JAMES M. DAWSON, Employee/Appellant, v. UNIV. OF MINN., SELF-INSURED/SEDGWICK CLAIMS MGMT. SERVS., Employer, and MARSDEN BLDG. MAINTENANCE and RELIANCE INS. CO./ALEXSIS, INC., Employer-Insurer, and MEDICA CHOICE/HEALTHCARE RECOVERIES, INC., and HOLMBERG CHIROPRACTIC SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 6, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's denial of the employee's claim for permanent partial disability benefits related to his cervical condition.

MEDICAL TREATMENT & EXPENSE - CHANGE OF PHYSICIAN; MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Prior approval of a request to change physicians is not determinative of the compensability of medical treatment, and neither the change-of-physicians rules nor the permanent treatment parameters are applicable where an employer and insurer have denied primary liability for a work injury. Because the compensation judge erred in denying the claimed treatment expenses on change-of-physician and treatment parameters grounds under the circumstances of this case, the matter is remanded for reconsideration and additional findings.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Johnson, J., and Hefte, J.
Compensation Judge: James R. Otto.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of permanent partial disability benefits and treatment expenses. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

On March 23, 1994, the employee slipped and fell several feet while descending a ladder in the course and scope of his employment as a pipe fitter for the University of Minnesota [the employer], self-insured. He landed stiff-legged on a cement floor; whether he then fell

further, landing on his left side, is disputed. He reported the incident to the employer the following day and began seeing Dr. James Anderson, on referral from the employer, and Dr. Dean Evans, D.C., on his own initiative, for treatment of low back and leg pain. By late April of 1994, the employee had begun reporting additional symptoms, including facial numbness and tingling pain into his left arm and left leg.

In October of 1994, the employee began seeing Dr. Gregory Holmberg, D.C., for symptoms which by this time included low back pain, neck pain, headaches, facial numbness, and partial loss of taste. The employee indicated that he had transferred his care from Dr. Evans to Dr. Holmberg for convenience due to clinic location.

On October 26, 1994, Dr. Evans filed a medical request seeking payment for several weeks of treatment rendered after the March 1994 injury. The employer responded that Dr. Anderson, not Dr. Evans, was the employee's primary treating physician and that Dr. Evans' treatment was in any event duplicative of the treatment the employee had received from Dr. Anderson. In a decision issued on November 28, 1994, a representative of the commissioner indicated that the employee was entitled, under applicable rules, to change physicians once within the first sixty days of treatment, and that the care rendered by Dr. Evans was otherwise reasonable, necessary, and compensable. In response, the employer filed a request for formal hearing.

The employee continued to treat intermittently with Dr. Holmberg and eventually saw several other health care providers, including Dr. Crispin See, of the Minneapolis Clinic of Neurology. Diagnostic tests included at least two cervical MRI scans and a lumber MRI.

On March 12, 1996, the employee aggravated his low back condition while working in a second, part-time job with Marsden Building Maintenance [Marsden]. He continued to treat with Dr. Holmberg after this incident.

The employee filed a claim petition alleging entitlement to permanent partial disability benefits, for cervical and lumbar injuries, from the employer and Marsden. The petition also listed claims for treatment expenses in connection with the care rendered by several providers. In its answer, the employer admitted that the employee had sustained a temporary lumbar injury, denied that the employee had injured his cervical spine, denied that the employee had sustained any permanent partial disability, and denied liability for the disputed treatment expenses on grounds of causation, reasonableness and necessity, inconsistency with the treatment parameters, and "on the basis of unauthorized change of physicians."

In July of 1998, the employee and Marsden entered into a partial stipulation for settlement, settling all claims related to the employee's March 12, 1996, injury, except medical expense claims for treatment rendered prior to May 21, 1998. An award on stipulation was issued on July 23, 1998.

The matter came on for hearing before a compensation judge on October 21, 1998. During the hearing, the employer for the first time admitted that the employee had sustained a

cervical "strain" as a result of his March 23, 1994, fall from the ladder.[1] In a statement of position submitted to the compensation judge at the commencement of the hearing, the employer asserted in part that the March 23, 1994, work injury was merely temporary, that many of the claimed treatment expenses should be denied as the treatment was "provided by an unauthorized treating physician," that much of Dr. Holmberg's care was provided well beyond the twelve weeks allowed under the treatment parameters governing passive care, and that some of the treatment was not causally related to the employee's work injury. With regard to the employee's claims for permanent partial disability benefits, the employer relied in part on the opinion of its independent examiner, Dr. Neil Dahlquist, who concluded that the employee's March 1994 work injury had not caused any permanent impairment. The employee based his permanency claims largely on the reports of Drs. Holmberg and See.

In a decision issued on November 25, 1998, the compensation judge concluded in part that the employee had sustained a lumbar injury on March 23, 1994, "the nature of which appears at this point in time to have been limited to a strain/sprain type personal injury"; that the employee's March 12, 1996, injury at Marsden was "a temporary low back strain/sprain" that had "no causal relationship" to any of the claimed treatment expenses; that the employee had not proven that he had sustained any permanent partial disability as a result of his March 23, 1994, work injury; that Dr. Holmberg had not notified the employer of proposed treatment as required by the permanent treatment parameters; that the employee had not obtained prior approval to change treatment providers, from Dr. Evans to Dr. Holmberg, as required by the rules; that the employer was not liable for the treatment provided by Drs. Holmberg and See and by Noran Neurological, or associated mileage; and that the employer was liable for the treatment provided by Dr. Evans, the employee's "assigned treatment provider" pursuant to the commissioner's November 28, 1994, decision. The compensation judge did not rule on the employer's contentions that the March 23, 1994, injuries were merely temporary, that there was no causal connection between some of the treatment and the employee's injuries, or that some of the treatment was unreasonably duplicative. The employee appeals.

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

[1] In their pretrial statement filed July 27, 1998, the employer was still denying liability for any cervical injury. We see no evidence of any change in position in this regard prior to hearing.

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

Permanent Partial Disability

In his June 26, 1995, report, Dr. See indicated that the employee had permanent partial disability "as a result of his post-traumatic left trigeminal neuropathy and herniated cervical disc, C5-6."[2] Dr. Holmberg later reported that the employee had a 9% whole body impairment, pursuant to Minn. R. 5223.0070, subp. 2B(1), due to the cervical disc herniation.[3] In contrast, Dr. Dahlquist, the employer and insurer's examiner, reported that the employee's small C5-6 disc bulge and degenerative changes were not "inconsistent with [the employee's] age, and he indicated that the employee had no permanent partial disability due to the March 23, 1994, fall at work. The compensation judge expressly rejected the opinion of Dr. See and accepted the opinion of Dr. Dahlquist, based in part on his conclusion that Dr. See had erroneously assumed that the employee had fallen on his left side in the March 23, 1994, incident.

We note initially that substantial evidence supports the compensation judge's conclusion that the employee did not fall on his left side in the work incident in question. Several contemporaneous treatment records indicate only that the employee had landed on the floor, stiff-legged. While there is evidence that might support the employee's position that he fell to one side, for example, later treatment records and the employee's testimony, the compensation judge was justified in rejecting that evidence. The employee also argues, however, that, whatever the specifics of the accident, the compensation judge erred in rejecting Dr. See's opinion on those grounds.

We acknowledge that a factfinder might reasonably have adopted the opinions of Drs. See and Holmberg, but we cannot accept the employee's argument that the judge's rejection of those opinions warrants reversal. We see the compensation judge's explanation as an

[2] The employee had claimed that he had developed trigeminal neuralgia and related symptoms due to his March 23, 1994, fall, but the compensation judge denied the claim, and the employee did not address the issue in his brief. Issues not addressed in an appellant's brief are deemed waived. Minn. R. 9800.0900, subp. 1.

[3] Dr. Holmberg also indicated that the employee had a 3.5% whole body impairment, related to his lumbar condition, pursuant to Minn. R. 5223.0070, subp. 1A(2), but the compensation judge also denied this claim, and the employee again failed to address this issue in his brief. That issue is thus also deemed waived. Minn. R. 9800.0900, subp. 1.

indication of his weighing of the expert opinions, and he apparently concluded that Dr. Dahlquist's opinion was simply more persuasive for the reasons cited. Also, as the judge noted, even Dr. See did not expressly connect the employee's herniated cervical disc to the March 23, 1994, work incident. Because Dr. Dahlquist examined the employee and reviewed the bulk of the employee's medical records, we can find no error in the judge's adoption of Dr. Dahlquist's opinion on this point. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). We therefore affirm the judge's denial of permanent partial disability benefits for the employee's cervical condition.

Treatment Expenses

The compensation judge concluded that, as the employee's "assigned treatment provider" pursuant to the commissioner's decision, Dr. Evans was entitled to payment for chiropractic treatment rendered after the employee's March 23, 1994, work injury. However, the judge denied all other claimed treatment expenses, giving only two reasons for that denial: 1. the failure of the employee and Dr. Holmberg to obtain "prior approval [for] a change of treatment providers from Dr. Evans to Dr. Holmberg before commencing treatment by Dr. Holmberg," as required by Minn. R. 5221.0430; and 2. Dr. Holmberg's failure to notify the employer of his proposed treatment, as required by Minn. Rule 5221.6050, subp. 9. We are compelled to conclude that the judge erred in denying payment on these grounds.

Minn. R. 5221.0430, subp. 3, provides as follows:

> Subp. 3. Unauthorized change; prohibited payments. If the employee or health care provider fails to obtain approval of a change of provider before commencing treatment where required by this part, the insurer is not liable for the treatment rendered prior to approval unless the insurer has agreed to pay for the treatment. Treatment rendered before a change of provider is approved under this subpart is not inappropriate if the treatment was provided in an emergency situation and prior approval could not reasonably have been obtained.

Id. In Henschel v. Interfaith Social Services, slip op. (W.C.C.A. Oct. 2, 1995), this court ruled that treatment rendered prior to approval of a request to change physicians may nevertheless be compensable if and when approval of a change of physician is ultimately granted. In other words, contrary to the compensation judge's conclusion, the employee's failure to obtain approval prior to commencing treatment with Dr. Holmberg is not determinative. The employee's claim petition for medical expenses was in effect a request for approval of a change in physicians, especially when viewed in conjunction with the position statement submitted by the employee to the compensation judge, in which the employee specifically addressed the change-of-physicians issue. The compensation judge did not expressly determine whether a change in physicians should be approved and certainly did not analyze the issue using the factors specified by rule or case law. See Minn. R. 5223.0430, subp. 4; Sam v. Special Sch. Dist. #1, slip op. (W.C.C.A. Oct. 6, 1998).

To deny all of the treatment now at issue on appeal, for lack of prior approval alone, was clearly erroneous.

It is also necessary in this case to distinguish between treatment rendered for the employee's lumbar condition and treatment rendered for the employee's cervical condition.[4] The employer admitted liability for a cervical strain on the date of hearing, but, in their answer to the employee's claim petition and continuing at least through the filing of their pre-trial statement in July of 1998, the employer denied that the employee had sustained any work-related cervical injury at all. Where primary liability for an injury has been denied, neither the change-of-physicians rules nor the permanent treatment parameters apply to treatment rendered for that injury. See, e.g., Rasmussen v. Carl Bolander & Sons Constr., slip op. (W.C.C.A. Aug. 7, 1996) (where the employer maintained a denial of primary liability, the employee was not required to seek approval to change physicians); Minn. R. 5221.6020, subp. 2 (the treatment parameters "do not apply to treatment of an injury after an insurer has denied liability for the injury"). Therefore, neither of the rules relied on by the judge provides grounds for denial of treatment expenses related to the employee's cervical condition through the date of hearing, when the employer first admitted liability for a cervical injury.[5]

The compensability of treatment for the employee's lumbar condition, specifically the treatment rendered by Dr. Holmberg, raises yet other considerations. We note initially that Dr. Holmberg's treatment commenced several months after the May 13, 1994, expiration of the temporary treatment parameters,[6] and several months prior to the January 4, 1995, effective date of the permanent treatment parameters.[7] As such, no parameters apply to treatment rendered by Dr. Holmberg prior to January 4, 1995. Treatment rendered after January 4, 1995, is subject to the parameters, but the notification rule relied on by the judge only became applicable when the treatment in question conflicted with the limits specified by the parameters, which, in the case of Dr. Holmberg's care, could not have occurred until at least twelve weeks after the January 4, 1995, effective date of the parameters.[8] In addition, the treatment parameters limiting passive care and

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[4] The compensation judge made no express findings as to the nature of the employee's cervical condition, except to deny permanency benefits, and it is at least arguable from his decision that the judge was not convinced that the employee had sustained any cervical injury at all in the March 23, 1994, fall. However, the employer admitted at hearing to a cervical strain, and the compensation judge was therefore not free to conclude that no cervical injury had occurred.

[5] It appears that much of Dr. Holmberg's later treatment was directed largely to the employee's cervical condition, as was the treatment by Dr. See.

[6] See Minn. R. 5221.6010 [Emergency], et seq. (1993).

[7] See Minn. R. 5221.6010, et seq. (1995).

[8] The notification rule cited by the judge, Minn. R. 5221.6050, subp. 9, requires a health care provider to notify the insurer "for treatment that departs from a parameter limiting the duration

therefore potentially requiring notification by Dr. Holmberg do not necessarily apply to any lumbar testing or examinations performed by other physicians. Finally, we see no indication that the employer raised the notification requirement of the parameters to the compensation judge. The limits set by the treatment parameters are a defense that may be waived, and it is generally inappropriate for a compensation judge to decide a contested issue on grounds not raised or litigated by the parties. Cf. Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988) (basic fairness requires notice and reasonable opportunity to be heard).

The compensation judge could have denied the claimed treatment expenses for any number of reasons, but not for the reasons cited. Because a proper decision as to this treatment may require various factual determinations, it is necessary to remand the matter to the judge for reconsideration and further findings. Issues for determination on remand include whether the employee's request to change physicians to Dr. Holmberg should be approved, under case law standards and Minn. R. 5221.0430, subp. 4; whether any or all of the treatment at issue was reasonable, necessary, and causally related to the employee's March 23, 1994, injury, under longstanding case law standards; and whether the disputed treatment is inconsistent with the permanent treatment parameters, where applicable. Had the employee presented his medical expense claims to the judge in a more organized fashion to begin with, the need for remand might possibly have been avoided. Therefore, the parties are directed on remand to make written submissions as to their positions on the issues, with specific citation to the evidence supporting their positions, and to identify to the judge which specific treatment parameters are relevant to which specific treatments. The judge need not and should not consider any parameters not specifically raised and addressed by the parties.

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or type of treatment in parts 5221.6050 to 5221.6600." Id., subp. 9A(4). Pursuant to Minn. R. 5221.6200, subp. 3, passive care is not indicated beyond 12 calendar weeks, but, under subpart 3B, an additional 12 visits may be appropriate under certain specified conditions.