DAVID W. CLAUSEN, Employee/Appellant, v. RYDER STUDENT TRANSP. SERVS., INC., SELF-INSURED/RYDER CLAIMS SERV., Employer/Cross-Appellant, and SAFECO INS. CO., Intervenor/Cross-Appellant, and MEDICA CHOICE and BACK IN ACTION, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 6, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF. Substantial evidence supports the compensation judge's finding that the employee's injuries arose out of and in the course of his employment where the employee, a bus driver, was struck by a tire while walking along a public highway from the bus terminal to an employer-leased parking lot, where the employer had directed the employee to park if unable to find a parking space in the employer-owned parking lot.

CAUSATION - SUBSTANTIAL EVIDENCE. The compensation judge's finding that the employee's *left* shoulder injury was a pre-existing condition is clearly erroneous where the compensation judge relied upon records regarding the employee's pre-existing *right* shoulder in making the finding, and must be vacated and remanded for reconsideration.

INTERVENORS; MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Reimbursement of medical expenses to a no-fault insurer is limited to amounts allowed under the medical fee schedule. The permanent treatment parameters do not limit the amount of reimbursement for medical expenses since the parameters do not apply where the employer and insurer have denied primary liability. Remand is necessary on a specific expense where the employer and insurer defend on basis of reasonableness and necessity and the compensation judge did not make a finding on that expense.

Affirmed in part, vacated in part and remanded.

Determined by: Rykken, J., Johnson, J., and Pederson, J.
Compensation Judge: Bonnie A. Peterson

OPINION

MIRIAM P. RYKKEN, Judge

The employee and intervenor, Safeco Insurance Company, appeal from the compensation judge's determination that the employee's left shoulder condition did not occur at the time of his injury on April 21, 1998 and from the compensation judge's denial of the employee's claim for payment of medical expenses and permanent partial disability benefits

relative to the employee's left shoulder, as well as the compensation judge's denial of the employee's claim for payment of temporary partial and temporary total disability benefits.

The employer and insurer cross-appeal from the judge's determination that the employee's back, neck and thoracic injuries arose out of and in the course and scope of the employee's employment with Ryder Student Transportation Services, Inc. The employer and insurer also cross-appeal from the compensation judge's award of temporary total disability benefits between April 21, 1998 - March 4, 1998, and the compensation judge's award of medical expenses and reimbursement of intervention claims relative to the employee's neck, back and thoracic injuries. We affirm in part, vacate in part, and remand the matter for further proceedings.

BACKGROUND

On April 21, 1998, David W. Clausen (employee) was employed by Ryder Student Transportation Services, Inc. (employer). The employee had worked for the employer as a school bus driver since January 11, 1982. On April 21, 1998, the employee parked his personal vehicle in a commercial parking lot space leased by the employer for its employees. This parking lot was located approximately one-quarter mile from the main bus terminal. The employee drove his morning school bus route, and returned to the main terminal by approximately 9:35 a.m. The employee testified that he parked his bus in a lot adjacent to the bus terminal. He turned on his four-way blinkers, and left his bus engine running. (T. 42.) According to the employee's testimony, he planned to leave his bus running and to move his car from the leased parking lot to the terminal parking lot; his objective was to place his bus in a convenient location for refueling and sweeping, and to place his car near-by for retrieving items from it in advance of his noon and afternoon bus routes. The employee planned to return to his bus after moving his car, in order to fuel and sweep out the bus. (T. 42, 44.)

The employee walked from the employer's terminal parking lot to the parking lot where his car was parked. His walking route was adjacent to Minnesota State Highway 13. While approaching his car, he was struck in the upper back by a tire that broke off a wheel assembly of a truck traveling on adjacent Highway 13. The employee was knocked to the ground, was rendered unconscious and was transported by emergency vehicle to Hennepin County Medical Center (HCMC).

The employee received initial medical treatment at HCMC, where he complained of pain in the back of his head, between his shoulder blades and in his cervical and thoracic spine area. (Employee's Ex. C.) Thoracic spine x-rays were taken, which revealed mild degenerative changes in the cervical and thoracic spine, with no evidence of acute fractures. Chest x-rays taken at HCMC were negative. The employee was advised to consult his personal physician after receiving treatment at HCMC; thereafter he consulted with Dr. Kenneth Hodges on April 23, 1998. Dr. Hodges diagnosed a concussion, and noted normal range of motion of the neck, redness on the back and posterior chest, contusions and abrasions on both lower legs, calf muscles, and forearms, and minimal right CVA tenderness. (Er. Ex. 5.)

Dr. Hodges referred the employee to Orthopedic Surgeons, Ltd., where the employee had treated in 1992 for a right shoulder injury. The employee was examined by Dr. Mark Urban on April 27, six days post-injury. According to Dr. Urban's April 27, 1998 report, the employee reported an "all over" achiness, headache, pain in his mid scapular region, a catching sensation in his neck and pain in his right lower rib cage. Dr. Urban diagnosed a contusion to the thoracic spine, "as well as multiple contusions to the assorted extremities." Dr. Urban restricted the employee from working until May 4, 1998, recommended Ibuprofen for pain and prescribed a short course of physical therapy to improve mobility and overall function, as well as a neurological consultation for treatment of continued headaches. (Er. Ex. 3.)

The employee did not proceed with physical therapy treatments, but instead obtained chiropractic treatments through Dr. Mike Chalupsky, D.C., commencing April 28, 1998. The employee initially treated with Dr. Chalupsky on a daily basis, and then three times weekly. Dr. Chalupsky released the employee to work on a part-time basis as of May 8, 1998, within the following restrictions: part-time work; no driving; light-duty work with no use of left arm; lifting 20 pounds or less. Within one month, Dr. Chalupsky referred the employee to an orthopedist, Dr. Douglas A. Becker, since his left shoulder symptoms did not improve. Dr. Chalupsky's referral letter to Dr. Becker, dated May 26, 1998, indicates that the employee had progressed well in the areas of his neck, upper back and right flank, but that his left shoulder showed minimal improvement, limited abduction, and difficulty with internal rotation and adduction.

At his May 27, 1998 appointment with Dr. Becker, the employee reported ongoing left shoulder pain following his injury on April 21, 1998. The employee reported that his "left shoulder pain has been increasingly noticeable ever since the accident." The employee also provided to Dr. Becker a history of left shoulder pain one and a half years earlier, which completely resolved after use of anti-inflammatory medication. An MRI examination of the left shoulder taken May 27, 1998 indicated a mild subacromial bursal thickening and bursitis, along with anterior, posterior and superior glenoid labrum tear. (Ee. Ex. G.) A follow-up physical examination with Dr. Hodges on June 5, 1998 reflected limited range of motion in the left shoulder, and a cuspid tear in the left shoulder. (Er. Ex. 5.)

Based on the findings on MRI scan and the employee's ongoing symptoms, Dr. Becker recommended surgery. He performed arthroscopic surgery on the employee's left shoulder on June 9, 1998. Dr. Becker ultimately released the employee for return to work four hours per day as of July 13, 1998, with no driving and lifting. Dr. Becker also prescribed physical therapy post-surgery. The employee continued to receive chiropractic treatment post-surgery, in lieu of physical therapy, including ultrasound and strengthening and range of motion exercises.

The employee returned to work for Ryder following surgery, returning to a light-duty office job. He answered phones and performed office projects such as preparing application forms and folders for route copies. By September 21, 1998, Dr. Becker determined that the employee could return to work driving a van, although he did not release the employee to his previous job as a bus driver. As of September 1998, the employee was still uncomfortable driving a full-sized school bus, due to the required physical duties such as holding onto the steering wheel,

reaching over for the microphone for the two-way radio, opening and closing the driver's window as required by law at train tracks, opening bus windows, closing roof hatches and sweeping the bus. (T. 68-69.) The employee drove van routes daily, commencing in September, and he continued to drive a passenger van at the time of the hearing on March 9, 1999.

Dr. Becker determined that the employee had reached maximum medical improvement as of September 21, 1998, and assigned a five percent permanent partial disability to the body as a whole based upon his left shoulder condition. (Employee's Ex. G.) Dr. Becker's report was served on the employee on October 6, 1998, as formal notice of maximum medical improvement pursuant to Minn. Stat. § 176.101, subd. 1(j). (Er. Ex. 5.)

At the request of the employer and insurer, the employee underwent an independent medical examination conducted by Dr. David W. Boxall, on September 1, 1998. (Er. Ex. 1.) Dr. Boxall diagnosed a contusion and a strain to the neck, upper back area and chest wall as a result of the injury on April 21, 1998. Dr. Boxall determined that the medical records did not support an injury to the left shoulder as a result of that April 21, 1998 injury, relying on the records of Dr. Urban, issued following his April 27, 1998 examination of the employee. Dr. Boxall determined that the employee had reached maximum medical improvement; his report was served on the employee as of September 11, 1998. (Er. Ex. 6.)

Dr. Boxall determined that medical treatment for one month to six weeks following the initial injury had been reasonable and necessary, but that the employee required no further medical treatment as a result of his April 21, 1998 injury. In Dr. Boxall's opinion, the employee should have followed through with the physical therapy recommended by Dr. Urban, as opposed to the chiropractic care he did receive. Had the left shoulder not responded to physical therapy, Dr. Boxall felt that the employee then should have undergone arthroscopic evaluation of the shoulder joint, including manipulation under anesthesia, as opposed to the surgery which was performed in June 1998 by Dr. Becker. Dr. Boxall's supplemental report, issued following his post-exam review of pre-existing medical records, outlines Dr. Boxall's opinion that the employee had a pre-existing history of left shoulder problems, with no left shoulder injury occurring as a result of the injury on April 21, 1998.

The employer and insurer denied primary liability for the employee's injury, alleging that the injury did not arise out of and in the course and scope of the employee's employment with the employer. As a result, Safeco Insurance Company (Safeco), intervenor and the employee's automobile no-fault insurance carrier, paid medical expenses on behalf of the employee in the amount of $19,999.24. Safeco also paid wage loss benefits to the employee totaling $9,260.00, during periods of the employee's claimed temporary total and temporary partial disability from employment.

On May 18, 1998, the employee filed a claim petition, alleging that he sustained an injury to his back, neck and left shoulder on April 21, 1998. The employee claimed temporary total disability benefits from April 21, 1998 through May 11, 1998, and temporary partial disability benefits from May 11, 1998 to the present and continuing. The employee also claimed payment

of chiropractic expenses incurred with Dr. Mike Chalupsky, and requested rehabilitation services. Safeco Insurance intervened for reimbursement of medical expenses and wage loss benefits paid.

At hearing, issues of causation and the extent of the employee's injury were addressed. The issue of the employee's entitlement to temporary disability benefits was also addressed. The parties disputed whether the employee was maximizing the number of hours he drove the van, once he was released to return to work as of September 21, 1998. The employer and insurer contended that the employee failed to mitigate his wage loss when he did not augment his driving with mid-day routes. The employee argued that he continued to work at the job and the number of work hours originally offered him when he was released to return to work as of September 21, 1998.

Following the hearing on March 9, 1999, the compensation judge determined that the employee's injury on April 21, 1998 arose out of and in the course and scope of the employee's employment with the employer. The judge determined that the employee injured his back, neck, thoracic area and ribs as a result of that injury, and that the employee was temporarily totally disabled from employment from April 21, 1998 through May 4, 1998. The compensation judge ordered the employer and insurer to pay for all medical treatment related to the employee's neck, back, thoracic and rib problems and to reimburse the intervenors for medical expenses related to those areas.

The compensation judge, however, determined that the employee did not sustain any left shoulder injury at the time of his injury on April 21, 1998, but that instead the employee had pre-existing left shoulder problems prior to 1998. The judge determined that the left shoulder treatment, including surgery, was not reasonable and necessary to cure or relieve the effects of the April 21, 1998 incident and therefore denied the intervenor's claims and employee's claims for all medical and chiropractic expenses related to treatment of the left shoulder. The compensation judge also denied the employee's claims for permanent partial disability benefits relative to the left shoulder.

The judge also determined that the disability after May 4, 1998 seemed to stem solely from complaints of left shoulder problems and disability following the left shoulder surgery. As a result, the judge determined that the employee failed to show that he was temporarily totally or temporarily partially disabled from employment since May 5, 1998, as a result of the incident of April 21, 1998. The judge also determined that the employee was physically capable of working full-time and that he did not make a reasonable and diligent attempt to maximize his earning capacity since May 10, 1998. The employee and intervenor appealed from the compensation judge's decision. The employer and insurer cross-appealed.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1

(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.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Arising Out Of and In The Course and Scope of Employee's Employment

Each case addressing whether an injury arose out of and in the course of employment stands on its own facts. Gibberd by Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988); Novack v. Montgomery Ward & Co., 158 Minn. 495, 498, 198 N.W.2d 290, 292, 2 W.C.D. 156 (1924). The phrase "arising out of" requires evidence of a causal connection between the injury and the employment, while the phrase "in the course of employment" requires that the injury occur within the time and space boundaries of employment. Rondeau v. Metropolitan Council, 58 W.C.D. 338 (W.C.C.A. 1998) (citing Foley v. Honeywell, Inc., 488 N.W.2d 268, 271-72 (Minn. 1992), and Gibberd, supra). Whether an injury arose out of and in the course of employment is generally a question of fact for the compensation judge, Franze v. National Delivery Serv., 49 W.C.D. 148, 155 (W.C.C.A. 1993), summarily aff'd (Minn. Aug. 25, 1993), and the burden of proof is on the employee/claimant. Minn. Stat. § 176.021, subd. 1.

As further stated in Rondeau, "[a]n injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." 58 W.C.D. at 344 (quoting 1 Arthur Larson, Workers' Compensation Law, § 14.00). An employee must also show that he has increased risk of injury which arises out of his employment with the employer and that a condition or incident related to his employment increases his exposure to potential harm beyond that faced by the general public. Fisher v. Fisher, 32 N.W.2d 424 (Minn. 1948); Gibberd, supra.

The compensation judge determined that the employee's back, neck and thoracic injuries caused by the April 21, 1998 incident arose out of and occurred within the course and scope of the employee's employment with the employer. As a result, the compensation judge ordered payment for certain temporary total disability benefits, and all reasonable and necessary medical expenses incurred by the employee for treatment of his back, neck, thoracic area and ribs.

In the unique circumstances of this case, the employee was walking from one employer-owned parking lot to his own vehicle in an employer-leased parking lot. He did so in order to bring his car closer to his bus, an activity which could be viewed as incidental to his work duties. The parties did not dispute that the employee had been directed by the employer to park his vehicle in the parking lot, if unable to find a parking spot on the employer's premises, and the compensation judge determined that the employee's car was parked in a lot leased by the employer specifically for use by employees for parking their vehicles. (Finding No. 19.) The location of the employees' parking lot required the employee to walk approximately a quarter of a mile along a frontage road close to Highway 13, a four-lane highway. The compensation judge found that the location of the parking lot increased the employee's risk from injury from Highway 13 traffic. (Finding No. 21.) In this case, the truck tire which hit the employee flew off a truck which was traveling on Highway 13. The tire crossed two lanes of traffic, the median and another two lanes of traffic and the frontage road before hitting the employee while he walked in the parking lot. Based upon the facts of the injury, the compensation judge reasonably concluded that the injury arose out of and in the course and scope of employment (Finding No. 22), and we therefore affirm that finding.

Claimed Left Shoulder Injury

The compensation judge determined that the initial medical reports generated immediately following the employee's injury on April 21, 1998 did not indicate any left shoulder injury. The judge also determined that the employee had pre-existing left shoulder problems similar to those problems corrected by the 1998 left shoulder surgery, and that the employee failed to show by a preponderance of the evidence that his left shoulder was injured at the time of the incident of April 21, 1998. As a result, the judge denied wage loss, permanency and medical benefits related to that left shoulder injury.

In the compensation judge's memorandum, the judge refers to lack of correct foundation on the part of the employee's physician. That physician, Dr. Donald Becker, indicated that the employee had no pre-existing left shoulder disease, and that the left shoulder condition and treatment directly resulted from the April 21, 1998 incident. (Ee. Ex. G.) The judge also states in the memorandum that the employee had treated since 1992 for left shoulder problems and had undergone a previous MRI to his left shoulder which was nearly identical to the MRI taken after the injury of April 21, 1998. (Memo. at 7.)

In fact, there are no medical reports in the record indicating that the employee treated for his left shoulder as early as 1992, nor is there any report in the record of an MRI scan of the left shoulder taken prior to April 21, 1998. The employee did have medical treatment for

both shoulders prior to the April 21, 1998 injury, but not as described by the compensation judge. It appears that the compensation judge, while reviewing medical exhibits of the parties, transposed the medical history on the left shoulder with the history on the right shoulder. There is only one reference in the medical records concerning pre-existing medical treatment for the employee's left shoulder. In the records of Dr. Grube, dated June 23, 1997, Dr. Grube's chart note indicates that the employee gave a history of falling on his left elbow in January 1997 and that he complained of continued left upper extremity pain in June 1997. Dr. Grube diagnosed left bicipital tendinitis. The employee testified that he recalled experiencing left arm discomfort that radiated into the left shoulder in early 1997, and that the medication prescribed by Dr. Grube in June 1997 resulted in a resolution of his symptoms within two months. (T. 78-81.) There is no report in the record reflecting any MRI taken of the employee's left shoulder.

By contrast, the employee received medical treatment for his right shoulder in 1992, related to a fall in October 1991 which injured his right arm and neck area. He consulted Dr. John Anderson, who recommended an MRI of the right shoulder. The employee underwent an MRI on February 17, 1992 at Fairview Southdale Hospital. That MRI showed impingement secondary to moderate lateral downsloping of the acromion, spurring on the acromion, and fluid build-up in the subacromial bursa along with full thickness active tendonitis. Dr. John T. Anderson recommended an arthroscopic right shoulder decompression. The employee ultimately declined surgery and instead obtained chiropractic treatment for his right shoulder symptoms.

The compensation judge's determination regarding the causation of the employee's left shoulder symptoms resulted in related findings denying compensability of the employee's claims relative to his left shoulder injury. Based on medical evidence of record, we believe that the compensation judge's finding concerning the causation of the left shoulder injury is clearly erroneous. We vacate the compensation judge's findings concerning the causation, nature and compensability of the employee's left shoulder injury, Finding Nos. 6-18. We vacate those findings since they all relate to the judge's determination that the employee's left shoulder condition pre-existed his April 21, 1998 injury.

We remand this case to the compensation judge for additional review of the medical records and for a determination of the causation of the employee's left shoulder injury based upon that review. We also remand for additional findings concerning the compensability of the employee's claimed temporary total and temporary partial disability following May 4, 1998, as well as his claim for medical and chiropractic expenses related to his left shoulder. We make no determinations concerning the employee's post-surgery employment or attempts to increase his work hours, as those issues will need to be re-evaluated once the compensation judge determines whether the employee's temporary disability is causally related to his April 21, 1998 injury.

Reimbursement of Intervention Claim

The compensation judge ordered the employer and insurer to reimburse all intervenors, including Safeco Insurance Company, for all benefits paid for neck, back and thoracic medical care and also for disability payments made from April 21, 1998 through May 4, 1998,

including all interest as allowed under the statute. (Order Nos. 7, 9 and 11.) The compensation judge also listed stipulated facts including that "[t]he employee received no-fault benefits and all parties agree that no-fault benefits should be reimbursed up to the limits of workers' compensation benefits allowed if liability is determined." (Stipulated Fact No. 5.) The compensation judge does not list in the Findings and Order, nor memorandum, any further information detailing the amounts to be reimbursed to the intervenors.

At issue is the amount of medical expenses to be reimbursed to Safeco. During pre-hearing discussions, the parties agreed that if the employee were to prevail in his claim there would be reimbursement to the intervenor, and "that the parties will get together as far as the dollar amount." (T. 6.) The judge also stated that she would make no award as to a dollar amount. (T. 7.) During a discussion between the judge and the attorneys representing the intervenor and employer, the attorneys commented that they understood that if the judge ordered reimbursement of medical expenses to the no-fault carrier, Safeco Insurance Company, such reimbursement would be made pursuant to the workers' compensation medical fee schedule. The attorney for the employer and insurer asserted that other medical insurers' reimbursements are payable on a 100 percent basis, but for a no-fault insurer, payments are limited pursuant to the fee schedule. (T. 23-24.)

In its appellate brief, the employer argued that reimbursement to a no-fault carrier should be limited by the benefits the employer would owe under the Minnesota Workers' Compensation Act. The employer argued that benefits should be limited by the fee schedule for medical expenses and by the limitations on temporary disability benefits set forth in Minn. Stat. § 176.101. The employer differentiated between medical benefits paid by a no-fault insurer and benefits paid by insurers specifically listed in Minn. Stat. § 176.191, subd. 3: Health and Accident Insurers, Nonprofit Health Service Plan Corporations and Health Maintenance Organizations, as listed in Minn. Stat. Chaps. 62A, 62C and 62D. The employer further argued that based upon the no-fault statute, Minn. Stat. § 65B.61, subd. 1, workers' compensation benefits are primary, with the no-fault carrier being liable for any excess benefits not covered under the workers' compensation statute.

By contrast to its position during the hearing, in its appellate brief Safeco argued that it should be reimbursed in full for medical expenses paid on behalf of the employee, with no limitations set by the fee schedule and permanent medical treatment parameters, relying on Chrz v. Sacred Heart Hospice, slip op. (W.C.C.A. Feb. 13, 1990). In Chrz, full reimbursement was awarded to the intervenor, a medical insurer, based upon the statute. Minn. Stat. § 176.191, subd. 3, provides that when the employer and the workers' compensation insurer dispute the compensability of the employee's injury, the employee's medical insurer shall make payment of the medical costs and that if the injury is later determined to be compensable, then the workers' compensation insurer is to reimburse the medical insurer for the medical costs paid. Chrz, supra. The statute also provides a remedy to the workers' compensation insurer for collecting reimbursement of any "overpayments" from the medical provider, in the amount by which the payments to the provider exceeded the medical fee schedule.

It is upon these portions of the statute and the applicable rules that Safeco relied in asserting that it is due full reimbursement. We disagree. The workers' compensation statute, Minn. Stat. § 176.191, subd. 3, specifically lists three medical insurers which are entitled to full reimbursement in situations, such as the case at hand, wherein primary liability was denied by the workers' compensation insurer. No-fault insurers are not included in that list of three. It appears that the legislature intended to specify medical insurers' reimbursement rights, presumably to assure prompt payment of medical benefits when causation is disputed. No-fault benefits are governed by Minn. Statute § 65B.41, et seq., and result from a separate insurance contract between the individual employee and his no-fault insurer.

By ordering reimbursement of medical expenses to the no-fault insurer, Safeco, this court is not determining the no-fault carrier's liability to pay no-fault benefits, but instead is deciding, within the WCCA's jurisdiction, the extent of reimbursement due to the no-fault intervenor. Freeman v. Armour Food Co., 380 N.W.2d 816, 38 W.C.D. 445 (Minn. 1986). We order, therefore, that the insurer shall reimburse the intervenor, Safeco, for all medical benefits paid by Safeco to or on behalf of the employee, relative to treatment of the neck, back and thoracic area, subject to the fee schedule. See Burdick, 55 W.C.D. 195 (W.C.C.A. 1996).

Safeco also argued that the permanent treatment parameters, Minn. R. 5221.0001, et seq., should not be utilized in this case to limit the amount of reimbursement for medical expenses paid by Safeco. The employer denied primary liability, resulting in Safeco's prompt payment of medical expenses. Safeco argued that it should not be penalized by being required to pay for treatment that could have been discontinued or limited by the employer and insurer through application of the permanent treatment parameter provisions, had primary liability not been denied by that employer and insurer. We agree with this argument. As set forth in Minn. R. 5221.6020, subp. 2, Rules 5221.6010 through 5221.6600 of the permanent treatment parameters "do not apply to treatment of an injury after an insurer has denied liability for the injury." Reimbursement to Safeco should therefore be limited to amounts allowed under the fee schedule, but with no further limitation made pursuant to the permanent medical treatment parameters.

The judge ordered reimbursement to all intervenors for "all benefits paid for neck, back and thoracic medical care," and reimbursement of a portion of wage loss benefits paid by Safeco to the employee. (Orders No. 7 and 9.) We affirm those orders, subject to the fee schedule and subject to limitations for wage loss benefits pursuant to Minn. Stat. § 176.101.

Reimbursement of Expenses Related to Eyeglasses and Eye Treatment

Intervenor Safeco claimed reimbursement for replacement of eyeglasses which were damaged as a result of the employee's April 21, 1998 injury, and for reimbursement for medical expenses associated with eye problems the employee developed following that injury, a total of $719.57 ($70.00 paid to Eye Physicians & Surgeons and $649.57 paid to Midwest Vision Center). The compensation judge did not specifically address this claim in the Findings and Order. The employer and insurer, in their reply brief, do concede that Safeco should be reimbursed for the cost of glasses and eye care pursuant to the fee schedule, if it is determined that

the employee's injury arose out of and in the course and scope of employment. However, they reserve the defense of reasonableness and necessity, particularly with respect to the bill incurred with Midwest Vision Center, in the amount of $649.57, and so have not agreed to reimburse a specific amount for medical treatment to the eyes.

We therefore remand this issue to the compensation judge, for a finding on this issue consistent with the judge's order for reimbursement of other medical treatment to the back, thoracic spine and neck.