The connection, if any, between the employee's work injury and the medication for hypertension is not apparent from the record.

treatment parameters - - reasonable and necessary to cure and relieve the employee from the effects of his work-related injury. We therefore affirm the judge's conclusion in this regard.

#### Reasonableness and Necessity - Treatment Parameters

The remaining issues in this matter concern the effect and applicability of the permanent treatment parameters, Minn. R. 5221.6010, et. seq. The first question in this regard is whether, given the terms of the stipulation for settlement, the treatment parameters even apply at all. As previously noted, the settlement agreement provides that the employee is "entitled to future reasonable and necessary medical treatment pursuant to M.S. 176.135," with certain specific exceptions. Although his finding in this regard is somewhat ambiguous, it is evident from his memorandum that the compensation judge concluded that the settlement agreement precludes any application of the parameters to limit the employee's medical care. In Finding 1, the compensation judge determined as follows:

1. Pursuant to the terms and provisions of the Stipulation for Settlement Agreement signed by the attorney for the employer on **3/31/93**, Mr. Boryca was entitled to future reasonable **medical** treatment pursuant to Minn. Stat. §176.135, without any contingencies.

(Emphasis in the original.) In subsequent findings, the judge concluded that the permanent treatment parameters were not binding here, explaining in his memorandum:

Minn. Rules 5221, to the extent they put conditions on the obtaining of medical treatment otherwise allowed by Minn. Stat. § 176.135 do not apply in any claim where there has been an Award on Stipulation that approved a settlement agreement that left open medical treatment as provided by Minn. Stat. § 176.135 (prior notification is a condition).

The judge erred in his conclusions on this issue. The 1993 stipulation for settlement understandably contains no language as to the applicability of the treatment parameters, in that the stipulation was drafted and executed prior to the promulgation of those rules. However, the rules are by their own terms applicable to all treatment rendered after their effective date, Minn. R. 5221.6020, subp. 2.<sup>8</sup> More importantly, the supreme court has indicated that the parameters do not conflict with Minn. Stat. § 176.135, but rather represent current medical consensus as to what treatment is reasonably required for various work-related conditions. See Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 34-35, 58 W.C.D. 395, 405-07 (Minn. 1998). In other words, consideration of the treatment parameters is simply a component of all reasonableness and necessity determinations in which the parameters have been raised by the parties. We are not

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<sup>8</sup> Unless the insurer "has denied liability for the injury." Minn. R. 5221.6020, subp. 2.

saying that parties may not draft an agreement indicating that the parameters will not be applied to post-settlement treatment, we are only saying that the parties did not do so here. We therefore reverse the judge's conclusion that the 1993 settlement agreement precludes application of the rules.

In his responsive brief, the employee contends that the treatment parameters should not be applied in any event to care rendered by an out-of-state provider. This position has some appeal, in that it is difficult even for local providers to understand and comply with this very complex and lengthy set of rules. However, contrary to the employee's argument, we see no evidence that the parameters were developed based on Minnesota standards of care. Rather, the enabling legislation directed the commissioner to adopt rules used to determine "whether a provider of health care services . . . is performing procedures or providing services at a level or with a frequency that is excessive, unnecessary, or inappropriate based upon accepted medical standards for quality health care." Minn. Stat. § 176.83, subd. 5 (emphasis added). That is, the rules are based on "accepted medical standards" in general, not on accepted Minnesota medical standards, and there is in any event no evidence that the standard of care for medical treatment in Minnesota is different in any way from the standard of care in other areas of the country. Compare Crowson v. Valley Park, Inc., 56 W.C.D. 239 (W.C.C.A. 1997) (noting that the medical fee schedules are inapplicable to out-of-state medical care because those schedules were developed based on prevailing Minnesota charges for care). Perhaps most importantly, Minn. Stat. § 176.83, subd. 5, specifically indicates that "[t]he rules shall apply uniformly to all providers . . ." We can find no authority that would allow us to exclude out-of-state medical providers from the limitations on treatment imposed by the parameters.

Finally, the employee notes that the judge made alternative findings, applying the treatment parameters and finding the disputed treatment consistent with those rules. The judge's finding in this regard reads as follows: "The treatment and the prescriptions provided to [the employee] by Dr. Jacqueline Chanlatte was appropriate under Minn. Rules 5221.6200, Subd. 12(c) and 5221.6600." In his memorandum, the judge wrote as follows: "Even if the Rules did apply, [the employee's] disputed treatment and prescription expenses warrant a departure under Minn. Rule 5221.6050, Subp. 8A & D(3)." No other explanation was provided.

After considering the record and the provisions cited by the judge, we find the judge's findings as to the parameters inadequate for purposes of review. The judge cited no evidence in conjunction with his reference to the rules, and none of his factual findings has any obvious application to any of the cited parameters. Moreover, one of the provisions cited by the judge, Minn. R. 5221.6600, is several pages long, and it is not our responsibility to apply the facts to the rules in the first instance or to guess at the judge's reasoning. Finally, when referencing the departure parameters, the judge did not explain how, if at all, the notification requirements for a departure had been satisfied,<sup>9</sup> and the judge apparently misconstrued the requirements of Minn.

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<sup>9</sup> See Minn. R. 5221.6050, subp. 9; Olson v. Allina Health Sys., No. [REDACTED SSN] (W.C.C.A. Feb. 5, 1999) (noting that the departure rules themselves mandate prior notification).

R. 5221.6050, subd. D, which requires the satisfaction of two out of three criteria, not just one criterion, in order to qualify for a departure from the rules.

As previously noted, the treatment parameters are complex, and they are not workable in litigation unless the parties inform the judge as to which specific rules are at issue and the judge then explains in his or her decision, with reference to the evidence, as to how the rules allow, or preclude, any given claimed treatment expense. It is also important to note that there are different kinds of treatment expenses at issue here - - medication expenses, office visits to Dr. Chanlatte and others, and the employee's hospitalization - - which may well implicate different parameters. It is simply unacceptable for the parties or the judge to simply cite a rule without further explanation. Therefore, we remand the matter to the compensation judge for reconsideration of the employee's medical expense claims under the treatment parameters. The compensation judge may, if he so chooses, require the parties to submit additional argument as to specific parameters and how specific evidence supports or satisfies the application of any particular rule. As we have indicated previously, the limits imposed by the parameters are a defense to treatment claims, and the judge need not and should not deny such claims based on any rule not specifically raised by the employer and insurer. In his decision on remand, the judge should explain his application of the rules in terms of the evidence submitted at the original hearing.