DUDLEY P. JOHNSON, Employee/Appellant, v. N. PRIDE and N. H. INS. CO./AIGCS, Employer-Insurer, and MINN. DEP'T OF HUM. SERVS. and BLUE CROSS AND BLUE SHIELD OF MINN., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 15, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & POCEDURE - ADEQUACY OF FINDINGS; CAUSATION. The compensation judge's findings are vacated and the case remanded where the compensation judge failed to make specific findings regarding whether the employee sustained a work-related injury on February 1, 1991, and whether that injury was a substantial contributing cause to his current herniated disc at C5-6.

CAUSATION - INTERVENING CAUSE. The compensation judge erred in applying the principle of a superseding, intervening cause to deny liability where the March 1996 injury occurred while the employee was working in his auto repair shop.

MEDICAL TREATMENT & EXPENSE - SURGERY; MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. The compensation judge erred in relying on the medical treatment parameters where the employer and insurer have denied primary liability for a February 1, 1991 work injury. The compensation judge's decision is not supported by the medical evidence, and the finding is vacated and the case remanded for reconsideration.

Reversed in part, and vacated and remanded in part.

Determined by: Johnson, J., Wheeler, C.J. and Rykken, J.
Compensation Judge: Joan G. Hallock

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's findings that the employer and insurer do not have primary liability for an alleged February 1, 1991, neck injury; that a March 1996 incident was a superseding, intervening cause of the employee's disc herniation; and that surgery requested by the employee was not reasonable or necessary as of the date of hearing. We reverse in part, and vacate and remand for further proceedings.

BACKGROUND

Dudley P. Johnson, the employee, began working as a maintenance engineer for Northern Pride, the employer, in September 1990. The employer was insured for workers' compensation purposes by New Hampshire Insurance Company/AIGCS. On about February 1, 1991, the employee and a co-worker transported a forklift to the employer's plant on a flatbed truck. At the plant, the employee attempted to back the forklift off the truck onto a loading dock. As he was backing, the bed of the truck tipped up, lowering the back several feet. The forklift slid backwards and "slammed" into the loading dock. The employee was shaken by the incident, and reported it to Curt Grorud, his supervisor, that day or the next. (Finding 3; T. 17, 74; Resp. Ex. 2: p. 9.)

The employee testified he experienced symptoms within a matter of days. He stated the symptoms came on gradually, headaches and neck pain first, then right shoulder pain within a month. However, the employee continued to perform his regular duties for the employer and lost no time from work. (Finding 3; T. 18-19, 63.) On April 22, 1991, the employee reported an injury to the neck and upper back in February 1991 as a result of the forklift incident, and a first report of injury was completed. (Judgment Roll.) The employer and insurer denied primary liability.[1]

The employee first sought treatment on April 24, 1991 from Steven L. Keogh, D.C., complaining of a stiff neck, neck and upper back pain radiating into the right shoulder, and headaches. The employee gave a history of an accident on February 1, 1991 while unloading a forklift from a flatbed truck. Dr. Keogh diagnosed a traumatic cervical strain/sprain with associated radiculitis and muscle spasm. The employee continued to receive chiropractic treatment from Dr. Keogh on a regular basis from April 24 through August 7, 1991. He was seen again on September 6 and on October 23 and 25, 1991 for headaches, and stiffness and pain in the neck and upper back and shoulders.

The employee was also seen by his family physician, Dr. David Lofgren. On April 25, 1991, the employee reported neck and right shoulder pain after "crash[ing]" a forklift at work about two months previously. On examination, the doctor noted mildly limited cervical range of motion, tenderness over the cervical spine area, normal reflexes and a strong grip. Dr. Lofgren diagnosed a cervical sprain, prescribed anti-inflammatory and analgesic medications, and stated he had no objection to continuing chiropractic care. The employee returned to Dr. Lofgren on June 21, 1991 reporting worsening neck pain and headaches with heavy lifting at work. The doctor again noted decreased range of motion, but "good reflexes in his arms. Grips a little bit less than normal, but they are certainly present with no neurological deficits." An x-ray taken June 24, 1991 showed straightening of the lordotic curve and mild disc narrowing at C5-6. Dr. Lofgren interpreted the x-ray as "pretty negative," diagnosed a cervical sprain, and

[1] The employer and insurer served a notice on the employee on June 5, 1991, denying primary liability for a work injury on February 1, 1991, asserting there was no information verifying that the employee's current problems were related to his employment. The notice of denial and first report were filed at the Department of Labor and Industry on June 10, 1991.

prescribed rest and medications. (Pet. Ex. C: 4/25/91, 6/21/91, 6/24/91[2].)

The employee filed a claim petition on October 1, 1991 seeking payment of his medical bills. On December 12, 1991, the employee was examined by Steven B. Ross, D.C., at the request of the employer and insurer. Dr. Ross noted "the patient . . . has been feeling relatively good," with reduced headaches and complaints of occasional stiffness and "pinching" in the neck and upper back. (Pet. Ex. D.) On examination, the doctor noted no positive findings other than mild to moderate loss of cervical range of motion. Dr. Ross diagnosed a resolved cervical-thoracic strain/sprain as a result of the incident on February 1, 1991, with pre-existing scoliosis and mild degenerative joint disease at C5-6. He opined the employee had reached maximum medical improvement, had no permanent partial disability, and that no further chiropractic care was warranted. The employee was seen again by Dr. Keogh on February 7 and 11, 1992 and on March 13, 1992 for neck and upper back pain and headaches.

In May 1992, the parties entered into a stipulation for settlement. The employer and insurer maintained a denial of primary liability, but agreed to pay the employee's outstanding medical bills plus $1,000.00 in return for a complete closeout of all chiropractic expenses. An award on stipulation was issued by a settlement judge at the Department of Labor and Industry on June 4, 1992.

The employee was laid off by the employer in late November 1991, as part of a seasonal lay-off. He obtained employment as a mechanic with Hydra-Mac in the spring of 1992, repairing and servicing equipment for Hydra-Mac and its customers. The employee testified he had no medical coverage while unemployed, and that although he had health coverage at Hydra-Mac, coverage for treatment of the neck was excluded as a pre-existing condition.

The employee left Hydra-Mac in early 1993 when he did not receive a promotion. He worked for Olson Repair for a few months, then opened an auto repair shop at his residence in May 1993. The employee also worked part-time for Keith Schmalz from November 1993 through December 1995, doing snow plowing and other equipment-operating jobs. The employee testified he had no medical coverage during this period. Shortly after beginning work for Mr. Schmalz, the employee ran into a manhole cover while plowing snow. He came to a sudden stop, hitting his head and spider-cracking the windshield. In February 1994, the employee worked for Mr. Schmalz at the employer's premises, operating a jackhammer mounted on the front of a Hydra-Mac to break up concrete flooring. The general manager of the employer, Russell Christianson, testified he observed the employee "sitting there vibrating and shaking as the machine would shake." (T. 70, 82-84.)

On September 28, 1994, the employee returned to Dr. Lofgren complaining of neck pain going down his right arm. The employee had not received medical treatment for his neck since last seen by Dr. Keogh in March 1992.[2] On examination, the neck was quite stiff with

[2] The employee received unrelated medical treatment from Dr. Lofgren in the interim

considerable loss of range of motion, but reflexes and strength were normal. Dr. Lofgren diagnosed a cervical sprain and prescribed anti-inflammatory and muscle relaxant medications.

The employee next sought treatment for his neck on March 14, 1996. On that date, the employee hit and injured his thumb with a sledgehammer while working in his auto repair shop. He jerked back and had a flare-up of neck symptoms. He was seen by Dr. Penny Langland[3] who diagnosed a left thumb fracture and cervical strain. A muscle-relaxant and narcotic analgesic were prescribed, and the employee was advised to follow-up with Dr. Lofgren. The employee was seen by Dr. Lofgren on April 10 and May 2, 1996, reporting neck pain and pain in the right upper arm to the elbow. On examination, Dr. Lofgren noted very limited range of motion, but reflexes were normal with good strength. An MRI scan was taken May 15, 1996 that showed a moderate disc bulge at C5-6, more towards the right, indenting the spinal cord somewhat.

The employee continued to treat with Dr. Lofgren, reporting neck pain with increasing right arm and shoulder pain. On July 25, 1996, Dr. Lofgren prescribed a course of physical therapy. The employee was seen for physical therapy from August 6 through September 27, 1996. Although he reported some improvement in his neck pain, the employee remained very stiff with poor range of motion and radicular-type pain in the right upper extremity. (Resp. Ex. 5.)

By August 1996, the employee closed his auto repair business, testifying he was unable to do the work due to worsening neck and right upper extremity symptoms. (T. 36, 38-40.) In September 1996, the employee began working full-time for Keith Schmalz. He testified that he has lost time from work due to his neck and arm symptoms while self-employed and while working for Mr. Schmalz. (T. 38-39.)

The employer returned to Dr. Lofgren on October 24, 1996, complaining of problems with the right shoulder. An x-ray of the shoulder was negative, and the AC joint was normal. Dr. Lofgren diagnosed right shoulder tendinitis, but commented "I'm sure it has to do with his neck as well." (Pet. Ex. C: 10/24/96.) On October 30, 1996, the employee was seen by Dr. Michael Smith, an orthopedic surgeon, on referral from Dr. Lofgren. The employee stated his symptoms began in February 1991 following a forklift accident, and "[m]ost recently, since March of 1996 he had a severe flare-up." (Pet. Ex. E.) The employee reported neck, right shoulder and right arm pain with associated weakness and numbness in the right arm. The doctor noted a grade IV weakness in the right biceps and wrist extensors and decreased sensation in the right radial forearm. Based on his examination and the May 15, 1996 MRI scan, Dr. Smith diagnosed a right paracentral disc herniation at C5-6, and recommended surgery.

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consisting of three visits in October and November 1993 for a fractured left hand.

[3] Both Dr. Langland and Dr. Lofgren worked at the Falls Clinic/Dakota Clinic, Ltd., in Thief River Falls, Minnesota.

The employee continued to treat with Dr. Lofgren. On January 7, 1997, the doctor prescribed another course of physical therapy. The employee began therapy on January 8, 1997, but experienced significant aggravation with treatment, and missed a number of sessions for reasons unrelated to the treatment. On February 4, 1997, the employee reported decreased neck pain, but increased shoulder and arm pain with very bad headaches. The therapist discussed the lack of progress with the employee, noting the treatment modalities had been ineffective for the most part. The employee did not return for further therapy after that date. He was discharged on February 18, 1997, with minimal improvement. (Resp. Ex. 5.) On April 11, 1997, Dr. Lofgren noted the employee had elected to proceed with the surgery. Dr. Lofgren's December 23, 1997 chart note indicates the employee continued to experience pain down his arm with weakness and numbness. The doctor diagnosed degenerative disc disease established by MRI scan, and observed the employee was "still working with Workman's Comp to try to get surgery paid for." (Pet. Ex. C: 12/23/97.)

On January 16, 1998, the employee was examined by Dr. David C. Holte at the request of the employer and insurer. Dr. Holte concluded the employee sustained a cervical sprain/strain as result of a work-related injury on February 1, 1991. He opined the employee's current diagnosis was a cervical disc herniation at C5-6 with probable onset on or after March 14, 1996, as well as chronic right shoulder tendinitis and a possible impingement syndrome. Dr. Holte did not believe the disc herniation was causally related to the February 1, 1991 injury. He further opined that the proposed surgery might be appropriate, but had a number of concerns about proceeding with surgery at that point. (Resp. Ex. 1.)

In July 1997, Dr. Smith became unable to perform the proposed surgery. As a result, the employee was seen by Dr. Timothy A. Garvey, an orthopedic surgeon, on April 23, 1998, for further evaluation. Dr. Garvey also diagnosed a herniated disc at C5-6 and recommended a decompression and fusion at C5-6. (Pet. Ex. I.)

On September 12, 1997, the employee filed a claim petition seeking authorization for the surgery, temporary total disability following surgery, and payment of medical expenses. The employer and insurer again denied primary liability for a cervical spine injury on February 1, 1991. The case was heard by a compensation judge at the Office of Administrative Hearings on September 10, 1998. In her findings and order the compensation judge found the employer and insurer "do not have primary liability for the alleged February 1, 1991 neck injury;" the incident in March 1996 constituted a superseding, intervening cause of the employee's disc herniation; and a surgical decompression and fusion at C5-6 was not reasonable or necessary as of the date of hearing. The employee appeals.

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings

must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Medical Causation; Lack of Foundation

The compensation judge found "the employer and insurer do not have primary liability for the alleged February 1, 1991 neck injury. The . . . herniated disc at C5-6 is most likely caused by other factors. Dr. Holte's opinions in this regard are accepted." (Finding 32.) The employee contends that the judge's findings are contrary to the evidence as a whole. He argues, further, that Dr. Holte's opinions are based on factual assumptions not supported by the evidence, and the judge erred in relying upon these opinions. We vacate and remand for additional findings.

The threshold question in any workers' compensation case is whether the employee suffered a "personal injury . . . arising out of and in the course of employment." Minn. Stat. § 176.021, subd. 1. A finding that the employer and insurer "do not have primary liability" simply begs the question: that is, did the employee sustain a personal injury on February 1, 1991? The employer and insurer do not dispute the occurrence of the forklift incident in February 1991. However, they deny the employee's claim that he suffered a cervical spine injury in 1991 as a result of that incident. The compensation judge failed to make any findings specifically determining this issue.

Moreover, "[t]here is a difference between primary liability for an injury and medical causation between that injury and ongoing disability." Kurowski v. Kittson Memorial Hosp., 396 N.W.2d 827, 39 W.C.D. 169, 175-76 (Minn. 1986). If the employee did sustain a work injury in 1991, the question then becomes whether that personal injury was a substantial contributing cause of the employee's later disability and need for medical treatment. It is not necessary for the employee to show the work injury was the sole cause of the disability for which benefits are sought. It is only necessary to show that the injury was a legal cause, that is, an appreciable or substantial contributing cause. Salmon v. Wheelabrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D. 117, 122 (Minn. 1987); Roman v. Minneapolis Street Ry. Co., 268 Minn. 367, 380, 129 N.W.2d 550, 558, 23 W.C.D. 573, 591-92 (1964).

The evidence is conflicting on this issue. The employee's expert, Dr. Smith, opined the employee sustained a cervical strain/sprain in 1991, and that this injury precipitated, or contributed to chronic cervical degenerative disc disease resulting in the herniated disc at C5-6. Dr. Holte, on the other hand, believed the 1991 strain/sprain resolved by 1992 with no permanent residuals. He opined the employee sustained a new injury on March 14, 1996, and did not believe that the February 1, 1991, injury contributed to his current cervical disc condition. The

compensation judge also failed to make the findings necessary to resolve this issue.

In remanding, we note the compensation judge concluded the employee failed to prove he sustained a herniated disc in February 1991, emphasizing the employee experienced notably increased symptoms following the March 1996 incident, and that the herniated disc was not established by diagnostic testing until May 1996. (Mem. at 6.) This misses the point. Whether the C5-6 disc herniation occurred in March 1996 or prior thereto is not dispositive. Rather, the question is whether the employee's injury of February 1991, if any, contributed in any appreciable or significant way to the herniated disc diagnosed in 1996. Certainly, it is both medically and legally possible for a previous strain/sprain injury to contribute to a later herniated disc. Compare Roman, id. The question is whether the evidence, more probably than not, sustains such a claim.

Finally, the employee contends that the compensation judge committed reversible error in relying on Dr. Holte's opinions, asserting the opinions are based on factual assumptions not supported by the evidence. We agree, in part. During the deposition of Dr. Holte, counsel for the employer and insurer posed a series of hypothetical questions. One of the questions asked Dr. Holte to assume, among other things, that the employee's activities during the two or three months after the accident included snowmobiling and a household move. Counsel also asked the doctor to assume the employee had returned to work after the forklift incident, and performed various duties including removal of a concrete floor and the repair and moving of heavy chillers. Counsel then asked Dr. Holte whether, in his opinion, the employee's cervical strain/sprain was related to the February 1991 forklift incident. Dr. Holte replied, "It's possible he had some residuals from that, but it's likely he had symptoms also related to other activities, unrelated to the injury of February 1991." (Resp. Ex. 1: pp. 9-11.) On cross-examination, Dr. Holte agreed that he had no information with respect to the employee's household move or snowmobiling other than the hypothetical question, and agreed that in stating the sprain/ strain was likely related to other incidents it was these incidents that he was referring to. He further acknowledged there was no mention in the medical records of such incidents, and indicated he assumed the employee experienced symptoms with those activities.

In an additional hypothetical question, Dr. Holte was asked to assume that the employee began working for Keith Schmaltz in the fall of 1995, and that sometime prior to March 1996, the employee operated a Hydra-Mac with a jackhammer mounted on the front, breaking up a concrete floor at the employer's plant. Dr. Holte was asked to assume that sometime during the winters of 1995-96 or 1996-97, the employee struck a curb or manhole cover while removing snow, throwing him forward and causing him to strike his head against the windshield. Counsel did note that there were no medical records referencing this windshield incident. (Resp. Ex. 1, p. 19.) Based on this hypothetical, Dr. Holte opined the activities described were significant contributing factors to the employee's current symptoms, commenting that activities such as "backing up, repeatedly twisting the neck, jackhammering, sudden stops, [and] plowing snow, are similar to mechanisms of injuries which cause cervical strains/sprains." Dr. Holte again acknowledged that there was nothing in the medical records or other sources of information indicating the employee had any symptoms associated with these activities, and his opinion was

based solely on the hypothetical provided. (Resp. Ex. 1, p. 27.)

Expert opinion in a workers' compensation case may be based on personal knowledge of the case, including an examination of the employee and review of pertinent medical records, or by facts presented in the form of a hypothetical question. Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 30 W.C.D. 426 (Minn. 1978). While a hypothetical question need not contain all of the details of the evidence, it must contain substantially all of the undisputed material facts relating to the subject of the opinion and those disputed facts which have some clear support in the record. Sandhofer v. Abbott-Northwestern Hosp., 283 N.W.2d 362 (Minn. 1979). A hypothetical question need not be confined solely to undisputed facts, or the facts "proved" by the evidence, but the facts assumed must be supported by competent evidence in the record. Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971); Grapentin v. Harvey, 262 Minn. 222, 114 N.W.2d 578 (1962); see Scott, id.; Drews v. Kohl's, 55 W.C.D. 33 (W.C.C.A. 1996).

Here, there is no evidence, whatsoever, in the testimony taken at hearing or in the medical records of any snowmobiling or the repair or moving of heavy chillers. Although there was testimony that the employee moved his household around March 20, 1991, there was no evidence that the employee engaged in any strenuous activities or that the move resulted in an injury or any flare-up of symptoms. And while there was evidence that the employee helped to remove a concrete floor at the employer's plant, the testimony indicates that this activity did not occur until February 1994. Here, too, the only evidence presented was the testimony of Mr. Christianson who stated the employee seemed to be comfortable while operating the Hydra-Mac, and the employee's testimony that he did not recall any increased neck pain or symptoms as a result of that work activity. (T. 70, 86.)

Likewise, the later hypothetical question assumes dates which are simply incorrect, placing the snow removal and jackhammering occurrences sometime in late 1995 through 1997, when the testimony places the snow removal incident in November 1993 and the jackhammering work in February 1994. Here again, the employee testified, in uncontroverted testimony, that he did not recall any problems or symptoms as the result of these activities.

Certain of the hypothetical questions asked Dr. Holte to assume facts not in the record and not supported by the evidence. An alleged activity or incident that might have resulted in symptoms, without clear support in the record, is too speculative to serve as the foundation for an expert opinion on causation. These are not deficiencies which go merely to the weight to be afforded to the expert's testimony. If the hypothetical question is materially faulty, the medical opinion lacks foundation and may not be relied upon by the compensation judge. "While the trier of fact's choice between experts whose testimony conflicts is usually upheld, that choice is not upheld where the facts assumed by the expert in rendering his opinion are not supported by the evidence." Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985).

The remainder of the employee's objections to Dr. Holte's opinions (see Appellant's Brief, pp. 21-22) call into question neither Dr. Holte's knowledge about the

employee's medical treatment and condition nor the doctor's professional qualifications. These objections go to the persuasiveness or weight to be accorded Dr. Holte's opinion, and are insufficient to establish a lack of foundation. See, Drews, id.

The compensation judge found the employee's C5-6 disc herniation was caused by "other factors" and adopted "Dr. Holte's opinion in this regard." (Finding 32.) Dr. Holte testified the "other factors" he was referring to were the facts that the employee snowmobiled and moved his home. (Resp. Ex. 1; p. 31.) The compensation judge did not identify these "other factors" or identify which specific opinion of Dr. Holte she relied on. The compensation judge's findings, which are primarily a recitation of the evidence, are insufficient to resolve the questions of fact and law submitted at the hearing. Accordingly, we vacate finding 32 and remand for redetermination in accordance with this opinion. Specific findings should be made regarding whether the employee sustained a personal injury on or about February 1, 1991; the nature of the injury, including whether the injury was temporary or permanent; and whether the February 1, 1991, injury was a substantial contributing cause of the employee's current disability and need for medical treatment.

Intervening, Superseding Cause

The employee does not dispute that the March 14, 1996, incident substantially exacerbated his cervical condition. The employee argues, however, that the compensation judge's application of the principle of superseding, intervening cause to deny liability under the facts of this case is clearly erroneous. We agree.

The March 14, 1996, injury occurred while the employee was working in his auto repair shop. The employee was self-employed and did not have workers' compensation coverage. The injury is, nevertheless, a work-related injury. The principle of a superseding, intervening cause applies only where there is a work injury followed by an injury caused by a non-work-related activity. The principle of superseding, intervening cause does not apply, and is does not constitute a viable defense to liability where an employee sustains a reinjury or aggravation while performing subsequent work activities. Daddario v. Ziem's Floor Covering, 58 W.C.D. 538 (W.C.C.A. 1998); see Nelson v. American Lutheran Church, 420 N.W.2d 588, 40 W.C.D. 849 (Minn. 1988); 1 A. Larson and Lex K. Larson, Larson's Workers' Compensation Law, ch. 10 (1999). Rather, the pertinent questions are whether the employee sustained a previous work-related injury and, if so, whether the first work injury is a substantial contributing cause of his subsequent disability and need for medical treatment.[4] We, accordingly, reverse finding 33 determining that the March 1966 incident constituted a superseding, intervening cause.

[4] The proportionate contribution of the prior injury to his current disability may also be relevant. Where the second work-related injury is not compensable, the employer and insurer on the risk for the first work-related injury are liable only for their apportioned share of workers' compensation benefits. Pearson v. Foot Transfer Co., 301 Minn. 489, 221 N.W.2d 710, 27 W.C.D. 535 (1974); Geller v. Curran-Houston, Inc., 58 W.C.D. 66 (W.C.C.A. 1997).

Approval for Surgery

The compensation judge determined that, even if the injury was work-related, the proposed surgical decompression and fusion at C5-6 was not reasonable or necessary at the present time. The judge found the employee had failed to cooperate with physical therapy and concluded, "using the Treatment Parameters as a guide," that a "better course of nonsurgical treatment would be a prerequisite to a recommendation for surgery." (Finding 34.) We conclude the compensation judge's finding is neither legally correct nor supported by the evidence.

The compensation judge appears to have imposed, as a prerequisite to approval for the surgery, a course of treatment required by the "Treatment Parameters." The employer and insurer in this case have denied, and continue to deny, primary liability for the February 1, 1991, injury. Thus the medical treatment parameters do not apply. Minn. R. 5221.6020, subp. 2; Dawson v. University of Minn., slip op. (W.C.C.A. May 6, 1999); Grossman v. Rainbow Foods, slip op. (W.C.C.A. May 13, 1998).

Rather, the question is whether the proposed surgery is "reasonable and necessary." This normally is a question of fact for the compensation judge. Here, the employer and insurer submitted, in opposition to the employee's claim, the report and deposition testimony of Dr. Holte. Dr. Holte testified that he would not operate at this point, noting the employee's clinical presentation was not entirely consistent with a disc herniation. He recommended a current MRI scan and additional evaluation of the employee's right shoulder before considering surgery. *No* medical provider has recommended or suggested additional physical therapy. The compensation judge could have denied the requested surgery for a number of reasons, but there is no support for the reasons cited. We, therefore, vacate finding 34, and remand for redetermination of whether the proposed surgery is reasonable, necessary and causally related to the employee's February 1, 1991, injury.