

LLOYD L. FINKE, Employee/Appellant, v. MIDWEST COAST TRANSP. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
FEBRUARY 3, 1999

No. [REDACTED SSN]

HEADNOTES

**MEDICAL TREATMENT & EXPENSE - OUT-OF-STATE PROVIDER.** Where the record contained no evidence whatever as to whether the out-of-state provider's charges were or were not consistent with the usual and customary charges for similar treatment in the Sioux Falls, South Dakota, community, and the compensation judge erred in reaching a determination on the issue through misapplication of the South Dakota workers' compensation medical fee schedules, we vacate and remand to afford the parties an opportunity to submit evidence on the issue of whether the provider's charges were within the usual and customary charges for similar treatment in the treatment community.

Vacated and remanded.

Determined by Johnson, J., Pederson, J., and Wheeler, C.J.  
Compensation Judge: Harold W. Schultz

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that certain medical charges billed by a South Dakota medical provider were excessive. We vacate and remand.

BACKGROUND

On September 10, 1974, the employee, Lloyd L. Finke, a Minnesota resident, sustained a work-related heart attack arising out of and in the course of his employment with Midwest Coast Transportation, a South Dakota employer, while he was unloading one of the employer's trucks in Wisconsin. The employer and its insurer, St. Paul Fire & Marine Insurance Company, accepted liability and paid various Minnesota workers' compensation benefits. (Court Exh. 1: Stipulated Facts; DOLI file: First Report of Injury.)

From September 24, 1996 to November 19, 1996, the employee, then age 63, was treated medically for his heart condition at the North Central Heart Institute in Sioux Falls, South Dakota. A nuclear stress test on September 24, 1996 suggested reversible inferior wall ischemia. Dr. Donald T. Bishop, a cardiologist at the North Central Institute, recommended that the

employee undergo cardiac catheterization. On November 19, 1996, Dr. Bishop performed both left and right heart catheterization. The parties have stipulated that the treatment received at the North Central Heart Institute was reasonable, necessary and causally related to the work injury. (Exh. A: Medical Records; Court Exh. 1: Stipulated Facts.)

The North Central Heart Institute billed charges amounting to \$6,716.00 for the treatment rendered to the employee during the period in question. St. Paul Fire and Marine Insurance Company sent the bill to a company known as Forté for a review of the bill. The review, performed by Susan R. Kurysh, R.N., resulted in a Medical Bill Review Report, dated December 31, 1996, which stated that the fees charged exceeded those provided in South Dakota administrative rules which set forth a medical fee schedule for charges subject to the South Dakota Workers' Compensation Act. Forté recommended that St. Paul Fire and Marine pay only \$2,112.41, an amount it contended was the applicable charge under the South Dakota workers' compensation rules. On January 21, 1997 the employer and insurer made payment to the North Central Heart Institute in the amount recommended by Forté, leaving an unpaid balance of \$4,603.59. (Court Exh. 1: Stipulated Facts; Exh. B; T. 8; Resp. Exh. 1; Findings 1, 2 [unappealed].)

On September 11, 1997, the employee filed a medical request seeking payment of the remaining amount of the North Central Heart Institute bill. The employer and insurer denied liability on the basis that the amount billed beyond the \$2,112.41 already paid represented an excessive charge. (Judgment Roll.) Although placed on notice of its intervention rights, the North Central Heart Institute did not intervene. (Finding 4 [unappealed].)

The matter was heard before a compensation judge of the Office of Administrative Hearings on April 15, 1998. No witnesses were called, and the parties presented the case by oral argument, a stipulation of certain facts and submission of written exhibits. The employee's evidence consisted principally of the North Central Heart Institute's bill. The employer and insurer relied primarily on the Medical Bill Review Report by Forté and a few pages copied from Article 47:03 of the Administrative Rules of South Dakota, containing a small portion of that state's workers' compensation physician fee schedule.

Following the hearing, the compensation judge found that the payments made by the employer and insurer "were made pursuant to the South Dakota fee schedule and, therefore, are consistent with [the medical provider's] entitlement to payment in this case." (Mem. at 4.) Consequently, the judge held that "the charges over and above the amount of \$2,112.41 in this case are excessive." (Finding 7.) The employee appeals.

## STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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.

Question of law. The issues on appeal in this matter also involve the interpretation and application of case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn. Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

## DECISION

The issue in this case is whether the employer and insurer are liable for all or part of the unpaid portion of the medical charges of the North Central Heart Institute. The factual issue under Minn. Stat. § 175.135 is whether the charges by the health care provider were appropriate or were excessive.

Citing prior cases of this court, the employee argues that, as the charges are those of an out-of-state medical provider, the charges are not subject to the Minnesota workers' compensation medical fee schedule established by the Commissioner of Labor and Industry pursuant to Minn. Stat. § 176.136 (1979).<sup>1</sup> The employee next points out that while a statutory provision of more general application, Minn. Stat. § 176.135, subd. 3, previously limited an employer and insurer's liability for medical charges to those which "prevail in the same community for similar treatment . . . furnished to injured persons of a like standard of living when the same are paid for by the injured persons," that provision was repealed in 1992. Accordingly, argues the employee, the employer and insurer are simply liable, without limitation, for actual charges made by an out-of-state medical provider for reasonable and necessary services rendered to an employee in treatment of the employee's work-related injury.

The employer and insurer, on the other hand, argue, first, that their liability for out-of-state medical charges is properly limited to the usual and customary charge for the services in the community where treatment was rendered, despite the repeal of that prior statutory standard. They contend, further, that where, as in the present case, the state in which the treatment was

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<sup>1</sup> See McRoberts v. Palmer West Constr. Co., 42 W.C.D. 449 (W.C.C.A. 1989); Henderson v. Anchor Agency, Inc., slip op. (W.C.C.A. July 25, 1989).

rendered has enacted a medical fee schedule limiting medical charges in workers' compensation cases, the amounts permitted under that state's workers' compensation medical fee schedule represent the usual and customary charge for services rendered in that state. Accordingly, they argue, their liability for the medical charges in this case was properly limited to the amounts set forth in the South Dakota workers' compensation medical fee schedule.

The compensation judge agreed with the employer and insurer that the proper standard for determining whether an out-of-state provider's charges were excessive was that of the usual and customary charge in the community where treatment was rendered, relying on Crowson v. Valley Park, Inc., 56 W.C.D. 539 (W.C.C.A. 1997), *summarily aff'd* June 13, 1997. The judge noted that neither party had introduced evidence "in respect to whether [the] bill is consistent with the prevailing charges in the Sioux Falls, South Dakota, community." (Finding 5.) He further found that, under the preponderance of the evidence, the payments made by the employer and insurer were "consistent with the South Dakota Medical Fee Schedule." (Finding 6.) Finally, the judge held that under these circumstances, the unpaid portion of the charges should be deemed excessive. (Finding 7.) The judge thus denied the employee's claim for any payment by the employer and insurer beyond the amounts paid pursuant to the South Dakota medical fee schedule. (Order 1.)

In Crowson, *supra*, 56 W.C.D. 539, we reiterated our conclusion from prior cases that out-of-state medical charges were not subject to the Minnesota medical fee schedule. We further concluded that "the former statutory language [of § 176.135, subd. 3] provides a useful standard for evaluating all out-of-state provider medical expense claims, regardless of the date of injury." 56 W.C.D. at 543, *ftn. 2*. In addition, we expressly held that a determination of the issue whether an out-of-state medical provider's charges were excessive was "not whether the insurer's payments are consistent with 'the charges therefor as prevail in the same community for similar treatment' but whether the provider's charges are consistent with this [former] statutory standard." 56 W.C.D. at 543 (*emphasis omitted*).

We continue to hold the view we expressed in Crowson that the standard to be used in evaluating whether the charges of an out-of-state medical provider are excessive is whether the charges exceed the usual and customary charges for similar treatment in the community where treatment was rendered. The employee has the burden of presenting some evidence that the health care provider's charges met the "usual and customary" charges standard, which burden can be met by a statement from the provider to that effect. The burden then shifts to the employer and insurer to prove that the charges were excessive.

In this case, the compensation judge apparently found that the charges were in excess of the usual and customary charges because they were in excess of the amounts payable under the South Dakota worker's compensation fee schedule. This conclusion was inappropriate as a matter of law, as the employee's right to reimbursement of medical expenses in this case is governed by Minnesota and not South Dakota law.

The employer and insurer argue that the South Dakota medical fee schedule, even

if not determinative of the issue as a matter of law, nonetheless constituted evidence of what charges would have been usual and customary for any South Dakota workers' compensation claimant. While that may be true, no evidence in the record establishes whether the South Dakota medical fee schedules were based upon the locally prevailing usual and customary medical charges for the medical procedures specified.

It appears that both parties misapprehended the elements of proof of the appropriate standard. In the absence of any evidence, the compensation judge here erred in reaching a determination on the issue through misapplication of the South Dakota workers' compensation medical fee schedules. Under the circumstances, we vacate and remand to afford the parties an opportunity to submit evidence on the issue of whether the provider's charges were within the usual and customary charges for similar treatment in the treatment community.